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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZATION OF THE COURT (BAY'S REPORTS) UP TO AND INCLUDING VOLUME 25 OF THE SOUTH CAROLINA REPORTS

ANNOTATED EDITION

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REPORTS

OF

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

FROM JANUARY 1833 TO JANUARY 1834
BOTH INCLUSIVE

BY W. R. HILL

STATE REPORTER

VOL. I

COLUMBIA, S. C.
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LAW

JUDGES

OF THE COURT OF APPEALS

Hon. DAVID JOHNSON, President.
Hon. J. B. O'NEALL.
Hon. WILLIAM HARPER.

CHANCELLORS

Hon. HENRY W. DE SAUSSURE.
Hon. JOB JOHNSTON.

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CASES IN CHANCERY

DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA, IN JANUARY, 1833.

JUDGES PRESENT.

HON. DAVID JOHNSON, Presiding Judge.
" J. B. O'NEALL.
" WM. HARPER.

1 Hill, Eq. *1

*THOMAS TERRY, Adm'r of his wife, Martha Terry, dec'd, v. FERDINAND HOPKINS, Sen., and others.

(Columbia. Jan., 1833.)

[*Husband and Wife* ⇐8.]

Where a widow, before her second marriage, conveys her property to the children of her first marriage, reserving only a life estate in a portion, to herself, and this was known to her intended husband, the conveyance is not a fraud on his marital rights, but is valid.

[Ed. Note.—Cited in Ramsay v. Joyce, McMul. Eq. 251, 37 Am. Dec. 550.

For other cases, see Husband and Wife, Cent. Dig. § 29; Dec. Dig. ⇐8.]

[*Husband and Wife* ⇐10.]

Where a parent gave a slave to his daughter, on her marriage, on condition that he should have a right to take him back, on paying his value, or substituting other property; the marital rights of the husband attach, and the right of property vests in him, subject to that condition, and devolves on his administrators, after his death, to the same extent, and in the same condition.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 23, 34, 35, 38–46, 396, 398; Dec. Dig. ⇐10.]

[*Husband and Wife* ⇐18.]

A husband who has administered on his wife's estate, cannot be reimbursed out of it, for payments made by him, during coverture, on a contract of the wife before marriage; but he will be entitled to credit for any payment on that account, since her death.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 118; Dec. Dig. ⇐18.]

[*Parent and Child* ⇐14.]

A husband, as the administrator of his wife, will not be allowed to raise an account against her children by a former marriage, for her care and trouble in attending to them before her second marriage, and for raising young negroes, when she herself, made no such charges.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 154; Dec. Dig. ⇐14.]

[*Trusts* ⇐282.]

A trustee who has received money, must discharge himself by proof.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 402; Dec. Dig. ⇐282.]

[*Account* ⇐19.]

A defendant who, in his answer, prays an account from the plaintiff, is bound to render an account of any monies due to the latter, although the bill does not pray an account against him.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 107; Dec. Dig. ⇐19.]

This was a bill to set aside certain deeds, and for an account and partition. The facts of the case, and the several questions arising out of them, are presented in the following opinion of the Court, delivered by

JOHNSON, J. In February 1819 the complainant married Mrs. Hopkins, the relict of Geo. W. Hopkins, who died intestate, and he charges in his bill in substance;—That by a partition of his estate, only one sixth of the personal estate, being an equal portion

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*with each of her children, was allotted to the widow, instead of one third to which she was entitled by law, and deeds executed by her, on the 19th December 1818, by which, in effect, she confirmed it, and reserving to herself only a life estate in the portion allotted to her, were procured and obtained from her, by the fraud and covin of the defendant Ferdinand Hopkins Sen., and upon his representation that the property in the negroes, which constituted the bulk of the personal estate, was, in himself, were fraudulent and void as to the widow.—But if not, that her deeds, of the 19th December 1818, were a fraud upon his marital rights, and therefore void.

The answer of Ferdinand Hopkins, Sen., positively and unequivocally repels the allegation of fraud, on his part, and states that during the revolutionary war, his father David Hopkins, gave to himself and his brother Newton Hopkins, the stock from which these negroes descended, in trust that they would divide them equally between themselves, and their brother G. W. Hopkins the intestate, and a sister, Mary; which had been done to the entire satisfaction of all parties. That the intestate took the exclusive possession of those allotted to him, in 1798 or '9, and continued in possession of them, up to the time of his death, and that they remained in possession of his widow up to the time of the partition, and that he never had at any time, pretended any claim to, or interest in the negroes. In connection with this subject, it appears that the defendant Ferdinand Hopkins, Sen., had by deed dated the 30th December 1799, conveyed to G. W. Hopkins, his portion of the negroes, given by their father, and upon the partition of his negroes amongst his children and widow, on the 19th December 1818, he conveyed to each child, (with the exception of Mrs. Glenn, who seems to have been forgotten,) the portion of these negroes allotted to them, reciting that the title was in himself. This deed was found by the complainant, amongst the papers of G. W. Hopkins, after bill filed. In relation to this matter, he states in his answer, that the deed to George W. Hopkins, of 1799, had been forgotten both by himself and the widow, when the deeds of 1818, were executed, and that it was done to avoid any question about his rights. He denies, also, unequivocally, that he exercised any influ-

*3

ence over Mrs. Hopkins, to procure *her to execute the deeds of the 19th December 1818, by which reserving a life estate, she relinquishes her interest to her children, and avers that it was done wholly of her own accord.

On the death of George W. Hopkins, in 1805, his widow and the defendant Ferdinand Hopkins, Sen., administered on his estate; and in the inventory made by them and returned to the Ordinary's Office, these negroes are included: and it is also worthy of remark, that in the deeds from Mrs. Hopkins, of the 19th December 1818, written by F. H., sen. it is recited that the negroes and other property therein contained, are a part of the estate of George W. Hopkins. Thus much I have collected from the documents before me, and I will now proceed to extract from the parol testimony what relates to their questions.

William Hughes a witness for the defendant, stated that before Mrs. Hopkins made the deeds of the 19th December 1818, she stated in a conversation with him, that "she intended to convey her property to her children, but wished to reserve a life estate in herself;" and he had another conversation with her after the conveyance was executed, but she did not then speak of its particular provisions. Ephraim Lyles, another witness, states that he was twice sent for to write this deed; upon his going, he advised Mrs. Hopkins "to send for the defendant, Ferdinand Hopkins, Sen., and when he came, the witness being informed that the right of the property was in him, suggested to him, that he ought to convey it from himself, and that Mrs. Hopkins then executed the deeds to her children."—She acted, says this witness, against the advice of the defendant, Ferdinand Hopkins, Sen. He advised her, "to hold the staff in her own hands."

Opposed to this, is the evidence of Mrs. Terry, to whom Mrs. Hopkins stated, about a year before her marriage with the complainant, that the title of these negroes was in the defendant Ferdinand Hopkins, Sen., and that he had frequently "urged her to make the titles to her own children," and that they were to be so made. Afterwards she complained that it was a hardship, as she had had so much trouble in raising the negroes, and could not now call one of them her own. Burr Head also states, that short-

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ly after the division of the negroes, *he heard her express much dissatisfaction concerning one which had fallen to her daughter Mrs. Glenn, which she had raised about the house, and wanted, and Mrs. Glenn would not exchange with her. But expressed no dissatisfaction about the deeds.

These are the leading facts connected with this question, and they leave in my mind no doubt that the defendant Ferdinand Hopkins, Sen., acted with perfect fairness in this transaction.—The entire absence of any interest on his part,—his never having pretended any claim—his returning them in the inventory, as a part of the estate of G. W. Hopkins—his advice to Mrs. Hopkins, "to hold the staff in her own hand"—are all utterly inconsistent with a design on his part, to use an improper influence over Mrs. Hopkins, in any disposition she might think proper to make of her interest, in this part of the estate: and his account of his having forgotten the deed to G. W. Hopkins, made in the partition on the 30th December 1799, is the only rational solution of the incongruity arising from his having executed the subsequent deed of 1818. It follows then that the deeds executed by Mrs. Hopkins to her children were voluntary on her part, and binding. The Chancellor has so decided, and so far as that question is concerned the appeal must be dismissed.

2. The second question arising out of this state of the facts, is whether supposing the

deeds voluntary, on the part of Mrs. Hopkins, they are a fraud on the marital rights of the complainant, and therefore void.

The fortune of the intended wife is most frequently a weighty consideration and a strong inducement to the marriage contract, and the happiness of both the parties may, in a good degree depend on the observance of good faith, with respect to it; and the general rule, very clearly, is that if pending a treaty of marriage, the intended wife makes a secret voluntary disposition of her property, and the marriage is had, it is a fraud upon the marital rights of the husband, and void. In Hunt & Mathews, 1 Vern. 408, a widow before she married again, disposed of the greater part of her estate, for the benefit of her children by her first marriage, and it became a question whether that disposition was void as to the second

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husband, who had married her *a short time after; and it was held that it was not—the Court deeming it a conscientious thing in the wife to provide for such children, before she placed herself in the power of a second husband. And I remember that that rule is stated in the case of Jones v. Cole, brought up to this Court, from Newberry some time ago, but not yet reported, where the husband also had notice. But Roper, in his treatise on the laws arising from the relation of husband and wife (page 162) questions, and I think with much show of reasoning, the propriety of allowing this case, as an exception, to the general rule laid down in Strathmore v. Bowes, 1 Ves. Jun. 28, & Havard v. Hooker, 2 Ch. Rep. 81. The objection he remarks, is not, to the object of the settlement. The fault is, the fraud committed by it, on the second husband, and it would seem that, as to him the effect must be precisely the same, whether the disposition was in favor of the children or others. This case however steers clear of this difficulty. There is in the first place no proof that the treaty of marriage was on foot at the time these deeds were executed. They are dated on the 19th of December 1818, and the marriage was not solemnized until some time in the month of February following; a period too long necessarily to authorize the inference that the treaty of marriage was then pending. But a conclusive circumstance is, that the complainant had notice of these deeds before his marriage. The witness Lyles, told him of the deeds—Emanuel Allen informed him that the negroes were generally considered as the property of the defendant Ferdinand Hopkins, Sen.; and in the Chancellor's decree of 1825, it is said he approved and applauded it. If the fortune was the inducement to seek the marriage, this would have furnished a reasonable ground to have broken it off, and he will not be permitted now to complain of a circumstance which was known to him before he was committed.

3. At the time of the intermarriage between the complainant and Mrs. Hopkins, she had possession of two negroes, Daniel and Betty, which the complainant claims, in virtue of his marital rights,—the defendants on the contrary claim them as part of the estate of George W. Hopkins.

The circumstances connected with these claims, appear to me to admit of no doubt.

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The evidence of Thomas Booker, *James Sanders, Daniel Glenn, Wm. Wright, William Hughes, Mrs. Head, Bennett Humphries, Lofton Nunn, and Mrs. Nunn, make out beyond all contradiction, that Bird Booker, the father of Mrs. Hopkins, gave to her, negro Will, during the lifetime of her first husband, George W. Hopkins, with an understanding, that he would have the right to take him back again, if he thought proper, on paying the value for him, or substituting other property in his place. Subsequently to the death of George W. Hopkins, and before the marriage of his widow, Bird Booker did take Will back, and put in his place a negro called Phill, who on being chastised a few days after, by the overseer, ran away and returned to Mr. Booker. About four years after, Mr. Booker sent to Mrs. Hopkins, Daniel and Betty, the negroes in controversy. Daniel was of less value than Will, and the witness says, that the additional negro Betty, was sent for the purpose of supplying this difference in value, and as a compensation for the loss of the services of Will, during the time he had him. The circumstances relied upon by the complainant, to show that Daniel and Betty was a gift directly to Mrs. Hopkins, by her father, are 1st., that neither they nor Will, were included in the inventory of George W. Hopkins' estate; and 2ndly, that these negroes are given to her, by the will and testament of her said father, dated in October 1818, and long after she had had them in possession.

If, as has been assumed, Bird Booker gave Will to Mrs. H. in the lifetime of her first husband, subject to the condition, that he should be restored upon his paying value, or substituting other property, the property in Will vested in Geo. W. H. subject to that condition, and Mr. Booker was not at liberty to resume the property, without having first performed the condition—these rights devolved on the administrators of Geo. W. H. precisely to the same extent, and in the same condition as they existed in him, and no neglect, on the part of the administrators, to include Will in the inventory, nor the subsequent act of Mr. Booker, in disposing of the negroes substituted for Will, could vary them. But these circumstances appear to me, to be reconcilable with the assumed state of facts. It was known that Mr. Booker had

reserved the right to take back Will—probably his determination to do so, was known

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*at the time, and he was not, therefore, included in the inventory of Geo. W. H.'s estate; improperly, I admit, but I can well conceive, that persons, intending to do what was right, might not well understand the character and the extent of his rights. Bird Booker had not made any formal transfer of the negroes, Daniel and Betty, and he might have thought it necessary to give them in his will, as confirmatory of what he had before done—a very common practice, and I cannot perceive any evil growing out of it. We are, therefore, of opinion, that Daniel and Betty must be regarded as part of the personal estate of Geo. W. H. and accounted for as such; and the decree of the Circuit Court, in this respect, must be reversed.

4. During the widowhood of Mrs. H. she purchased a tract of land, situated in Union District, for $2,800, on a credit, and gave her note for payment. A part of this sum was paid by her, before her intermarriage with the complainant. During their coverture, the complainant himself, paid, on account of this contract, the sum of $800, and subsequently to her death, $903.82, as appears by the Report of the Commissioner of July 1831; and one question raised, on the part of the defendant, is, whether he is entitled to be reimbursed out of the lands, or her personal estate, for the sum paid by him, during the coverture.

Mrs. Terry died entitled to a personal estate, not reduced to possession by the complainant during their coverture, and after her death he administered on it. It is not questioned, that in his account of this estate, he is entitled to be credited with the amount paid on this contract, subsequently to her death. He was not personally liable, (Roper 74) and of course, it must be charged to her estate. But the claim to be reimbursed the amount paid by him, during the coverture, is clearly untenable. The husband takes the wife cum onere; and during the coverture, the debts contracted by the wife, are the debts of the husband, and that, whether she brings a fortune with her or not. A common-place view of this question, will put it in the clearest point of view. A woman indebted, takes a husband; the law makes him liable, and he pays them—who is his debtor? How will he exact payment of the wife? She cannot be his debtor. On marriage, he

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is entitled to all her goods, *and an estate for her life, in her real estate. Her death cannot create a debt, which, before, had no existence. This rule works, perhaps, sometimes harshly. A wife may owe large sums, and a corresponding estate may be in expectancy, which might not come in during her life, and it would seem a hardship, that, if the husband paid the debts during the coverture, he should not be reimbursed. But, it will be remembered, that the husband takes the whole personal estate of the wife, and an estate for life, in her lands. In the treaty of marriage, circumspect persons look sometimes to the debtor and creditor sides of the account, and the apparent hardship vanishes, when it is recollected that the act was voluntary.

5. It is contended, also, for the complainant, that he is entitled to compensation for raising the children of G. W. Hopkins, and the young negroes belonging to the estate.

This claim refers principally to Mrs. Terry's administration of the estate, during her widowhood. Mrs. Terry had possession, and the management of the whole estate, real and personal. In the account stated by the Commissioner, she is charged only with the proceeds of the crops sent to market, and is credited with all disbursements made on account of the estate, without distinguishing for what particular object, or for whose individual use. She herself, raised no account against the children, or charge for raising the young negroes. But it is now brought up, for the first time, by the complainant. The annual income from the estate, did not greatly exceed the necessary expenditures; and it is evident that Mrs. Terry herself, supposed, that as they were all subsisting in common, and were all entitled to an equal distribution of the estate, there could be no great inequality in their expenditures; and none appears, from the evidence. But if that were not so, the children alone, would have a right to complain;—not the complainant, because he is credited with every dollar that was disbursed on account of the estate; and what more would he have. Is it, that he is entitled to compensation for Mrs. Terry's care and trouble, in attending to her own children, before he married her? I will not do him the injustice to believe that was intended.

6. It is claimed, also, for the complainant,

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that Ferdinand *Hopkins, sen. ought to have been charged with the amount of a note due by H. Head and J. Kennedy, say $274;—but on what ground, is not stated. It does appear, however, that he received $30.92 from H. Head, on account of this note, which is not accounted for. The Commissioner concludes that this amount was paid to the widow, because he has paid over to her all other monies received by him, and the necessities of the estate required all its means; and because the widow managed it exclusively. Knowing the parties, as I do, if I were left to form a conjecture, I should certainly concur with the Commissioner. But we cannot proceed upon conjecture.—Ferdinand Hopkins did receive this amount; and, unless he can account for the payment, by proof, he is chargeable with it. But, if it is desired, I think that the subject ought to be considered

as open for further proof, if it can be furnished; and the Commissioner is ordered to re-examine this item, if further evidence shall be offered by Mr. Hopkins.

7. It is objected, also, that Ferdinand Hopkins, jun., the son of Mrs. Terry, and one of the defendants, is not charged with $400.18¾, received by him, on account of the crops of 1816 & '17.

He was of full age, it appears, from the Commissioner's Report, when he received $260 part of the amount, and the principal objection, on his part, to his liability to account, appears to have been that the plaintiff had not in his bill prayed an account against him. That is true, but in his answer, this defendant prays an account from the complainant, of the administration of the estate of G. W. Hopkins, by his mother, the complainant's intestate; and this charge if it be allowed, is pro tanto, a legitimate set off against that demand, and is a matter directly put in issue by his own answer. He is, therefore, bound to render the account. His infancy, when he received a part of the sum, is, doubtless, a protection as to that, but we will not anticipate that he will, or that he should, avail himself of it. In order, therefore, that all the facts may appear, we have concluded to refer it back to the Commissioner to examine and report freely upon the subject, and it is so ordered.

This view of the case covers, I believe,

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all the questions *which have been raised by the motion on the part of the complainant, and embraces, also, all the grounds which have been specified by the defendant. And it is ordered and decreed that the decree of the Circuit Court, be reformed according to the principles of this decree; and that the Commissioner do state the accounts between the parties conformably thereto.

MARTIN, J. (sitting for HARPER, J.), concurred.

O'NEALL, J., having been of counsel for the defendant, gave no opinion.

Eaves, for the plaintiff.
Williams, contra.

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1 Hill, Eq. 10

WM. NEWMAN and Wife v. PETER H. WILBOURNE, Ex'r, and CAREY WILBOURNE, Exr'x, and Others, Legatees of William Wilbourne, dec'd.

(Columbia. Jan., 1833.)

[*Wills* ⇐758.]

The doctrine of advancements applies solely to cases of intestacy.

[Ed. Note.—Cited in Douglass v. Brice, 4 Rich. Eq. 323.

For other cases, see Wills, Cent. Dig. § 1957; Dec. Dig. ⇐758.]

[*Wills* ⇐731.]

One legatee cannot compel another to account for a debt due to the estate: none but the executor has that right.(*a*)

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1793–1800; Dec. Dig. ⇐731.]

[*Interest* ⇐46.]

Where the testator had loaned negroes to his son in law, which he afterwards permitted him to sell, and to apply the proceeds to his debts; the amount for which they were sold will be regarded as a loan without interest until payment was demanded.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 101; Dec. Dig. ⇐46.]

[*Equity* ⇐62.]

An executrix who has no interest, is a competent witness to prove a debt, where it is properly before a Court of Equity; but if the debt is recoverable in an action at law, in which she must be the plaintiff, this Court will not permit her to be examined, but will send the parties to a Court of Law to establish the debt.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 183; Dec. Dig. ⇐62.]

[*Evidence* ⇐233.]

Where delivery of possession is relied on, as evidence of a gift, the subsequent declarations of the donor, will not be competent to vary the legal consequences.

[Ed. Note.—Cited in Sumner v. Murphy, 2 Hill, 490, 27 Am. Dec. 397; Stone v. Stroud, 6 Rich. 309; Tibbetts v. Langley Mfg. Co., 12 S. C. 485.

For other cases, see Evidence, Cent. Dig. § 867; Dec. Dig. ⇐233.]

[*Wills* ⇐758.]

[Where decedent died testate and without directing in his will that a legatee should account for advancements, such legatee cannot be compelled to so account.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1958; Dec. Dig. ⇐758.]

The facts necessary to a correct understanding of the points made, and decided in this case, are so fully stated in the following decree of this Court, as to render any further report unnecessary.

Curia, per O'NEALL, J. The bill is filed by Newman and his wife, (who was one of the children and legatees of the testator,) against the executor and executrix, and the other legatees, for an account and settlement of the estate. The bill states "that they (the complainants) are not particularly informed what advancements were made by the said William Wilbourne to his children, but they have understood, and so charge, that the said William Webb received from the said William Wilbourne, a short time before his death, three negroes, to wit, Tish and two children; but whether the said negroes were sold by the said William Wilbourne, to the said William Webb, or intended as an advancement to his son-in-law, they are not sufficiently in-

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formed on the subject, to state *positively." The prayer for answer, requires all the chil-

(*a*) Farley v. Farley, 1 M'C. Eq. Rep. 506; Screven v. Bostick, 2 Ib. 417 [16 Am. Dec. 664].

dren except Webb and wife, to state what advancements were made to them, by the testator; and from them it requires an answer, "whether he (Webb) did not receive the negroes above mentioned, from the said William Wilbourne, some short time before his death." The answer of the defendants Webb and wife states that they are advised, that no advancements made by the testator, in his lifetime, to his children, can be taken into computation and settlement of his estate, under the said will; they therefore, on that ground alone, decline answering that part of the bill which charges a gift, made by way of advancement, to these defendants."

It was referred to the Commissioner, to ascertain the amount of the estate of William Wilbourne deceased, and what advancements, (if any,) were made to his children, by the said William Wilbourne, in his lifetime. Under this order the Commissioner made up the accounts of the executor and executrix; thereby ascertaining the amount of the estate, for division under the will, and reported that he had not ascertained that any advancements were made, by the testator, to any of his children, in his lifetime; but that there was evidence establishing a debt of $750, against the defendant Webb. This report which was made up to June Term 1831, was excepted to, by Webb. The Chancellor, on a review of the evidence, thought it sufficient to establish the debt, and that the Commissioner was authorized to make the charge, but sent back the report, to be corrected in some particulars. The corrections were made, and at June Term 1832, the report was directed to be modified, and was then confirmed, establishing a balance of $484.66, against Webb, after deducting his wife's share of her father's estate. It is most obvious, I think, on looking into the bill, answer and order of reference, that it was originally contemplated to make the defendants, Webb and wife, account for Tish and her children, as an advancement. The doctrine of advancements applies, however, solely to cases of intestacy: and it has been, over and over again, held in this State, that even in a case of partial intestacy, a child could not be compelled to account for advancements made to him by his parent, in his lifetime. But when there is a total testacy, and nothing upon

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*which the will does not operate, there never was a question, that a legatee could not be compelled to account for advancements, unless the will directed it to be done.

I have looked into the evidence, contained in Chancellor DeSaussure's decree, with a view of ascertaining how the fact really was, whether Tish and her children were, or were not, an advancement; and I think it is impossible to say, from it, whether they were given or loaned. They went into Webb's possession after his marriage, and were sold to pay his debt, by the consent of the testator, who executed a bill of sale for them. If the bill had alleged, that they went into his possession, as a loan, and this had been the issue between them, I should have been contented, to resolve my doubts, by the Chancellor's decision. It is, however, alleged in the bill, that they went into his possession, as an advancement, or by a sale. There is no pretence, that they were sold to Webb. It is now alleged, that they were sold by the testator, to pay Webb's debt; and that he is therefore indebted to the testator, in the amount of their price, for so much money paid, laid out and expended at his request. This may, for aught I know, be the truth of the case; but there is no charge, in the bill, authorizing such a demand to be set up. If there had been, I know of no right, which one legatee has to call upon another to account for, and pay a debt to the estate. Generally the executors at law have an ample remedy, for the collection of their testators' credits; in some cases of bills, either by, or against them, for a final settlement, they might be allowed to set up, and claim from a legatee, an aconnt for debts, which he owed to them as executors, or to their testator, in his lifetime. But to return to the merits of the charge against Webb. The decree assumes, that the negroes were loaned to Webb.—If so, it was a loan without hire. When was it to terminate?—at the testator's death, or at the time his estate was to be divided, or upon demand? If the loan of the negroes was without hire; must not the amount for which they were sold, stand upon the same footing as a loan without interest, until payment was demanded? This, I think, must be the result, unless there was some contract, varying the legal effect of the sale of the goods loaned—none appears to have been proved:

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and *yet the Commissioner has charged interest from the 24th of February, 1828. It may be, that payment was then demanded, but I can discover no evidence of a demand, until the bill was filed, in March, 1831.

The evidence of the executrix, Mrs. Carey Wilbourne, was competent to prove the debt, due by Webb, if it had been properly before the Court of Equity: for she has no interest in the residuary estate of which it would be a part. But the fact, that she may be sworn here, is, perhaps, a strong reason why this Court should not assume cognizance of this part of the case until, the debt is established at law. For there she must be a plaintiff, and could not then be examined, as a witness. To permit the case to be taken from the Law Court, and brought into Equity, and then to make competent a witness not competent at law, might constitute a dangerous precedent.

As to the declarations of Mr. Wilbourne, that he had not given the negroes to Webb, that he had only loaned them, or that Webb was to pay, or account for them, they were

incompetent evidence. In the case of Sims v. Saunders, State Rep. 374, Judge Nott states the rule. He says, "as a general rule of law, a person who has made a gift, or done any other act, cannot be permitted to impeach it, by his after declarations.—If, therefore, the gift in this case had been proved, the declarations of the donor ought to have been rejected; but the proof was imperfect, and inconclusive. If the plaintiff had relied alone on the evidence of the gift and delivery, without resorting to subsequent declarations on her part, the defendant could not have been permitted to give such evidence." As I understand this case, the defendants relied on the fact of a delivery of the possession, as evidence of a gift; and if so, no subsequent declarations of the testator, could be competent to vary the legal consequences.

From every view of the case, I am not satisfied to affirm the decree as it stands; it may be that it is right, but I cannot satisfy myself that it is so, from the lights which have been afforded. I think the executor and executrix ought to recover the debt at law, and then account to the complainants and the defendants, Webb and wife, for their shares in this case, in this Court.

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*It is therefore, ordered and decreed, that so much of the Chancellor's decree, as makes the defendant, Webb, liable for the debt of $750, with the interest thereon, be reversed, and that the executor and executrix do forthwith proceed at law, to sue for, and recover the same, (if it can be done)—that until the final decision of the same at law, and the further order of this Court, they be permitted to retain, in their hands, the share of the estate of William Wilbourne deceased, to which William Webb and wife are entitled; and if, upon the trial at law, they should recover the said debt, then, that they do deduct, from the said recovery the said share, with the interest which shall accrue in the mean time; but if they should fail to recover the same then that the defendants, Webb and wife, have leave in this case, to move the Circuit Court of Equity, for a decree against the executor and executrix, for the said share and interest.

JOHNSON, J., concurred.

HARPER, J., absent.

Pope, for the Plaintiff.
Bausket & Wallace, for the Defendants.

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1 Hill, Eq. 14

JOHN M. MAXWELL, Adm'r of Charles Maxwell, dec'd, v. FRANCIS CONNOR.

(Columbia, Jan., 1833.)

[*Principal and Surety* ⇐104.]

Where the payee of a promissory note, by contract with the principal maker extends the time of payment, without the consent of the surety, the latter is discharged, and he may avail himself of this defence, in a Court of Law; but having failed to do so, he cannot afterwards obtain relief in Equity.

[Ed. Note.—Cited in Gist v. Davis, 2 Hill Eq. 346, 29 Am. Dec. 89; Jackson v. Patrick, 10 S. C. 207.

For other cases, see Principal and Surety, Cent. Dig. § 186; Dec. Dig. ⇐104.]

[*Judgment* ⇐423.]

[Cited in Gist v. Davis, 2 Hill, Eq. 347, 29 Am. Dec. 89; Leonard v. McCool, 3 Strob. Eq. 51; Willis v. Tozer, 44 S. C. 21, 21 S. E. 617, to the point that where a court of law overruled a defense that a surety was discharged by time given to a debtor, on the ground that it was available in equity only, the surety, having omitted to appeal, was *held* bound by the judgment.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 799; Dec. Dig. ⇐423.]

[*Judgment* ⇐452.]

[An administrator of a deceased surety cannot, after judgment against the surety in a suit at law, maintain a bill to discharge the surety on the ground that the creditor, without the knowledge or consent of the surety, upon sufficient consideration, gave time to the principal debtor.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 792; Dec. Dig. ⇐452.]

[This case is also cited in Caldwell v. Micheau, 1 Speers, 278; Hunt v. Coachman, 6 Rich. Eq. 287; Barnes v. Cunningham, 9 Rich. Eq. 478; Hart v. Bates, 17 S. C. 42; Hand v. Savannah & C. R. Co., 17 S. C. 263; Trimmier v. Thomson, 19 S. C. 253; Bleckeley, Brown & Fretwell v. Branyan, 28 S. C. 451, 6 S. E. 291; Abbeville Electric Light & Power Co. v. Western Electrical Supply Co., 66 S. C. 342, 44 S. E. 952, on the doctrine of res judicata.]

On the 17th of March 1820, Charles Maxwell, the plaintiff's intestate, executed a promissory note, as one of the securities of John M. Davenport, to Ambrose Edwards or bearer, for $500, due at twelve months. On the 31st day of July 1826, the note being unpaid, Edwards procured Davenport to execute to him a mortgage of a tract of land, to secure its payment; and by covenants in the mortgage, without the knowledge or consent

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of Maxwell the surety, varied the terms *of the note, by extending the time of payment to the 1st day of January 1829. Edwards afterwards transferred the note to the defendant, Connor, who was a witness to the mortgage, and he instituted suit, on it, against Maxwell, in the Court of Common Pleas, in February, 1829. On the trial of this action, in October 1830, Maxwell, for his defence relied on the ground, that the payee, Edwards, had, without his knowledge or consent, by the covenants of the mortgage varied the term of the note, and that consequently he was released from his liability. The Court overruled the defence, on the ground that it could only avail in Equity, and not at Law. A verdict was accordingly rendered against Maxwell, from which no appeal was taken, and judgment was signed, and execution lodged. He thereupon filed his

bill, setting forth these facts, and praying a perpetual injunction against the proceedings at law. Before the case came to a hearing, Charles Maxwell died, intestate, and the present plaintiff, his administrator, filed a bill of revivor. The cause was heard at Abbeville, at June Term, 1832, and the following decree pronounced.

Johnston, Chancellor. I shall not touch on the defendant's evidence, but shall decide the case stated and made out by the plaintiff.

The plaintiff states his case, in the bill. His claim to relief, is, that his intestate was discharged by a contract extending time to his principal, without his intestate's concurrence. He does not ask this Court to deliver up the paper securities to him, but simply insists that his intestate was discharged and released. All he asks is, that this Court should declare him discharged.

He states at the same time, that a judgment has been obtained, at law, on the contract, against intestate; which judgment must of course, impliedly assert that he was not discharged from, but bound by, the contract.

The plaintiff, so far from coming here upon the ground of testimony discovered since the trial at law, states in his bill, that his intestate had the evidence then, which he has now, to prove his discharge, and actually tendered it to the Court. He has, in fact, offered no testimony here, which has arisen since the trial at law. There is no pretence

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in the bill, or sugges*tion in the evidence offered here, that there was any lack of testimony at the law trial, or that any has been discovered since.

This is the plaintiff's case.

There is no question in my mind, that the extension of credit, by the payee, to the principal maker of the note, is a good discharge of the surety, if made without his concurrence, and under a valid contract, which ties up the hands of the payee.—Mere indulgence will not discharge him: mere refusal to sue, will not discharge him. Although there are cases to the latter effect. But an obligatory contract to extend time, will; because it is in fact, a new contract, substituting new terms for the old, and therefore discharging the old contract, and whatever discharges the old contract, discharges the parties to it.—At all events, if the old contract cannot be enforced against one, it cannot be enforced against any of the parties to it, when all are equally bound.

But a very material enquiry, is, whether the discharge was not as available a defence at law, as it is here. The plaintiff only asks to be discharged, and the question is, whether the Court of law was not as competent to grant him that relief, as this Court. And then follows the question, whether, if the defence was available at law, the plaintiff can be heard here, when he states that he has just come out of a trial, of the same case, in a competent tribunal. Shall he have two trials?

I think it has never been doubted, either by law or equity Judges, when the question has been suggested, but that when the fact of surety-ship can be reached at law, a Law-Court is bound as much as a Court of Equity to rule that an extension of time, such as is set up in this case, is a full discharge to the surety: or, that when nothing is asked, but to be declared discharged, a Law Court is as competent to grant that relief, as a Court of Equity. The principle of discharge is, in its nature, a legal principle.

It is difficult to conceive why a discharge should not be a discharge, wherever presented; whether in law or equity—there can be no difference in the two Courts on principle, whatever there may be in the mode of ascertaining the facts and administering some of the remedies.

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*I will look to the question, and see how it stands on authority. One or two authorities, in this Court, will suffice to shew, that this Court never arrogated exclusive jurisdiction of the question, whether a surety was, or was not discharged: but has always admitted that the Courts of law have concurrent jurisdiction, when they can ascertain the facts.

In Rees and Berrington, 2 Ves. 540, where the form of paper security was that of a joint and several bond, for the payment of money, Lord Loughborough says, "the form of the security, forces these cases into Equity. But take it out of that form; and suppose in this instance, that the plaintiff was a surety by a proper bond at law as surety. What is the consequence? Where a man is surety at law, for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security. When they are bound jointly and severally, the surety cannot aver, by pleading, that he is bound as surety. But if he could establish that at law, the principle at law is, that he has an interest in the condition, and if the period is extended, that totally defeats the condition; and the consequence is, the surety is released from his engagement." He adds "the principle is a legal principle."

When he says "Suppose the plaintiff was a surety by a proper bond at law, as surety," I understand him to refer to a bond of such form, as, on its face, would have shewn the plaintiff to have been a party, as surety only.

In King v. Baldwin, 2 John Ch. Rep. 557, Chancellor Kent says, "he, (King,) has made his defence, to a recovery on the note, before a Court of competent jurisdiction, upon the same fact, that he now puts forward, and that defence was overruled—it was observed by the present Chief Justice, in delivering the opinion of the Supreme Court, in the case of

The People v. Jansen, (7 Johnson's Reports, 332,) that there was nothing in the nature of a defence by a surety, to make it peculiarly a subject of Equity jurisdiction, and that whatever would exonerate the surety, in one Court, ought also in the other. The fact being ascertained, he observed, the rule must be the same, in that Court, as in the Court of Chancery. And this was, undoubtedly, the

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opin*ion of Lord Loughborough, in the case to which the Chief Justice refers."

In the same case, Chancellor Kent also refers to two law authorities (10 East, 34, and 1 Bos. & Pul. 419) for the purpose of drawing from them the rule, as to what shall amount to a discharge; and squaring his decision in Equity, by the law rule, surely he would not have done this, if he had not admitted that the subject was one of law cognizance—and that the rule was the same in both Courts.

In our own Courts of Equity, in no case, has such a question been raised, so that no opinion can be gathered from our own Reporters—but unquestionably higher authority than that I have quoted, is not required, when the question is, as it is, open in our own Courts.

We have seen the opinions of Equity Judges—let us now turn to those of Law Judges. The authorities are abundant, and the practice of law Courts has been never to turn away, but always to take jurisdiction of the question, whether a surety has been discharged by extension of time, or variation of the contract with his principal.

Nothing is more familiar than the successful defence of acceptors and indorsers, on that ground, of whom Lord Ellenborough in Laseter v. Peat, 2 Camp. 185, says "they stand as surety, and sureties, to single contracts, and are discharged by extending time to their principals, without their concurrence."

It is vain to say, that the defence of discharge to indorsers and acceptors, stands upon the principles of commercial law, differently from other cases. That may be—but the question now before us, is not affected by it. The question is not whether indorsers and acceptors may not be discharged by less laches, or extension of time, than other sureties: but the question is, whether a discharge may not be relied on, in a Court of law, by a surety, as well as in this Court.

But there is abundant authority in law Reports, to shew that whatever be the nature of the security whether bond, note, or any thing else; if the fact of suretyship can be ascertained at law, laches amounting to a fraud on the surety, or extension of time, by valid contract to the principal, without his assent, is a good legal defence for the surety.

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*In Peel v. Tatlock, 1 Bos. & Pul. 419, the question was, whether a fraudulent concealment, by the obligee of a bond, of conduct on the part of the principal which it was essential to the surety's interest that he should have been apprised of, was a discharge, at law, of the surety, and the Court was prevented from holding the affirmative, only because the fact of such concealment was not established.

In this case, the bond was for the faithful performance of the principal, as cashier to a banking house.

In the Trent Navigation Company v. Harly, 10 East, 33 (and see 7 John. Rep. 338; 13 Ib. 175), where the defendant was surety to a bond, for the conduct of the company's cashier, the question was, whether the laches of the company, in not calling on the cashier, so soon as they might have done, if the account had been properly examined, from time to time, was an estoppel at law, as against the surety. Lord Ellenborough said, he knew of no such estoppel, at law, whatever remedy there might be in equity.

It is evident, his Lordship's difficulty was not, whether a discharge was not as good a defence in law, as in equity; but whether that might not amount to a discharge, in equity, which was not sufficient at law. His suggestion has no foundation, either in principle or authority. The case was one of mere indulgence, which is no more a discharge in equity, than in law.

This case, whilst it establishes no distinction between the two Courts, as to what shall amount to a discharge, shews that the fact of being discharged, is a legal defence, not questioned as such, of daily occurrence.

In The People v. Jansen, 7 John. Rep. 332, (already referred to) the suit was on a bond, given for the conduct of the principal obligor, as loan officer of a County in New York; and the question was, whether the defendants, who represented one of the sureties, were not discharged by the laches of the supervisors of the County, to prosecute the principal for defaults, as, by acts of Assembly, they were required to do.

Thompson, J., in delivering the opinion of the Court, says,

"The first question is, whether the defendants can in a Court of law, avail themselves

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of these facts, in their defence." *Here we see the very question, we are now discussing, stated. "I am," he resumes, "unable to discover any good reason for sending the defendants into a Court of Chancery for relief. There is nothing in the nature of the defence, to make it peculiarly a subject of equity jurisdiction: that the ancestor of the defendants was a surety only, appears upon the face of the bond; and whatever would exonerate the surety, in one Court, ought also, in the other. The facts being ascertained, the rule of law must be the same in this Court, as in the Court of Chancery. And this seems to be the light in which the subject was view-

ed, in the case of Rees v. Berrington (2 Ves. Jun. 542.) The doctrine of this case, clearly is, that whether a surety has been discharged, or not, is a legal principle, and that if the form of the security, and mode of proceeding at law, would authorize an enquiry into the fact, whether security or not, the defence would be the same at law, as in equity. Lord Loughborough says, it is the form of the security, which forces these cases into equity. For when the principal and security are bound jointly and severally, the security cannot aver, by pleading, that he is bound as surety: but if he could establish that at law, the rule or principle, by which his liability is to be determiued, is a legal principle."

It would be very extraordinary, if a Law Court should be inhibited, while a Court of Equity should be exclusively entrusted, with the application of a legal principle: when the Court is asked to do nothing more than barely apply it.

In Pain v. Packard, 13 John. R. 174, the defendant pleaded specially, that he signed the note, on which he was sued, as surety for one Manson, that whilst Manson was solvent, he urged the plaintiff to proceed against him, but that he neglected to do so, until Manson became insolvent, and absconded; on demurrer the plea was held good.

I do not uphold this decision, so far as it asserts that the mere indulgence of Pain, in defiance of Packard's remonstrances, discharged Packard. But it is good to shew that, "whether a surety has been discharged or not, is a legal principle;" and that the rule is the same in law, as in equity.

Indeed, it is not conceivable how there can be any difference, if (as Gibbs Ch. J. says,)

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"the defence which may be set up *[at law,] of time given to the principal, is borrowed from the Court of Equity." It must be the same in the Court borrowing it, as in that whence it was borrowed. I rather incline, however, to think that it is a defence standing on a legal principle, and that the borrowing was by this Court.

Come whence it may, it is now common to both Courts.

I shall stop here. All these cases, both law and equity, establish that Maxwell's was a good defense at law.

The only difficulty which ever forced such cases into equity, was that of arriving, in a law Court, at the fact of suretyship. Whenever that could be established, the law Courts took cognizance of the defence.

In Peel v. Tatlock; Trent N. Comp'y v. Harly; and People v. Jansen; the fact of suretyship appeared on the face of the bonds, which shewed for whose conduct the undertaking was, and the Court of law accordingly took cognizance of the defence.

In Paine v. Packard, the fact was admitted by the demurrer, and the defence prevailed.

In the case at bar, the fact of suretyship appears by the character in which Maxwell subscribed the note. He subscribed as surety, and the note could never be produced against him, without that coming along with it, to shew he was surety only. It is the very form of subscription, which in the case of Fulton v. Matthews, 15 John. R. 433, was considered satisfactory proof that Matthews was only surety for Wedge, he subscribed, "Tho. Matthews, security."

I have been more solicitous to prove that the rule, as to a surety's being discharged, was the same in law or equity, and that whatever was a discharge in one Court, was, also, in the other; than to establish that the defence, set up by Maxwell, was good in either Court; although the cases shew conclusively that it was good in both.

I have been less anxious, on this latter point, because if the rule be the same, in both Courts, it is perfectly immaterial whether the defence was good or bad. If good, it has been before a competent tribunal; if bad, the plaintiff is not entitled to relief here.

If the Court of law was competent to hear

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and determine *the defence; if it had concurrent jurisdiction with this Court, of the subject matter, as I think I have shewn; then the plaintiff states in his bill, he has been before a competent tribunal: and by that statement, has barred himself on the face of his own pleadings from relief here. The defendant is under no necessity to plead that which the bill states, and pleads for him. The office of defensive pleas, is not to argue, or assert points of law, but to aver facts, from which the legal inferences follow—but the legal inference is the same, from the same fact, from whatever side the fact comes out.

If a defendant has been before a competent tribunal, which has proceeded to judgment, that decision, until reversed, is conclusive upon him, in every tribunal having concurrent, or other jurisdiction. It is conclusive upon him as to every matter of defence, not only presented, but which could have been presented by him; and it is conclusive upon him, although the judgment be erroneous, if he acquiesce in it, and does not proceed to reverse it. It is conclusive on him, because a party, whenever he is brought into a Court, is bound to full diligence, which if he uses, he will obtain his right. If he neglects, either in putting in proper pleas, or introducing all his evidence to support them, he has no one to blame, but himself; nor will his neglect, in one Court, be allowed to give him a right to a second trial, either in that Court or another. If the tribunal before which he is, commits errors in deciding, his

appeal is not to a Court of merely concurrent, and not appellate jurisdiction, but to that tribunal which is by the constitution provided, exclusively and expressly, for the correction of errors; and if he neglects to prosecute an appeal, he must bear the consequences.

It is surely a hard case, if a party entitled to relief, in both Courts (I do not say this plaintiff is, because I do not go into an examination of the evidence against him,) but it is a hard case, if a party entitled to relief, in both Courts, is repelled from both, and is relieved in neither. But the wholesome rules of law cannot, for that reason, be broken down. In that case, ten would suffer for the one relieved.

I think the defence offered was receivable at law, under the general issue; but if that

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plea would not have covered it, it *was Maxwell's business, (being at liberty) to put in a special plea that would; and I also conceive that the defence, being improperly rejected, he ought to have carried the case up, by appeal; where, if I am right, he would certainly have succeeded in correcting the error.[a]

It has been said in argument, that because this Court possesses concurrent jurisdiction of the defence presented at law, which defence was not effectually made there, this Court may take it up. One plain answer is, that the pleas still stand on the law record, and that the judgment is a defeat of the facts pleaded; in which must be included every fact which could have been proved under the pleas. The judgment at law, then, is the judgment of that Court having competent authority to render it; that Maxwell was not discharged. This Court has no right to reverse that judgment; if it should reverse it, we would have two opposite judgments of equal authority and obligation, being judgments of Courts of coequal and concurrent jurisdiction, both upon the same subject matter.

Another answer is, that if Maxwell had not put in the pleas at all, and had not pretended to defend himself at law, he could not be heard here. He had his remedy there, and the same remedy which is now asked here. A Court of Appeals, common to both Courts, rendered it certain that the rules of law, applicable to his defence, were the same in both Courts. No reason could, therefore, be offered, why he should have neglected his defence at law, and come into this Court, except a mere speculation, as to the probability of obtaining a more favorable decision on the facts, founded on the different tempers of mind, and modes of thinking, of the persons constituting the two Courts. But the corrupting effect of this, if allowed, every one must see—of course the case put is hypothetical.

It was said, however, that Maxwell committed no fault, and that inasmuch as the decision at law, was erroneous in law, this Court should relieve the hardship, by exercising its concurrent jurisdiction.

Now the answer is, first, he was in fault for not appealing.

Secondly, this Court, for want of appellate

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jurisdiction, *has no authority to reverse the law decision, or pronounce whether it was or was not, erroneous, with a view to sustain, or overrule it.

Again, the declaration of the law Court, that this Court possessed exclusive cognizance of the defence, could not make it so; it could neither take away its own jurisdiction, nor alter the relative position in which this Court stands to that, which as to the subject matter, is that of a Court of concurrent jurisdiction, bound by comity to respect the decision of the other Court which first took hold of the case.

Again: as a Court of concurrent jurisdiction, this Court possesses no more power to relieve from hardships, growing out of erroneous decisions of that Court, on a matter within its jurisdiction, than that Court, sitting at a subsequent time, possesses. Now, if the plaintiff, in place of filing this bill, had, at March Term, 1831, come into the same Law Court, before the same Judge who excluded the evidence at October Term, 1830, and satisfied him by an ample examination of authorities, that the defence was a good one at law, and ought to have been received, could he have vacated the judgment, and ordered a new trial? Not without usurping the province assigned by the Constitution to the Appeal Court.[b]

But I am arguing a point as well settled as any in the whole circle of the law.—Look to the authorities, and they will shew this.

From this decree the plaintiff appealed, on the grounds:

1. That the Chancellor should have entertained the bill, as the matters set forth in it were of equitable cognizance: and he erred in ruling that the defence at law was available there, when the contrary had been held by the Court of Law.

2. That the plaintiff, suing in his representative capacity, on a demand of his intestate, is not liable for the costs, either personally, or out of the estate.

Noble, for the plaintiff, cited and commented on Wayne v. Kirby, (December Term

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1831;) Sherbrook v. Russell, *1 Eq. Rep. 315, Executors of Green v. Warren's Executors, 1 Eq. Rep. 430, Butler v. Hammond, 2 Eq.

[a] 1 Camp, N. P. 249, 200, 557; 1 Chitty, 417.

[b] 7 T. Rep. 692; 8 Ib. 436; 1 John. Ch. Rep. 91, 543; Johnson's Cases, 433.

Rep. 226; Kennedy v. Gibbs, Ib. 389; 3 Eq. Rep. 596, Hampton v. Levy, 1 M'C. Ch. 145; Golphin v. M'Kinney & Briethaupt, Ib. 280, Smith v. Tunno, Ib. 443; Rees v. Barrington, 2 Ves., jr. 540.

Burt, for the defendant.

Curia, per JOHNSON, J. The mortgage of July 1826, and the covenants therein contained, vary essentially the legal effect of the note of March 1820. According to the note, the sum contained in it was due and payable, twelve months after the date (March 1821.) By the covenants contained in the mortgage, the payment is postponed until January 1829. Thus varied, it is not the same contract by which the complainant's intestate was bound. But the Court concur entirely with the Chancellor, for the very satisfactory reasons he has advanced, that this defence was available at law—that his only remedy for the error of the Circuit Law Court in overruling the defence, was by appeal; and having neglected to pursue that course, he is not entitled to relief in Equity.

The Chancellor has made no special order on the subject of costs. The question propounded in the second ground of the complainant is not, therefore, before the Court, and cannot properly arise, except upon motion to tax costs before the Commissioner.

Motion dismissed.

O'NEALL, J., concurred.

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1 Hill, Eq. 25

MARY MILLER, Administratrix de bonis non of Archibald Miller, Dec'd. v. A. G. and E. O. ALEXANDER, Executors of Harmon Alexander, Dec'd.

(Columbia. Jan., 1833.)

[*Judgment* ⇐665.]

In order that the parties should be bound by the decree of the Ordinary on matters of account, it should appear by the proceedings, that they were legally before him, either by citation duly served, or appearance by consent, set out on the face of the decree.

[Ed. Note.—Cited in Thackum v. Longworth, 2 Hill Eq. 274; Long v. Cason, 4 Rich. Eq. 62; Renwick v. Smith, 11 S. C. 304; Fricks v. Lewis, 26 S. C. 240, 1 S. E. 884.

For other cases, see Judgment, Cent. Dig. § 1177; Dec. Dig. ⇐665.]

[*Executors and Administrators* ⇐293.]

Where an administrator, in the course of his administration, on a sale of his intestate's property, took a note payable to himself as such, and dies; and administration de bonis non is granted, although the legal right to the note is in the first administrator, yet the equitable right is in the administrator de bonis non: and if, on a final settlement of accounts, the amount of the note appears to be due from the estate of the first administrator, the administrator de bonis non will be entitled to the possession of the note.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1164; Dec. Dig. ⇐293.]

[*Executors and Administrators* ⇐120.]

[Cited in Gary v. People's Nat. Bank, 26 S. C. 549, 2 S. E. 568, 4 Am. St. Rep. 733, to the point that an administrator de bonis non is not entitled to possession of a note given to the prior administrator as such.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 486; Dec. Dig. ⇐120.]

[*Executors and Administrators* ⇐120.]

[Cited in Rhame v. Lewis, 13 Rich. Eq. 304; Shell v. Boyd, 32 S. C. 363, 11 S. E. 205, to the point that an administrator de bonis non is entitled to recover, against the estate of the former administrator deceased, the balance due from such estate to the estate of the intestate, though the deceased administrator had disposed of all the property and paid all the debts and expenses of the estate.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 488; Dec. Dig. ⇐120.]

[*Executors and Administrators* ⇐513.]

[A statement of the ordinary, of the accounts of an administrator, is not conclusive upon the parties in equity, where no citation was issued either to bring in the administrator to account, or the heirs to attend the settlement, and no consent is given to the ordinary's determination.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2268; Dec. Dig. ⇐513.]

[This case is also cited in Dickerson v. Smith, 17 S. C. 305, and Alsobrook v. Alsobrook, 19 S. C. 546, without specific application.]

Curia, per O'NEALL, J. The unfortunate destruction of the Circuit decree by fire, has

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created some embarrassment to *this Court, in ascertaining both the facts of the case, and the grounds on which the decree was predicated. It is, on this account, necessary that a summary of the facts which we regard to be important, should be made, in order that the opinion to be expressed, may be fully understood.

It appears that Archibald Miller died intestate, leaving no issue, but a father or mother, one brother and three sisters, his only heirs and next of kin, him surviving. The defendants' testator administered and sold his personal estate: at that sale Sarah Miller and the complainant, who were two sisters, and heirs of the intestate, purchased to the amount of five hundred dollars, and for the payment of this sum gave their note, under seal, to the defendants' testator. Upon some occasion, and with a view to settle with a part of the distributees, the defendants' testator, and the complainant, went before the Ordinary of York District, and he made a statement of the accounts of the administrator, in which he omitted to charge the defendants' testator with the interest actually paid, or due on notes, including the one now in dispute, which he held an account of, and as assets of the intestate's estate.—By this statement he ascertained the share of each distributee, and decreed it to be paid by the administrator. This statement of the accounts and decree, was, however, entirely

ex parte; no citation was issued, and none of the distributees, except Mary Miller, were present. Under it, however, some of them gave receipts for the sums at which their shares were erroneously stated by the Ordinary. Soon after this transaction, Harmon Alexander died, leaving a will, of which the defendants are the executors. Mary Miller, supposing herself as one of the heirs of her brother, and as agent for the others, to be entitled to the note of herself and her sister, which she knew to be a part of the assets of his estate, possessed herself of it. The defendants filed a bill in the Court of Equity against her for a discovery, and to compel her to restore it to them. In the mean time, she took out letters of administration de bonis non, on her brother's estate. And in her answer she claimed to be allowed as administratrix de bonis non, to retain it. This Court, on an appeal from the Circuit decree in her favor, thought that she could not be

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permit*ted to put the complainants to proof of their right to the note, in shewing that upon a final settlement of the accounts of their testator's administration that the sum which it secured to be paid, would be due and owing to him; but that it devolved upon her to be the actor, and to prove from the accounts of the testator's administration that he was in arrear to her intestate's estate, the amount of the note; and for the purpose of carrying these views into effect, decreed that she should deliver the note to (the then complainants) the present defendants, unless she should within three months after notice, file a cross bill for the discovery of facts necessary to her defence, and prosecute the same to a final decree with all convenient dispatch. Under this decree, this bill was filed, and the discovery of the accounts of the defendant's testator, with the estate of Archibald Miller (dec'd.) made, and the same were referred to the Commissioner for his report. He reported, "that upon a careful investigation of the whole matter, he is satisfied that the whole amount of the complainant's note, in dispute, with the interest, and a balance of $17.23" cash, in the hands of the defendant's testator, "is justly due the estate of Archibald Miller, dec'd." The case was heard at June Term 1831, and the Chancellor (Johnston) dismissed the cross bill. During the pendency of the original and cross bills, the defendants sued at law on the note, and at Spring Term 1832, of the Court of Common Pleas, recovered judgment on the note against the complainant Mary Miller, Sarah Miller and Major T. Hall, the obligors.

Out of these facts arise two questions: first, does the statement of the accounts, and the decree by the Ordinary, conclude the complainant from demanding in the Court of Equity an account of the administration of Harmon Alexander, on the estate of Archibald Miller (dec'd?) Secondly, if it does not, then, is she, as administratrix de bonis non, entitled to receive from the defendants whatever balance their testator is in arrear to his and her intestate?

1. I entertain no doubt that the statement of the accounts and decree, by the Ordinary, is not conclusive between the parties. It was wholly an ex parte proceeding, made up entirely at the instance of the administrator, to enable him to settle with his cestuique trusts. In order to be conclusive, it ought to

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*be the judgment of the Court, between parties regularly in Court on the same matter, then in issue between them, which is at present. It would then operate as an estoppel between parties and privies in estate or in law. But before it can have this effect, it must appear by the proceedings had before the Ordinary, that the parties to be affected by it were legally in Court. This can only be done by a citation duly served, and returned to the Ordinary; or by an appearance of the parties, by consent, set out and appearing on the face of the decree.—No citation was issued either to bring in the administrator to account, or to require the heirs to attend the settlement of his accounts, no consent appears to have been given to any judicial determination by the Ordinary. Mary Miller was in his office when he commenced the statement, but it does not appear that she was present when he wrote his decree, or that she expected him to do so. It is, however, sufficient to say, that from the decree it does not appear that she was a party to it by consent. There can be no doubt that she expected the Ordinary, as any other accountant, to ascertain her share from the papers before him, leaving her at liberty to review and correct his errors. None of the other heirs were present, or in any way assenting to the decree, and as against their rights, it cannot be pretended that it could have any operation. In the complainant's character of administratrix de bonis non, she now represents the intestate, and upon her rights in that character, whatever they may be, a decree made by the Ordinary before the former administration ended, and therefore before she was clothed with the present powers, can have no effect. The conclusiveness of the decree of the Court of Ordinary when regularly made upon all matters of account embraced by it, in the Court of Equity, is matter of doubt. Errors apparent upon the face of it ought to be, and I should think might be corrected. If a party who has obtained a decree of the Court of Ordinary, has to ask the Court of Equity to give it effect, the Court will examine the accounts upon which it is based, and give relief according to the right of the case. The case of M'Cullough v. Daniel, (a)

(a) M'Cullough v. Daniel.—This was a bill to enforce a decree of the Ordinary against the defendant as executor, to which he was a party

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reported in part, in Harp. State Equi*ty Rep. 255, and finally decided by the Court of Appeals, May Term 1828, is an illustration on this position. If a decree was obtained by fraud or collusion, it might be reviewed and relief granted by the Court of Equity. If it was necessary for the purposes of this case, the complainant might, I think, under the head of either error apparent on the face of the decree, or the fraud of the administrator, have relief against it. For it is manifest on the face of the decree that the interest which ought to have been, is omitted to be charged. This omission, too, was occasioned if not by the moral, at least by the legal fraud of the administrator: he withheld from the Ordinary the facts that he had received interest, and that interest was due on the notes which he then had on account of the estate. But neither of these views are necessary for the purposes of this case: the decree is not conclusive against the complainant, inasmuch as she was not a party by process or consent. It is in this point of view nothing more than a statement of the accounts between the parties, to which such receipts as were given, have reference. This, it is supposed, is a discharge to the administrator. A receipt has never been supposed to have the effect of a release. It is nothing more than the evidence of so much paid; and when it purports to be in full, it devolves upon the party who signs it the burthen of shewing error or mistake in the settlement on which it is predicated. This has been done in this case, by shewing the errors in the Ordinary's statement of the accounts, and which he himself admitted he had made, by the administrator's withholding the facts from him.

2. The complainant, as administratrix de bonis non, is entitled to all the goods, chattels, and credits, of her intestate, which were not administered by the former administrator. This is conceded; but it is said, all of the goods, chattels and credits of the intestate, were administered by Harmon Alexander, and therefore the complainant is not entitled to recover. It is true, the administrator did, in a course of administration, sell the goods and chattels, and collect and receive the credits of his intestate—these were

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acts of par*tial administration—he thereby charged himself with the nett proceeds, as so much money belonging to his intestate, out of which he was first to pay debts and expenses, and the balance, if any, to distribute and pay to the respective distributees. It may be, and very probably is true, that he paid the debts and expenses; but the balance, now reported against him, was the money of his intestate, still in his hands to be administered. Upon his death, his legal right to retain it ceased; and upon the grant of administration de bonis non, it passed as the goods, chattels, and credits of the deceased, unadministered by the administrator, Harmon Alexander, deceased, to the complainant. This legal right to receive the unadministered balance of money, in the hands of Harmon Alexander, or rather his executors, did not make her the legal owner of the note in dispute. That, legally, belonged to the administrator, to whom it was payable; and after his death, the right of action upon it passed to his executors.—For it was a personal contract made with the administrator, and for its amount he was personally liable to his intestate's estate. His executors could demand and enforce payment of it.—At law, it could not be averred that the proceeds, when collected, could, of right, belong to the obligors, or one of them. For, over the accounts of the administrator, or his consequent liability to the distributees, that Court has no jurisdiction. It merely looks to the legal rights, and not to any equities which may exist.—This is the extent of the doctrine contained in the case of Seabrook ads. Williams, 3 M'C. 371. It never was intended to be said, in that case, that because an administrator de bonis non could not sue on a note given to the first administrator, that, therefore, he would not be entitled to recover, in Equity, any unadministered balance which might be in the hands of the first administrator. There can be, therefore, no doubt that the complainant is entitled to recover from the defendants whatever sum their testator is in arrear to the estate of Archibald Miller, deceased. Notwithstanding the complainant has no legal right to her own and her sister's note, yet in Equity she may have the amount to be paid her by the defendants, set off against it; and if the sum

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*due her is equal to, or exceeds the amount of the note, if it was in their possession she would have the right to have it delivered to her; and if (as is the case) it is in her possession, she would have the right to retain it. The judgment at law, predicated upon it, under such circumstances, cannot be allowed to be enforced. At Law, the defendants are entitled to the note and the judgment; but in equity, she is entitled to receive from them the proceeds. She cannot, therefore, be compelled to pay, with one hand, a sum which she is entitled to receive with the other. This conclusion is in accordance with, and sustained by the former opinion of this Court, in the case of the Executors of Harmon Alexander, deceased, v. Mary Miller. For, in that case, the judge (Johnson) who delivered the opiuion, says:

by citation, and from which he had not appealed. The Court ordered an account before the Commissioner, without regard to the Ordinary's decree—the Commissioner made a report in favor of the defendant, which was finally confirmed by the Court of Appeals, and the bill dismissed. R.

"The note or bill, the subject of this suit, being the evidence of a personal contract with the complainants' testator, they are doubtless entitled, prima facie, to the possession of it; and the foundation of the right claimed by the defendant, to retain it, is, that the fund intended to be secured by it, probably belongs to the estate of Archibald Miller, deceased, and that, as administratrix de bonis non, she is entitled to the possession and disposition of it; and if this be true, there can be no doubt that Equity would not interpose: for, admitting that the possession of the bill would entitle the complainants to recover at Law, yet, they would be bound to account to her, in Equity, for it: and an order for its delivery would drive the parties to that circuity of action, to prevent which is one of the most useful branches of Equity jurisdiction."

It is therefore ordered and decreed, that the decree of the Chancellor be reversed; that the complainant Mary Miller as administratrix de bonis non of Archibald Miller dec'd., be permitted to retain the note in dispute; that she do charge herself with the amount thereof, including principal and interest, in her accounts on the estate of Archibald Miller (dec'd) in the Ordinary's office of York District; that the defendants Albert G. Alexander and Eli O. Alexander, executors of Harmon Alexander dec'd., be perpetually enjoined from enforcing the judgment recovered by them at law, against

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Mary Miller, Sa*rah Miller and Major T. Hall, on the said note; that the said defendants do, out of the estate of their testator pay to the complainant the sum of $17.23 reported by the Commissioner, with the interest thereon; and that they do also, out of the estate of their testator, pay the cost of the cases both in Equity and at law.

JOHNSON, J., concurred.

HARPER, J., absent.

Rogers for the plaintiff.
Williams for the defendant.

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1 Hill, Eq. 32

WM. McELWEE v. GEO. SUTTON and WM. BLACK.

(Columbia. Jan., 1833.)

[*Discovery* ⇐19.]

Where a bill is for discovery and relief, in a case where discovery is the only ground of Equity jurisdiction, it must be sworn to; but if the bill is for discovery merely, no affidavit is necessary.

[Ed. Note.—Cited in Melton v. Withers, 2 S. C. 567.

For other cases, see Discovery, Cent. Dig. § 26; Dec. Dig. ⇐19.]

[*Discovery* ⇐26.]

As a general rule, the plaintiff in a bill for discovery is required to pay the costs; but if he asks a discovery from the defendant before filing the bill, who refuses it, and he is compelled to come into Equity, the defendant will not be allowed costs.

[Ed. Note.—Cited in McCelvy v. Noble, 13 Rich. 336.

For other cases, see Discovery, Cent. Dig. § 38; Dec. Dig. ⇐26.]

This was a bill for the discovery of facts, to enable the plaintiff to prosecute at law his action of trover against these defendants. It was not sworn to, nor accompanied with an affidavit that the facts charged could not otherwise have been proved or obtained. The defendant, Sutton, had been applied to before the filing of the bill, for a discovery of the facts sought for, which he then refused to make, but which afterwards in his answer he did make. The defendant Black had not been applied to for a discovery, before bill filed, and in his answer he denied the facts material to the plaintiff's action.

The case was heard before Chancellor Johnston at York, June Term 1831, who decreed that Sutton should pay all the costs. From this decree an appeal was taken on the grounds:

1. That there was no affidavit to the truth of the facts charged in the bill, or that the discovery could not otherwise be obtained.

2. That the defendant Sutton ought not to pay the costs of his co-defendant, Black, but that they should be paid by the complainant.

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*O'NEALL, J. The rule seems to be where a bill is filed for discovery and relief, in a case where the discovery is the only ground of Equity jurisdiction, that the party must file with his bill, an affidavit of the truth of the statements contained in it. In such a case, "the affidavit must state that the deeds or writings of which the plaintiff seeks a discovery, are not in the custody or power of the plaintiff, and that he knows not where they are, unless they are in the hands of the defendant." "But where a bill is for discovery merely," no affidavit is necessary. Coop. Plead. 61. In this case the bill was filed for the discovery of facts in the knowledge of the defendants alone, as ancillary to the party's remedy at law, and not for any relief beyond it. In such a case no affidavit was necessary.—But if it had been, the defendants could only have availed themselves of the want of it by demurrer. After answering, it was too late to raise the objection.

The general practice of the Courts of Chancery, is to require the plaintiff in a bill for discovery merely, to pay the costs. But in the case of Weymouth v. Boyer 1. Ves. Jun. 423, Mr. Justice Buller sitting for the Lord Chancellor, suggested a reasonable and proper exception to the general rule. He said, "as to the costs, I am aware that it is the practice of this Court, that if a plaintiff comes for a discovery, when he has it, he

shall pay the costs; but I think the rule as expressed is too general, and if ever a case arises when I sit here, under circumstance which I think a proper ground for withholding the costs, I shall put the parties to reconsider the question. By a proper case, I mean this—if the plaintiff is entitled to the discovery, and goes first to the defendant to ask for the accounts he has in justice a right to; if the defendant refuses, and the plaintiff is thereby compelled to come here for the discovery, I would not give the defendant costs. If, on the other hand, the plaintiff thinks fit to file his bill without trying first to get the discovery in that way in which men acting with each other ought first to ask their rights, I think he ought to pay the costs." This exception, reasonable as it appears to be, has not received the settled sanction of the English Court of Chancery; for Cooper in his treatise on Equity Pleading, 61, speaks of the exception as a

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mere dictum.—*In this State, I know no case in which any rule has been settled by the Court of Appeals, as to the costs of a bill of discovery. Costs in the Court of Equity are generally regarded as so much a matter of discretion, that it is rarely the Circuit decision is disturbed. In the case of Whitney & Parsons v. R. T. & John S. Cates, Chancellor Thompson, on its appearing that the defendants had refused to make any discovery before the bill was filed, and when their answer admitted all the allegations of the bill charging a gross fraud, gave the complainants their costs. That was however an extraordinary case, and ought not perhaps to constitute a precedent for a departure from the general rule.

I am, however, prepared to adopt the exception of Mr. Justice Buller. For it is an outrage upon justice, to say that he who compels another to come into this Court, should saddle him with his costs. On the other hand, it is perhaps wise not to afford encouragement to bills for discovery merely, by giving costs to the plaintiff. It might be the means, were the rule otherwise than it is, to bring many needless bills of this kind into the Court. As I have before said, costs are generally within the discretion of the Chancellor; but where there is a fixed rule on the subject, it must be conformed to. In the case before us, the complainant did require from the defendant, Sutton, but not from the other defendant, Black, the discovery, before filing his bill; and under the exception which I have just stated, each party should have paid his own costs, except the costs of the defendant Black; his costs ought to be paid by the complainant, and the Circuit decree is accordingly so modified.

JOHNSON and HARPER, Js. concurred.

Rogers, for the appellant.
Williams, contra.

*ELIJAH HINSON and Wife, as Tenants in Remainder under the Will of James Perry, Dec'd, and ELIJAH HINSON, as Adm'r. of Philemon Starke, dec'd, v. JAMES B. PICKETT.

JOHN J. MYERS, Adm'r of Baldy H. Starke, Dec'd, v. JAMES B. PICKETT.

(Columbia. Jan., 1833.)

[*Wills* ⇐614.]

A bequest of personal property in the following words, "I lend to my daughter, P. S. four negroes, [naming them] during her natural life, and then to the heirs of her body," vests the absolute estate in the first taker.

[Ed. Note.—Cited in Stockton v. Martin, 1 Brev. 71; Brummet v. Barber, 2 Hill, 553; Beadle v. Hunter & Garrett, 3 Strob. 333; Weatherford v. Tate, 2 Strob. Eq. 28; Foster v. Kerr, 4 Rich. Eq. 391; Wade v. Fisher, 9 Rich. Eq. 363.

For other cases, see Wills, Cent. Dig. §§ 1393–1416; Dec. Dig. ⇐614.]

[*Wills* ⇐614.]

The term 'lend' in a bequest will be considered synonimous with 'give,' unless it is manifest that the testator did not intend the legal estate to pass to the legatee.

[Ed. Note.—Cited in Buist v. Dawes, 4 Strob. Eq. 47.

For other cases, see Wills, Cent. Dig. §§ 1399, 1413; Dec. Dig. ⇐614.]

[*Wills* ⇐622.]

After a bequest to P. S., during her natural life, a limitation over the heirs of her body, enlarges the life estate into an absolute one, unless the remainder can take effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1444; Dec. Dig. ⇐622.]

[*Wills* ⇐614.]

Effect of the word 'then,' in such a bequest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393–1416; Dec. Dig. ⇐614.]

[*Wills* ⇐612.]

The appointment of executors in a will "for the intents and purposes therein contained," will not control the legal effect of words creating a limitation over to the heirs of one's body.

[Ed. Note.—Cited in Parris v. Cobb, 5 Rich. Eq. 470.

For other cases, see Wills, Cent. Dig. § 1389; Dec. Dig. ⇐612.]

[*Equity* ⇐52.]

The Court of Equity will entertain jurisdiction of a bill by an administrator against a distributee in possession, or one claiming under him, in order to prevent circuity of action & to enable the latter to set up an equitable demand against the estate.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 172; Dec. Dig. ⇐52.]

[*Equity* ⇐43.]

Where a defendant is in possession of property, which is claimed in different rights, by two plaintiffs in separate bills against him; the Court of Equity will entertain jurisdiction of both cases, and decide in favor of the paramount title, in order to prevent further litigation between the parties.

[Ed. Note.—Cited in McGowan v. Hitt, 16 S. C. 611, 42 Am. Rep. 650.

For other cases, see Equity, Cent. Dig. § 166; Dec. Dig. ⇐43.]

[*Equity* ⇐43.]

Existing equities between the parties, will give jurisdiction in Equity; and if the Court

can see that, after sending the plaintiff to law, the defendant will bring him back to set up his equity, the Court will retain the bill, and decree at once on the questions made.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 121; Dec. Dig. ⟸43.]

[*Equity* ⟸370.]

The effect of two separate bills for the same property being tried together, and decided by one decree, is the same as if all the matters contained in both, had been stated in one; & the cases may be consolidated.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 781; Dec. Dig. ⟸370.]

[*Life Estates* ⟸6.]

Where the defendant is in possession of personal property as tenant per auter vie, Equity will entertain jurisdiction at the instance of the remainder men, in order to compel him to give security for the forthcoming of the property, if there has been any attempt to remove it; and the defendant cannot in such case, defeat the jurisdiction of the Court, by setting up a paramount legal title in one of the plaintiffs.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 18, 23; Dec. Dig. ⟸6.]

[*Sales* ⟸28.]

Where one who was a distributee of an estate conveyed certain slaves of his ancestor by bill of sale, in which no words are used descriptive of his distributive share, and before administration, when he had no legal interest; the distributive share does not pass to the vendee; but if the vendee has advanced money, in satisfaction of a debt due by the intestate, he may be subrogated to the rights of the creditor whose debt he has paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 55; Dec. Dig. ⟸28.]

[*Executors and Administrators* ⟸438.]

[A person in possession, claiming all the rights of a distributee, is a proper party to a suit for distribution, though not in fact entitled.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1784; Dec. Dig. ⟸438.]

[This case is also cited in Fraser v. McClenaghan, 2 Strob. Eq. 230, without specific application.]

Curia per O'NEALL, J. These cases relating to the same property, were heard both on the Circuit and in the Court of Appeals together, and the questions arising out of them will be considered as if they arose out of one case. It will be useful to state briefly the facts upon which we are required to pass an opinion.

Philemon Starke, about the year 1800, intermarried with Margaret, the daughter of James Perry. According to the testimony of one witness, Rebecca Graham, the negroes now in dispute, or the parents of them, went into their possession after their marriage, being sent by James Perry to his son-in-law and daughter. On the 14th of April 1806, James Perry made and executed his last will and testament, in which is contained the following clause "also I lend to my daughter Peggy Starke four negroes, namely, one negro boy named Brister, one negro girl named Betty, one negro woman named Abb, and one negro boy named Isaac: I also lend to my daughter Ann Harrison, four negroes, namely, one negro boy named Niger, one negro girl named Flora, one negro girl named Patty, one negro boy named George, during their natural lives, and then to the heirs of their bodies." He appointed his son Josiah, and his nephew Zadock Perry, executors of his last will and testament, "in trust for the intents and purposes" therein "contained."

Philemon Starke survived James Perry some time, and died intestate, leaving his widow Margaret, and two children, Baldy H.

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Starke, and Jane Caroline, now the wife *of Elijah Hinson, him surviving. The negroes mentioned in the will of James Perry, as bequeathed to his daughter Peggy (the said Margaret) were in the possession of the said Philemon at his death, and afterwards remained for some time in the possession of his widow. On the 15th of September 1823, the life estate of the said Margaret, in the said slaves (as it was then supposed to be) under the will of James Perry dec'd. was seized in execution at the suit of Austin F. Peay v. Margaret Starke, for a debt contracted by her, as it is said, in satisfaction of a debt of her (dec'd.) husband; and on the 6th of October in the same year was sold to the plaintiff, Col. Peay, for $500. He kept the negroes in his possession for a little more than one year after the sale, and on the 26th of November 1824, sold to Baldy H. Starke the supposed life estate of his mother in them, for $800, and delivered the said negroes to him. On the 29th of November 1824, Baldy H. Starke executed a bill of sale to James B. Pickett in consideration of $1289, ($800 of which it is believed was advanced by Pickett to enable the said Baldy to purchase the negroes from Peay) conveying to him the negroes Abby, Isaac, Betty, Brister, Feriba, Jacob, Mahala, Charlotte, Mat, Letha, and Amanda; the bill of sale describes them as a parcel of negroes "willed to my mother and the heirs of her body," by her father; it warrants the title to them as far as the title of the said Baldy H. Starke extends. On the same day, the said Baldy H. and James B. entered into a written contract, whereby the said Baldy H. agreed to hire from the said James B. for the term of five years, the negroes Abby, Isaac, Feriba, Mahala, Mat, Letha, and Amanda, at the annual hire of one dollar; and the said James B. agreed with the said Baldy H., that if he would, within five years, pay him $1289, with interest on $1000 from the 22nd of November 1824, that he would make "him titles of the above named Brister, Betty, Jacob and Charlotte." Baldy H. Starke died intestate, in January or February 1829, never having made any payment to the said James B. Pickett, and the complainant John J. Myers administered on his estate. In January 1829,

the complainant, Hinson, intermarried with

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Jane Caroline, *and subsequently administered on the estate of Philemon Starke (dec'd.) James B. Pickett had possession of Brister, Betty, Jacob and Charlotte, from the execution of the bill of sale; and before the expiration of the year 1829, acquired possession of the rest of the negroes, except Amanda, who died in the possession of Baldy H. Starke (dec'd.) As he alleges, he sold them just before the bills were filed, to James A. Knighton, who carried them out of the State. But the Chancellor has, from the facts in evidence before him, come to the conclusion that the said sale was a mere pretense, and that in fact the said James B. Pickett sent the said negroes to the western country, by the said James A. Knighton, to avoid the claim of the complainants. On the 27th of January 1830, Mrs. Margaret Starke conveyed to the complainant Mrs. Hinson, all the interest which she might have in the said slaves, in the event of its being decided that by her father's will they vested in her absolutely as the first taker.

The following questions require our consideration and judgment:

1. What estate vested in Margaret Starke, in the said negroes, under the will of James Perry, deceased?

2. If an absolute one, then, can the complainant, Hinson, as administrator of Philemon Starke, deceased, maintain his bill in the Court of Equity?

3. If the title of the said slaves is in the administrator of Philemon Starke, deceased, what right has the defendant, James B. Pickett, under the bill of sale to him, executed by Baldy H. Starke, deceased?

1. I have struggled to give effect to what I believe to be the clear intention of the testator, that Mrs. Starke should take an estate for life; and that, at her death, her children should, as purchasers, take the remainder. But the technical rule is too strong and too well settled, that the words "heirs of the body," must be considered words of limitation, and not words of purchase; and that consequently, the estate vests in the first taker. Notwithstanding, I am not well satisfied with either the justice or the reason

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*of the rule, yet I must be content to say "ita lex scripta," and console myself by what is said by one of the great masters of the science of the Common Law, "that at some other time, in some other place, and on some other occasion, the wisdom of the rule may appear."

The only three circumstances in this case, which are supposed to vary it from the great body of cases, in which a bequest of a personal chattel to one and the heirs of her body vests an absolute estate in the first taker, are— 1st, that the word 'lend' is used, instead of the word 'give:' 2nd, that the estate to Margaret Starke is expressly for life: 3rd, that the word 'then' "to the heirs of their bodies," ties up the limitation to the time of her death; and that the words 'heirs of her body,' are merely descriptive of a class of persons, (her children) who must then be in esse, and take the estate as purchasers, and not by descent, from her (if such a term as descent can be properly applied to personalty.)

The term lend, when used in a bequest, is generally equivalent to give. In some special cases, it has its appropriate meaning: as in the case of Baker v. Baker & Red, [Rich. Eq. Cas. 191,] decided by this Court, in December, 1831. But in such cases there is something which shews that the testator did not intend the legal estate to pass to the legatee. In the will under consideration, the testator has not manifested any such intention; he uses the word to pass from him his entire property in the chattel; and it is worthy of remark, that he uses the word not only in relation to the life estate, which he had created as he supposed, for his daughter, but also to the absolute estate in remainder, which he also supposed he had created, in favor of her children.—The testator parts with the entire dominion over the property, and it is absurd to say that an estate which can never revert, can be a loan, which implies that the use of the thing is parted with for a limited time, or for a specified purpose, and the right of property remains in the lender. It is therefore clear that the word 'lend,' in this will, must be considered as synonimous with 'give.'

The bequest to Margaret Starke is, it is

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true, expressly *for life; but the limitation over to the heirs of her body, shewing that the testator has parted with the entire property to her and her descendants, enlarges the life estate into an absolute one, unless the remainder intended to be created can take effect. The circumstance of the bequest being for life, cannot, therefore, alter the case. In all the cases of executory devises, to one and the heirs of her body, the intention is obvious enough, that the first taker should take an estate for life only. But a technical rule "nemo est hæres viventis," intervenes and defeats the intention. In real estate, such words would constitute here, a fee conditional; in England, a fee tail. In personalty, the words "heirs of the body," can have no legal and technical meaning, so as to affect the estate: for in personalty, there is no descent cast upon the death of the first taker. The remainder cannot take effect per formam doni, because the subject matter is not inheritable: and it hence follows, that the words 'heirs of the body' in personalty, can have no other effect than to enlarge the estate of the legatee to an absolute one.—This reasoning, I acknowledge, is technical, but it is in support of an arbitrary rule of construction, which is, itself, technical: and the reasons

in support of it must be, necessarily, of the same character.

The word "then" cannot have the effect to tie up the limitation, so as to let in the children of Mrs. Starke, as purchasers. For the words "the heirs of her body," still purport an indefinite succession of the line of the first taker; and before there could be a reversion to the testator, there must be an entire failure of descendants, according to the words employed by the testator. But, without pursuing this abstract question farther, it will be only necessary to refer to the cases of Guery v. Vernon, 1 N. & M'C. 69, and Henry & Wife v. Felder, 2 M'C. Eq. R. 323, in which all the questions involved in this part of the case, are considered and decided in conformity to the views I have already stated.

Another view was presented by the counsel, for Mr. and Mrs. Hinson, why the remainder ought to be supported; it is that the testator constituted his executors trustees to preserve it. But I think there is nothing

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in the will, to sus*tain this position. It is true the testator constitutes his executors trustees, for the intents and purposes contained in his will: but this was nothing more than the trust which resulted from their appointment as executors, and their acceptance of it. If the testator had used any words leaving the property under the control of his executors, during the life of his daughter, so as to prevent any legal estate from vesting in her by the assent of the executors to her legacy; or if he had bequeathed the property to them, in trust for the use of his daughter during life, and after her death, for the use of the heirs of her body, the argument would have been conclusive. This, however, has not been done, and we cannot give any effect to the words employed beyond the general trust, which the law imposes on every executor, to pay the debts and pecuniary legacies, and to deliver to the specific legatees the property specifically devised. Such a trust was ended, when the executors assented to the legacy to Mrs. Starke; and can have no effect in supporting a limitation over by way of executory devise. I am therefore reluctantly brought to the conclusion, that Mrs. Starke took an absolute estate as first taker under her father's will, and that the marital rights of her husband attached on the property and vested it in him, and that the right of property in the negroes now in dispute is in his administrator, the complainant Elijah Hinson. I say I have come to this conclusion reluctantly, because I believe it is against the testator's intention, and it may seriously prejudice the defendant. But if so, it is an injury of his own seeking. For had he not raised the question, all the other parties would have treated the property as for life, to Mrs. Starke, and after her death to her children in remainder, under the will of James Perry (dec'd.)

2. This brings me to the consideration of the second question, can the complainant Hinson, as administrator of Philemon Starke (dec'd.) maintain his bill in the Court of Equity? I think he can. The defendant acquired possession under Baldy H. Starke, who bought no more than a life estate supposed to be in Mrs. Starke. The defendant knew the situation of the title, at the time he ac-

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cepted the *bill of sale from Baldy H. Starke, and only intended and expected to acquire by it an estate in the whole of the slaves, for the life of Mrs. Starke, and a moiety in remainder, in the right of Baldy H. Starke, as a cotenant in remainder with Mrs. Hinson. If Baldy H. Starke had been in possession under his purchase from Col. Peay, the complainant Hinson, as administrator, would have been entitled to have proceeded against him in Equity, on two grounds: first, that he was a distributee in possession; and to prevent circuity of action, the Court of Equity would have taken cognizance of the case, and if there had been no debts, or if any, after providing for their payment, would have decreed distribution: secondly, that he might have been permitted to set up, and claim payment of the debt of his father, for which the judgment of A. F. Peay v. Margaret Starke was recovered, and to pay which the slaves had been sold for the life of the said Margaret. The defendant being in possession, under Baldy H. Starke, is prima facie, to be regarded as the owner of all his interest; and if that be true, there would be no doubt that the Court would retain the bill against him, for the same reasons which it would against his grantor Baldy H.; but it will turn out in the sequel, that the defendant is not the owner of the distributive share of the said Baldy H. in the said shares. Still this cannot oust the Court of jurisdiction; for he is in possession claiming to hold all the rights of Baldy H. Starke, and hence he was a necessary party to a recovery and distribution of the property. But the defendant is not only in possession under Baldy H. Starke, but he also stands in the relation of mortgagee to him.—For I have no doubt that the bill of sale, and the agreement, allowing to Baldy H. Starke the right of redemption, is, in Equity, a mortgage. As against Myers, administrator of Starke, he could not dispute the title of Baldy H. Starke as tenant for the life of Mrs. Starke, and as co-tenant in remainder with Mrs. Hinson. For he entered under that title. As long as the contest was between them, he would have been estopped to deny the title of the mortgagor. It is the intervention of the paramount title

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*of Philemon Starke dec'd., which Hinson as his administrator has been forced to set up,

by the defendant's defense, which could alone prevent Myers from obtaining, as administrator of the mortgagor, a decree allowing him to redeem. The assertion of this paramount title enables the mortgagee to say legally to the administrator of Starke: "I can neither give up possession to you, nor permit you to redeem, for the property is claimed from me, by another, claiming in a different right." In this point of view, the defendant becomes as it were the holder of a fund, or property, to which two claims are presented; in such a case he might by a bill compel them to interplead and settle their rights, so as to enable him to pay or deliver it to the legal owner. The same reason which would authorize the Court to sustain his bill, to prevent him from being harrassed by two suits at law, for the same property, will when applied to the complainants, authorize the Court to interfere at the instance of the paramount legal right. It will save the litigation of a suit at law, between the complainant Hinson and the defendant, and another suit in Equity, between the two complainants Hinson and Myers. But the defendant cannot be permitted to turn the party out of the Court of Equity, who has a clear right to come into it, to redeem, by setting up the paramount title in the administrator of Philemon Starke dec'd., without submitting to a decree in its favor.

Independently, however, of this view, the complainant is entitled to relief in the Court of Equity. The defendant is in possession, and out of Baldy H. Starke's share of the property, is entitled to be paid the debt which he owes him, and to secure the payment of which he conveyed to him the said slaves, if it should not turn out that there are other debts of a higher rank, sufficient to consume the whole of it.—This fact, although no ground to prevent the Court of Law from entertaining jurisdiction of an action brought to recover the said slaves, is yet such an equity between the parties as authorizes the Court of Equity to retain the bill, and while it decrees the property to be delivered up to the complainant Hinson, at the same time

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secures the rights *of the defendant, by making provision as far as practicable, for the payment of his debt. The defendant, too, it must be recollected, furnished the money which enabled Baldy H. Starke to purchase the negroes from Peay. If the fact be, as it is alleged, that Peay's debt against Margaret Starke was really contracted in satisfaction of a debt of Philemon Starke, (deceased) then I think that debt ought now to be set up against his estate; and as it has been satisfied with the money of the defendant, I think he may be subrogated to Peay's rights in this respect, in order to aid in the payment of Baldy H. Starke's debt to him. This circumstance in itself constitutes a ground of Equity jurisdiction, and it is perfectly immaterial that it is a ground for the defendant to claim the aid of Equity: for if the Court sees that after sending the complainant to Law, the defendant will bring him back into the Court of Equity, to set up his equity, the Court will, without this circuity, retain the bill, and decree at once on all the questions which can be made.

If the complainant Myers, administrator of Baldy H. Starke (dec'd,) had been a party to the bill of Hinson as administrator, it could not have been denied that the Court would entertain jurisdiction both against him and Pickett.—

For, as between Myers as administrator, and Pickett, as mortgagor and mortgagee, the jurisdiction is unquestionable; and it would have been equally so, between Hinson administrator, and them, when he alleged, as the fact is, that the property mortgaged, is the property of his intestate, and that out of it, as such, Pickett had no right to be paid, as mortgagee, the debt owing to him, and secured by the mortgage: and for the same reason, that the mortgagor could have no right to redeem. The effect of the two separate bills being tried together, and decided upon by one decree, is precisely the same as if all the matters contained in both had been stated in one, by both of the complainants. All parties in interest are before the Court, and will be bound by whatever decree may be pronounced: the cases, therefore, may be consolidated, and any necessity for the formal addition of Myers administrator of

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Starke, *as a complainant in, or defendant to the bill of Hinson, will be thus superseded.

I am disposed, however, not to rest the jurisdiction of the Court on these views alone: I will add another, which, to my mind, is perfectly satisfactory. When Hinson & Wife filed their bill, they had the right to consider Pickett as in possession of an estate in the said slaves for the life of their mother, under the bill of sale of Baldy H. Starke; and from a tenant per auter vie, who had sold, removed, or attempted to remove the property beyond the jurisdiction of this State, the tenants in remainder had the right in Equity, to demand security for the forthcoming of the property, on the falling in of the life estate—(Swann v. Ligon & Rudd, decided at Columbia, May Term, 1828.) Baldy H. Starke bought the slaves from Peay, for and during the life of his mother; he conveyed this right, and possibly his supposed interest in remainder, by his bill of sale to Pickett. The complainants were willing to concede to Pickett the life estate of their mother, and from the manner in which he acquired possession, they had the right to suppose he would not raise a contest which would defeat his own rights.—If he had conceded, as the complainants had done, that Mrs. Starke had an estate for life in the

slaves, and that it was conveyed to him, there could have been no doubt of the jurisdiction of the Court, to have ordered him to give security for the forthcoming of the property, if they had shewn, as it appears they did, that he had endangered their rights in remainder. To defeat this plain and obvious equity of the complainants, he has set up the existence of a paramount title in Philemon Starke, deceased; and to meet this possible state of things, the complainant (Hinson) administers on his estate, and superadds the whole legal title to his defective equitable title to a moiety, and amends his bill, and prays a decree under it. Does this oust the jurisdiction of the Court of Equity? I think it does not. For the defendant sets up the paramount title, to defeat the complainants' right to a decree, in a case confessedly within the jurisdiction of the Court of Equity, if their allegations are true.

On the part of the complainants, it is said

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this may be *true, and if so, the legal title is also with us, one of us being the administrator, and we therefore claim a decree in favor of it. The legal title is obliged to be decided on, its validity established, before the complainants' equity can be denied. When this is done, it would be nugatory to send the parties to Law, to try a question which the Court of Equity has already decided, as it must be there decided.—When a legal title is raised by the defendant in his defence or comes in question collaterally, the Court of Equity must decide on it. In this case it is raised by the defendant's defence, and is necessary to him to prevent their Equity from prevailing; but it is found on examination, that this legal title set up by the defendant, is in one of the complainants, and that therefore he is entitled to the benefit of it, and as it is brought forward by the defendant, the Court must decree upon it in favor of the complainant to whom it belongs

3. I am satisfied that the defence, carved out by the defendant for himself, is the destruction of his title, under Baldy H. Starke dec'd. The right of property being in the administrator of the intestate Philemon Starke, when he conveyed to the defendant, he conveyed to him no title, legal or equitable. For his bill of sale purports to convey the slaves themselves; this he could not do, as the property was in another. It cannot convey his distributive share, for no words descriptive of it, as such, and indicating an intention to convey it, are used. In the slaves, when he conveyed, he had no legal interest whatever; his interest was a mere equity that the administrator would deliver him one-third after payment of the debts. Until administration has been made, his right is only inchoate, for it may be that the debts may consume it all. His bill of sale, not conveying his distributive share, his administrator is entitled to take it, subject to an account, and deduction from it, for the hire of such slaves as he had in possession. The defendant's right to be refunded the money which he advanced to Baldy H. Starke, and to secure the payment of which the slaves were conveyed to him, with the interest thereon, is a simple contract debt against Baldy H. Starke, and must be paid accordingly, by his administrator, so far as his

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assets will extend. As *ancillary, and perhaps on an account had it may turn out in lieu of it, I think the defendant Pickett may be subrogated by virtue of the conveyance to him of the slaves, and the loan of the money to Baldy H. Starke for their purchase by him from Peay, to the right of Baldy H. Starke and Peay, to have $800 of the debt in the case of A. F. Peay v. Margaret Starke, with interest from the 24th of November 1824, set up as a debt against the estate of Philemon Starke, if it should turn out on investigation that the allegation is correct that the judgment of Austin F. Peay v. Margaret Starke, was on a contract entered into by her, to satisfy a debt of the said Philemon.

It is Ordered and decreed, that the Chancellor's decree be modified according to the principles contained in this opinion; that the case of Elijah Hinson and wife, and Elijah Hinson as administrator of Philemon Starke dec'd., v. James B. Pickett, and the case of John J. Myers administrator of Baldy H. Starke dec'd. v. James B. Pickett, be consolidated, and henceforward considered as one case, in which Hinson and wife, Hinson as administrator, and Myers as administrator, are to be considered as complainants, on the facts stated in both bills, and Pickett, the defendant, to have the benefit of both his answers, as one.

It is also Ordered and decreed, that the defendant Pickett, do forthwith deliver to the complainant Hinson as administrator of Philemon Starke dec'd., the slaves in dispute, or on failing to do so, within two months after notice of this decree, that he account to him before the Commissioner for the value of them, and that he, in either of the alternatives pointed out in this part of the decree, do account with the said Hinson as administrator, before the Commissioner, for the hire of the said slaves, from the time they respectively came into his possession, until the day on which he shall deliver them up, or be charged with their value as the case may be, with interest on the annual hire.

It is further Ordered and decreed, that the Commissioner do enquire and report, wheth-

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er the judgment of Aus*tin F. Peay v. Margaret Starke, was on a contract entered into by her, for, and in satisfaction of a debt of Philemon Starke dec'd., and if so, whether

on the 24th of November 1824, it amounted to and exceeded $800; and in that case to allow the defendant, James B. Pickett, credit for that sum, with interest from that time, in his accounts with the administrator of Philemon Starke dec'd.; if, however, it did not amount to so much, then for whatever sum it did amount to, with interest from that time. If, however, it was not for the debt of Philemon Starke dec'd., but was the proper debt of the said Margaret, then no credit can be allowed for it, in the accounts with the estate of Philemon Starke dec'd., but it must remain as a charge upon the distributive share of the said Margaret, by her voluntarily conveyed to Mrs. Hinson.

It is also Ordered and decreed, that the administrator of Baldy H. Starke do account for the hire of the said negroes during the time they were in the possession of the said Baldy, with interest on the annual hire, and that the same be deducted from the amount of his distributive share of the personal estate of the said Philemon Stark dec'd, recovered in this case.

It is further Ordered and decreed, that the Commissioner do report the amount and rank of the debts of Philemon Starke dec'd., and also of Baldy H. Starke dec'd., including whatever may be due James B. Pickett on account of the money paid by him to Baldy H. Starke, for the conveyance of the said slaves, after deducting (if any sum should be reported) whatever may be allowed to him, as a credit in the accounts of Philemon Starke, or as a charge on Margaret Starke's distributive share, on account of Peay's judgment against her.

It is further Ordered and decreed, that if the slaves are delivered to the complainant Hinson administrator, that he do forthwith sell the same for partition, on a credit of one year, taking bonds and security and mortgages from the purchasers, and that he do return the amount of sales to the Commissioner, as well as to the Ordinary; and that the Commissioner do take the same into account,

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in making up his *final report of the amount of the estate of Philemon Starke dec'd, for distribution.

It is further Ordered and decreed, that the personal estate of Philemon Starke dec'd., after payment of his debts, be distributed as follows: one third as the distributive share of Margaret Starke (after deducting therefrom the amount of Peay's judgment, if it should not exceed $800, with interest from the 24th of November 1824, if the same should be for her proper debt, and not for the debt of Philemon Starke, and paying the same over to James B. Pickett,) be paid to Elijah Hinson and wife, under the voluntary conveyance of Mrs. Starke to the said Mrs. Hinson; one other third, the distributive share of the complainant, Jane Caroline Hinson, be paid to Elijah Hinson and wife; and the remaining third, the distributive share of Baldy H. Starke dec'd., after making the deduction for hire hereinbefore directed, be paid to his administrator, John J. Myers, that out of it he do first pay the costs of the case, John J. Myers administrator v. James B. Pickett, up to this time, and then that out of the balance he do pay the debts of Baldy H. Starke dec'd, so far as his assets shall extend, in the order and proportions which may be fixed hereafter by the decree of the Court of Equity in this case.

The defendant must pay the costs of the case of Hinson and wife, and Hinson administrator: any further costs which may hereafter accrue in this case, will be subject to the order of the Circuit Court, to be hereafter made on the coming in of the Commissioner's report.

JOHNSON and HARPER, JJ., concurred.

Peareson & Nott, for the complainants.
Clarke & M'Dowell, for the defendants.

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1 Hill, Eq. *49

*JOHN C. VOLENTINE v. SAMUEL O. JOHNSON and ZACHARIAH JOHNSON.

(Columbia. Jan., 1833.)

[*Joint Tenancy* ⇐8; *Tenancy in Common* ⇐28.]

Where land is held jointly, each co-tenant has a right to the enjoyment, to the extent of his interest; and if one tenant voluntarily abandon his possession, the other remaining, will not be accountable for the rent of the entire tract, but only of such portion as has been rendered productive by the labour of the tenant who abandoned it.

[Ed. Note.—Cited in Lyles v. Lyles, 1 Hill, Eq. 86; Williman v. Holmes, 4 Rich. Eq. 477 note; Jones v. Massey, 14 S. C. 308; Scaife v. Thomson, 15 S. C. 367; Cain v. Cain, 53 S. C. 353, 31 S. E. 278, 69 Am. St. Rep. 863.

For other cases, see Joint Tenancy, Cent. Dig. §§ 7, 9; Dec. Dig. ⇐8; Tenancy in Common, Cent. Dig. § 79; Dec. Dig. ⇐28.]

[*Joint Tenancy* ⇐8.]

Where one joint tenant is in possession of land, and his cotenant is indebted to him on account of the purchase money, the rents and profits must be applied to the payment of that debt; first to the interest which had accumulated up to the time the rent became due, and then to the accruing interest before any part is applied to the principal.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 9; Dec. Dig. ⇐8.]

JOHNSON, J. In 1805, the complainant, and defendant Samuel O. Johnson, purchased jointly, a tract of land represented to contain about 206 acres, at the price of $600.—Of this sum, S. O. Johnson paid an amount which left the complainant indebted to him on account of the purchase, in the sum of $119.30. Both, immediately after the purchase, settled upon the land, and without any definite partition, each cleared and cultivated

separate fields and plantations of about equal quantities, both much short of one half of the whole tract, until 1816, when the complainant voluntarily abandoned his possession. Samuel O. Johnson continued in the use and occupation of what he had retained, and from year to year cultivated also parts of that portion which had been possessed and abandoned by the complainant, until 1825, when his undivided moiety was sold under fi. fa. at sheriff's sale, and purchased by the defendant Zachariah Johnson. The bill is for a partition of the land, between the complainant and Zachariah Johnson, and for an account of rents and profits against both the defendants, for the time they have respectively had the possession. The decree of the Circuit Court is predicated upon an account stated by the Commissioner, in which the defendants are charged with one half the annual rents of the whole plantation, including the lands cleared and cultivated by the defendant Samuel O. Johnson, as well as that by the complainant, notwithstanding neither of the defendants cultivated the whole of the plantation abandoned by the complainant; and error in this respect, is one of the grounds of the present appeal.

I cannot perceive that there is any room to doubt about this question—natural justice would suggest that one co-tenant has a right to the enjoyment of the estate, to the extent of his interest, and I know of no positive rule which deprives him of it. It deprives the other of no right and does him no wrong. He has the same right, and may profit by it, if he will. He therefore has no cause of complaint. These parties acted upon this principle, from 1805 to 1816, each appropri-

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ated *to himself what was necessary to his use, of the joint property, neither to the whole extent of his interest, for the witnesses say that neither cultivated more than 25 or 30 acres. The complainant could not, according to the principles, vary the rights of the defendant, by a voluntary abandonment of the use of his possession; their rights were precisely the same as if he had continued it. When, however, they used that, which the complainant had, by common consent, appropriated to his own use, and rendered productive by his own labor, they derived a benefit which was unequal, and ought to account for it. We think, therefore, very clearly, that the defendants are bound severally, to account for the rents and profits of so much of the land as they respectively cultivated, from year to year, which was improved and possessed by the complainant, before he abandoned the possession, but not for any part or portion of that improved by them, before or since that time.

We think, too, that there is error in the manner of setting off the accounts of rents and profits, against the sum due by the complainant to the defendant Samuel O. Johnson, on account of the purchase. That sum was a debt due to him, and his liability for rents and profits is in the nature of payments, and must be first applied to the payment of the accruing interest. Samuel O. Johnson is, of course, entitled to interest on the sum advanced by him from the time of payment; and the rents and profits, which first accrued, must be applied to the payment of the interest which had accumulated up to the time the rent became due, and so from year to year, until first, the accumulated interest is paid, and then to the accruing interest, before any part is applied to the payment of the principal.

It is therefore Ordered and decreed, that the decree of the Circuit Court be reformed according to the principles of this decree, and that the Commissioner do state an account conformably thereto.

O'NEALL and HARPER, JJ., concurred.

Williams & Clowney, for the appellants.
Thomson, contra.

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1 Hill, Eq. *51

*ELIZABETH CABEEN v. CAROLINE GORDON and Others, Heirs at Law of Mary Tims, Dec'd.

(Columbia. Jan., 1833.)

[*Equity* ⇐118; *Wills* ⇐826.]

On a bill to charge a specific legacy with the payment of an annual sum, all the parties in interest should be before the Court; and the Court may, at any stage of a case, direct a bill to be amended so as to make proper parties, and this may be done with or without costs, according to the discretion of the Court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 554; Dec. Dig. ⇐118; Wills, Cent. Dig. § 2134; Dec. Dig. ⇐826.]

[*Wills* ⇐639.]

The testator by his will, bequeathed certain negroes to his helpless daughter, B. and then declares "I allow my daughter M. to take care of the said B. and at her decease I allow my said daughter M. to have the said negroes, to her and her heirs & assigns, forever." *Held*, that this is a bequest on condition that the direction be complied with, and that if M. should not "take care of B." the remainder would not vest, and that the negroes might be sold for the support of B.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1522; Dec. Dig. ⇐639.]

[*Wills* ⇐466.]

The word "allow" in a will, may be construed as synonimous with "direct" or "give," so as to effectuate the intention of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 985; Dec. Dig. ⇐466.]

[*Specific Performance* ⇐32, 49, 51.]

A contract, to be sustained and specifically enforced as a bar to the plaintiff's equity, must be fair, just, reasonable, mutual, and founded on a good or valuable consideration.

[Ed. Note.—Cited in Holley v. Anness, 41 S. C. 355, 19 S. E. 646; Marthinson v. McCutch-

eon, 84 S. C. 266, 66 S. E. 120; Midland Timber Co. v. Prettyman, 93 S. C. 16, 75 S. E. 1012.

For other cases, see Specific Performance, Cent. Dig. §§ 89, 140, 153; Dec. Dig. ⟸32, 49, 51.]

[*Wills* ⟸740.]

But an agreement wanting some of these essential requisities, may avail the defendants so far as to prevent the account against them from being carried beyond the time of filing the bill.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1888–1895; Dec. Dig. ⟸740.]

[*Appeal and Error* ⟸1022.]

On questions of fact, the concurrence of the Commissioner and Chancellor, is generally decisive with this Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⟸1022.]

[*Contracts* ⟸274.]

[Property was bequeathed to A. on condition that he would maintain B. for her life, and B. agreed with A., without consideration, to receive a certain annuity in performance of the condition and received the annuity for a year under the agreement. *Held*, that B. could not afterwards claim for arrears of support for a time prior to the agreement, though the agreement had been set aside as invalid.]

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1204; Dec. Dig. ⟸274.]

[*Husband and Wife* ⟸8.]

[A legacy in remainder to a feme covert, after a life estate to another, is not an interest on which the marital right of her husband can attach during the life estate.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 25; Dec. Dig. ⟸8.]

Thomas Cabeen deceased, by his will, dated 3d December, 1801, inter alia, bequeathed to his daughter, Mary Cabeen, a negro woman, Jane, "allowing [in the words of the will] the second child (of the negro, if any) to my daughter Betsey:" and by another clause, he bequeaths to his "beloved daughter Betsey, a mulatto girl, named Nan; and I allow my daughter Mary, to take care of my said daughter Betsey, and at her decease, I allow my daughter Mary to have the said mulatto girl named Nan, with her increase, (if any) together with negro Jane's second child, (if any) to her and her heirs and assigns, forever." The negro woman, Jane, had a second child, as contemplated by the will, called Flora, who has now five children.

Mary Cabeen intermarried with Amos Tims, and removed to Alabama, where she died, leaving children (the present defendants, and their husbands,) never having taken care of the plaintiff, the (said daughter Betsey) nor having had possession of these negroes. The plaintiff, from infancy, has been helpless and infirm, unable to walk or assist herself in any way, and requires extraordinary care and attention.—She is of sane mind, but utterly unfit to manage or transact her own affairs. After her father's death, Nan and Flora (the negroes bequeathed to her) went into her possession, and she has held them ever since. She lived with, and was taken care of by her mother, until the death of the latter, since which she has been a dependent on her relations—the labor or hire of the negroes being wholly inadequate to her support. In the year 1828, and after the death of his wife, Amos Tims entered into a written obligation to pay the plaintiff $30 per annum, for five years, for Flora and her children, who were to be delivered up to the defendants. The plaintiff received some money under this arrangement; but after it had existed for a year and upwards, she gave Tims notice that she would not deliver Flora and her children, and that his obligation would be delivered to him, or cancelled.

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*The bill is filed to compel the defendants to support and maintain the plaintiff according to the condition of the bequest; or to abandon their right in remainder, and to subject the property to her maintenance.

The defendants, in their answer, declare themselves willing "to take care of" the plaintiff, according to the terms of the will, but rely on the agreement made with Amos Tims, which they set up in bar, and pray to be sustained.

The Commissioner, on a reference, ascertained and reported $175 per annum, as a proper allowance for the maintainance of the plaintiff.

The case was heard at Chester, July Term, 1832, before Chancellor De Saussure, who confirmed the Commissioner's Report, and ordered that the defendants should give security for the sum allowed, or that the negroes should be subjected to the payment thereof.

From this decree the defendants appealed, on the following grounds:

1. That the bill should have been dismissed, for the want of proper parties; Amos Tims, the husband of the legatee in remainder, in whom the fee vested, not being a party.

2. That according to a proper construction of the will, the remainder in fee vested absolutely and unconditionally in Mary Cabeen, at her father's death.

3. That, admitting the bequest was on condition that the complainant should be "taken care of," the Chancellor should have sustained the agreement with Amos Tims, as in performance of that condition.

4. That the annual allowance reported by the Commissioner, is too much.

5. That the defendants should not be subjected to the costs.

Eaves, for the appellants, commented on these grounds at large, and cited and relied on 3 Ves. Ch. Rep. 204; Ib. 102, 13; 1 Roper, 298, 319, 333, 186; 2 Con. Rep. 91; 2 M'C. Ch. Rep. 306; 20 Ves. Rep. 144-5; 1 Maddock, 286.

Mills, contra.

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*O'NEALL, J. The objections to the Chancellor's decree, which have been insisted on in the argument of this case, may be arranged under the following heads.

1st. The want of parties. 2nd. The construction of the clauses of the will of Thomas Cabeen dec'd., under which the complainant and the defendants claim. 3d. The effect of the agreement between the complainant and Amos Tims, by which the latter agreed to pay her, annually, $30 for five years. 4th. The amount to be paid to her annually. —5th. The costs.

1. Whether the legacy, in remainder, to Mary Tims, is to be considered as vested, or contingent, it is not such an interest as would jure mariti, vest in the husband. It was a mere chose in action, incapable of being reduced, either actually or constructively into possession, during the lifetime of the tenant for life. As husband, Amos Tims did not, and could not, therefore, acquire the absolute estate, or right of property in remainder, to which his wife may be entitled; his interest is as one of the distributees of his deceased wife. The legal estate of Mary Tims at her death, vested in her administrator; the right to have it distributed between her husband and children, creates in them an equity, which in a case like the present, where an annual sum is required to be paid to preserve the remainder, makes it necessary that both the administrator, and the husband and children of Mary Tims, should be parties. The former, as the representative of the legal estate, and the latter, as the parties really in interest in Equity.

This objection, for the want of parties, ought, it is true, in strict practice, to have been taken by demurrer; this course, if it had been pursued by the defendants, would have subjected the complainant to the costs, both of the demurrer and amendment. A demurrer for the want of parties, is therefore both the more regular, and usually the more prudent course. But there can be no doubt that the Court, at any stage of a case, upon seeing, that sufficient parties are not before it, have the right to arrest the case, and direct the bill to be amended, so as to bring in all the parties in interest. This may be done, either upon the payment of

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costs, or with*out costs, as the Court, in the exercise of a sound discretion, may think proper. By a sound discretion, I understand not a mere capricious exercise of power or will, but the exercise of a right judgment in determining which of the parties have alone been in default. If the complainant, then she ought to pay costs; but if on the other hand, both the complainants and the defendants have alike been in default, or if both alike have been mistaken in supposing that all parties necessary were before the Court, then the amendment ought to be without costs. In this case it appears from the answers of the defendants, as well as the bill of the complainants, that they all concurred in believing that all the parties interested in the matter in dispute, were before the Court. The objection is now made for the first time, as a shift to which ingenious counsel sometimes resort, to relieve their clients from a decree which operates hardly against their interests. Under these circumstances, the complainant must have leave to amend, (without paying costs) by making the administrator of Mary Tims dec'd. and her husband, Amos Tims, parties to this suit. This preliminary question being disposed of, in such a way as to make it necessary that the case should go back to the Circuit Court, it would seem to be unnecessary to consider the other parts of the case; but, as it is altogether an objection of strict practice, and the parties to be made cannot vary the case, and as the other points of the case have been fully developed and argued, and an expression of our opinion upon them may terminate the litigation, we have thought it best to consider and decide the whole case.

2. It is necessary to consider, and give construction to the two clauses of the will of Thomas Cabeen, under which the parties claim. The 2nd clause gives a negro woman Jane, to Mary Cabeen, (afterwards Tims) and the testator then qualifies the gift by saying, "allowing the first child of the said Jane (if any) to my daughter Nancy Hill, and the second (if any) to my daughter Betsy." The 5th clause is in the following words "I give and bequeath to my beloved daughter Betsy, one mulatto girl named Nan; and I allow my daughter Mary to take care of the said daughter Betsy, and at her decease, I

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allow my said daughter Mary to have *the said mulatto girl, named Nan, with her increase, if any, together with negro Jane's second child, (if any) to her and her heirs and assigns, forever."

The negro Jane had two children, as contemplated by the testator's will: the second one, Flora, was put in the possession of the complainant, and now has five children. Mary Cabeen married Amos Tims, and, most probably, after her marriage, never took care of the complainant. It appears, however, to have been tacitly understood by all parties, that the services of the slaves were sufficient to the comfortable maintenance of the complainant; and that no claim for any care or support was made on Mary Tims or her representatives, until the arrangement was entered into, between the complainant and the father of the defendants, Amos Tims, for the delivery of Flora and her children to him, and the payment by him, to her, of an annuity of $30. In the bill filed by the complainant, she only requires the defendants,

then, to elect whether they will abandon the remainder to their mother and her heirs, or to support her. Under these circumstances, the case will be considered as if Mary Tims had taken care of the complainant until the arrangement was made for the payment of an annual sum for her support, by Amos Tims.

It will be seen by referring to the clause of the will that the bequest of the slaves, to the complainant, is in the first place absolute; its reduction to a life estate is made to depend upon Mary taking care of her during life; in such an event, at her death the said Mary is to take the slaves in remainder. A plain construction of the 5th clause, according to the testator's intention, would make it assume the following form: "I give the slaves Nan and Flora to my daughter Betsy, but if my daughter Mary shall take care of the said Betsy during her life, then at her death I give the said slaves to the said Mary and her heirs and assigns forever."

The word "allow," used in this clause twice, is evidently used in two meanings, neither of which is its appropriate signification. In that part of the clause in which the testator speaks of Betsy being taken care of by Mary, it is used as synonymous with "di-

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rect;" in the other *part, which creates the remainder in favor of Mary, it is used instead of "give." The clause, when proper words are used to express the testator's meaning, would read thus: "I direct my daughter Mary to take care of said daughter Betsy, and at her decease I give to my daughter Mary," &c. Reading the clause in this way, according to the testator's intention, it is obvious that the direction must be complied with, or the remainder may never vest. For, to the support of the complainant, the whole property might not be sufficient, if she was left to provide for herself: and it is perfectly plain, that the testator has left her the uncontrolled disposition of it, unless her sister should take care of her. If she does, then the property, not being necessary for the support of the complainant, will remain for the legatee in remainder. "To take care of" is equivalent to support and maintenance, as well as personal attention.—Indeed all are included under the direction "to take care of." For one cannot be said to be taken care of, who is waited on with great care, but who is neither fed nor clothed; nor can one be taken care of, who is unable to feed herself, or put on her clothes, by placing before her food and raiment. The direction, in the will, to take care of the complainant, enjoins on the legatee in remainder, both personal attention to, and support of her. Upon the faithful discharge of this duty, during her life, depends the legacy in remainder. It is, therefore, purely contingent, and might, if the complainant had thought proper to pursue that course, have been entirely defeated by a sale of the property for her support.

3. The agreement (as it is called) between her and Amos Tims, to give up to him Flora and her children, and receive from him an annuity of $30 for five years, cannot be sustained as a bar to her present claim. I am not disposed to say that the complainant has not sufficient mind to make a contract; for her brother, who must know her better than any other person, says she has as much understanding as common women, though but little acquainted with business. If therefore, there was no other objection to it as a contract, I think it could not on this ground be

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set aside. As to this al*leged agreement, the defendants must be regarded as complainants seeking a specific performance. In 2 Powell on Contracts, 221, the rule is stated to be "that every agreement, to merit the interposition of a Court of Equity in its favor, must be fair, just, reasonable, bona fide, certain in all its parts, mutual, useful, made upon a good or valuable consideration, not merely voluntary; consistent with the general policy of a well regulated society, and free from fraud, circumvention, surprize; or at least such an agreement must, in its effect, ultimately tend to produce a just end." According to this rule, this agreement cannot be sustained as a contract, specifically to be enforced in Equity. For it is neither fair, just, reasonable, mutual, nor upon a good or valuable consideration. As to the complainant, it is without consideration, and is purely voluntary. For she only received, or was to receive a part of that to which she was before legally entitled.—But regarding this agreement as it ought to be, as a voluntary arrangement, by which she agreed to accept $30 per annum, in lieu of being taken care of by the representatives of her sister, and that it is set up as a defence to any claim, which the complainant makes, for arrearages of support and maintenance, which she might otherwise have claimed under her father's will, I think it would avail the defendants so far as to prevent the account against them from being carried beyond the time at which the bill was filed. For it was on her part, a voluntary acceptance of the annuity of $30, as a performance of the condition of the will; and in this point of view, it stands as a substitute, so long as she was willing to receive it in place of her claim under the will, and until she gave notice that she required the latter to be complied with. This arrangement being purely voluntary, and without any adequate consideration moving to her, cannot be regarded as an agreement or a contract; it is merely evidence that the condition in the will was performed. She had the right to end the arrangement when she pleased, by giving notice to the parties bound to perform the condition. This was done,

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by her letter to Amos Tims in *the winter of 1829 or '30; but as she did not make any claim for an allowance to be paid to her for support, until the filing of her bill, and as in it, she does not ask for past, but for present and future support and maintenance, she can only have a decree for her support and maintenance, to commence at the day on which her bill was filed. For this annual allowance, the defendants in their answer profess to be willing to be made liable; they must pay such sum as may be due at the next Court, and secure to be paid, in future annually, during the life of the complainant, such sum as may be fixed by the Commissioner's report, as a suitable annual allowance, or be barred from any claim to the remainder, in the said slaves.

4. As to the amount of $175, fixed by the Commissioner's report, as a suitable allowance to be paid by the defendants for the complainant's support and maintenance, we see no reason to think that it is contrary to the weight of the evidence before him. But upon a question of fact, the concurrence of the Commissioner and Chancellor is generally decisive with this Court. It would be only on very extraordinary occasions, that we should (if at all) undertake to revise their conclusion.

5. With the question of costs, we should not be disposed to interfere. It was a matter of discretion with the Chancellor; and we cannot see that it has been improperly exercised. But as the case must go back, for the purpose of making additional parties, (unless the defendants should hereafter waive the objection,) the question of costs must be reserved until the case shall be finally adjudicated by the Circuit Court.

It is Ordered and decreed, that the case be remanded to the Circuit Court, and that the complainant have leave to amend her bill (without the payment of costs,) by making the administrator of Mary Tims dec'd, and Amos Tims, parties; but if the defendants are disposed to waive the objection of the want of parties, they may do so, upon filing with the Commissioner within three months, their consent to waive it. In that event the

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decree of the Circuit Court is modified *according to the principles contained in this opinion, and the Commissioner is directed to ascertain and report to the next Court, the sum which will then be due to the complainant for maintenance from the filing of her bill, at $175 per year, and that he cause the defendants to execute bond, with good personal security to be approved by him, conditioned for the payment of $175, from the next Circuit Court of Equity for Chester, to the complainant, during her life.

JOHNSON and HARPER, JJ., concurred.

1 Hill, Eq. 59

BUCKNER HAIGOOD v. JOHN D. WELLS.

(Columbia. Jan., 1833.)

[*Executors and Administrators* ⇐538; *Trusts* ⇐276.]

Trustees of estates shall not exceed in expenditure the amount of the income, so as to charge the capital; in some cases of necessity this has been sanctioned by the Court: (*a*) but where the defendant had assumed the management of a testator's estate without authority, & refused to qualify as executor, it was held that he was not entitled to the privileges of a trustee. The Court would not require him to give security, but ordered him to account annually before the Commissioner, until he qualified, and that no balance should be struck in his favor, nor allowance made for his personal services.

[Ed. Note.—Cited in Lawton v. Hunt, 4 Strob. Eq. 6; Ashley v. Holman, 44 S. C. 166, 21 S. E. 624.

For other cases, see Executors and Administrators, Cent. Dig. § 2584; Dec. Dig. ⇐538; Trusts, Cent. Dig. § 395; Dec. Dig. ⇐276.]

[*Executors and Administrators* ⇐33.]

The Court will not discharge an executor from his office.

[Ed. Note.—Cited in Tillman v. Walkup, 7 S. C. 62; Gadsden v. Whaley, 14 S. C. 215.

For other cases, see Executors and Administrators, Cent. Dig. § 218; Dec. Dig. ⇐33.]

William Haigood, deceased, by his last will and testament, executed in 1821, devised and bequeathed his estate to his wife and children, and directed his executors to keep the negroes on the plantation, for the support of the family, until his youngest child should come of age (which will be in 1838;) and that then they shall be equally divided among his children; and appointed his wife, Nancy Haigood, and the plaintiff, his brother, his executrix and executor. Nancy Haigood refused to qualify; the plaintiff did, and took on himself the execution of the will, in the payment of debts and in the management, for some time, of the plantation, for the maintenance of the family. In 1823, Nancy Haigood married the defendant Wells, who thereupon assumed the exclusive management of the negroes and plantation, has received the avails of the crops, and refuses to qualify as executor. The bill charges that the defendant latterly refuses to account to him as executor; that the plaintiff's liability is endangered; and prays for a discharge from the executorship; and that the defendant may account, and be required to give security for the management of the estate.

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*The case was first heard before Chancellor Thompson, at Winnsboro,' who refused to relieve the plaintiff from his executorship, or to require the defendant to give security, but ordered him to account.

Under this order the Commissioner stated an account between the estate and the defendant, and reported a balance in his favor.

(*a*) Black v. Blakely, 2 M'C. Eq. Rep. 1.

On the case coming before Chancellor De Sassure, at July Term 1832, on exception to the Commissioner's report, he so modified the report, as to strike off the balance reported in favor of the defendant, on the ground, that a trustee of an estate for the support of minors, should not expend more than the income.

From these decrees both parties appealed: the plaintiff, because the Chancellor had refused to relieve him from his executorship, or to require the defendant to give security; and the defendant appealed, because the Chancellor refused to allow him the balance reported in his favor, which, as he alledges, was for the necessary expenditures of the family.

Pearson, for the plaintiff.
Clarke & McDowell, for the defendant.

HARPER, J. With respect to the defendant's first ground of appeal, we concur with the Chancellor, that trustees of estates for the support of minors "shall not exceed in expenditure the amount of the income, so as to charge the capital of the estate." In some cases, however, of manifest necessity, this has been authorized by the Court, and when done by a trustee in such a case as the Court would have authorized, has been subsequently sanctioned. But the defendant is not entitled to the privileges of a trustee; he must be regarded in some degree as a wrong doer.—We gather from the Commissioner's report, that up to 1826, the defendant acted as the agent of the complainant, in the management of the estate, and accounted to him for the crops, but after that year refused or neglected to account. He has thus left complainant responsible for the management of the estate, though he has excluded him

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from the *control of it, and when he might have relieved him of that responsibility, by qualifying as an executor himself.—He has besides, though reported to be industrious and frugal, managed badly. If managed properly, the property would in all probability have supported the family from the income. This is a sufficient reason to prevent the defendant's breaking in upon the capital.

We cannot discharge the complainant of his office of executor. This Court changes other trustees upon proper cause shewn; but this has never been done in the instance of an executor. Nor do we perceive that we can compel the defendant to give security. He might be restrained from meddling with the management of the estate, and be compelled to give up the control of it to the complainant; but this is not what the complainant desires, and it would be extremely inconvenient. The family are to be supported by the estate, they must live on the land and have the services of the slaves, and it is a matter of almost absolute necessity, that these should be in some degree under the control of the defendant, the head of the family.

What we can do, however, is to confirm the decree of the Chancellor, that no balance shall be struck in his favor, and further to decree that until the defendant shall think proper to qualify as executor, he shall account annually before the Commissioner; that in no instance shall any balance be struck in his favor, nor shall any thing be allowed for his personal services. The decree of the Chancellor is modified accordingly.

JOHNSON and O'NEALL, JJ., concurred.

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1 Hill, Eq. *62

*MICHAEL LEVER v. WM. LEVER, Executor of George Lever, Dec'd.

(Columbia. Jan., 1833.)

[*Limitation of Actions* ⇐66.]

The possession of an agent or bailee is not adverse until after demand; & when an agent or attorney receives money for his principal, there is no cause of action till demand, and the statute of limitations does not begin to run till then.

[Ed. Note.—Cited in Lever v. Lever, 2 Hill, Eq. 164; Wardlaw v. Gray's Heirs, Dud. Eq. 112; Parks v. Noble, 9 Rich. Eq. 99; Stroman v. O'Cain, 13 S. C. 104; State v. Lake, 30 S. C. 49, 50, 8 S. E. 322.

For other cases, see Limitation of Actions, Cent. Dig. § 363; Dec. Dig. ⇐66.]

[*Evidence* ⇐374.]

Where a note is signed only by the maker affixing his mark, & the subscribing witness is the executor of the (deceased) payee, the note cannot be given in evidence on proof of the handwriting of the witness; it must be shewn that the note existed before the witness' interest accrued.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1587; Dec. Dig. ⇐374.]

[*Bills and Notes* ⇐517.]

[Where the subscribing witness to a note, to which the principal had made his mark only, became interested in and brought a suit on the note, proof of his own handwriting was *held* insufficient to establish the note.]

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1809; Dec. Dig. ⇐517.]

[*Equity* ⇐87.]

[Cited in Stroman v. O'Cain, 13 S. C. 103, to the point that where there is a concurrent remedy in law and equity the statute of limitations applies in both courts.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242–244, 395; Dec. Dig. ⇐87.]

The bill states, that on the plaintiff's attaining full age, George Lever, his father and the defendant's testator, proposed to undertake the management and control of his estate, and to transact all his business, on the ground of his mental imbecility and want of education, which was agreed to by the plaintiff; that, accordingly, his father, for about sixteen years, and until his death, did transact his business and manage his estate, as an agent or trustee, and receive several large

sums of money and the proceeds of the plaintiff's crops, for which he never accounted.—That during this period he received from George Lever several small sums of money, for which he gave his notes, as it was understood, to serve as memoranda of the amounts received by him out of his own funds in his father's hands; but that the defendant has, since the death of George Lever, commenced suit on these notes against the plaintiff. That, on one occasion, the said George Lever induced the plaintiff to confess a judgment to him, for $257, for the purpose, as he told him, of protecting him against a scheme which certain designing persons had, to defraud him of his land, and that by confessing this judgment the land would be secure.—And that this judgment, thus fraudulently obtained, the defendant is about to enforce. The bill prays an account; and a perpetual injunction against the judgment, and further proceedings on the notes.

The defendant, in his answer, denies that George Lever was the agent or trustee of the plaintiff; but admits that he received several sums of money, which, however, he disbursed for the plaintiff's use. As regards the judgment, he avers his belief that it was confessed to secure certain debts then owing to George Lever, and to indemnify him against sundry liabilities which he had incurred for the plaintiff.—That the several notes referred to by the plaintiff, were not given as he alledges, as memoranda, but for value received, and that when they were respectively

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given, *the said George Lever fully accounted and settled with the plaintiff, for all monies previously received, and at such times there were balances due to him, for which the notes were given, and that the defendant was himself present, on these occasions, and drew the notes and witnessed them. The answer sets up these various accountings and settlements, by way of plea in bar, to any account up to the date of the notes, and pleads the statute of limitations.

The evidence shewed that George Lever acted as the plaintiff's agent or trustee, in the transaction of his business, and that he received the avails of the crops, and several large sums of money. It was proved, also, that George Lever when about making his will said "he intended to satisfy the judgment he held on Michael, and to give him up his land titles; he held the judgment to keep people from defrauding him of his land, but he would give up the judgment, and if he fooled away the land, he must do it." In support of his plea of a former account and settlement between the parties, the defendant produced the notes referred to in his answer, to which as it seemed, the plaintiff had affixed his mark, and offered to prove their execution by proof of his own (defendant's) signature, as the subscribing witness. The Chancellor held, that this was not sufficient to authorize the notes to be received, and rejected them.

The case came to trial at Newberry, July Term 1832, and the following decree was afterwards delivered:

Johnston, Chancellor. The allegation, that the notes taken by George Lever from the plaintiff, were intended merely as memoranda, may be true, but there was no proof to support it, and that part of the bill must fail. I think the proof is sufficient to establish the allegation, that the 257 dollars-judgment was confessed to cover the plaintiff's land from crafty speculations. The defendant's answer on this point, is not as of his own knowledge, and requires less proof to rebut it, than if it had been. I shall therefore sustain that part of the bill: but the injunction to restrain the enforcement of the execution, will continue only until further order—it being

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the intention of the Court to *perpetuate it, in case the accounts on the other part of the case hereinafter to be ordered, shall result in favor of the plaintiff; but if in favor of the defendant, then to make the judgment stand as collateral security, for the balance which shall be struck in his favor.

The great difficulties of the case, however, concern the other parts of the bill, which charge that George Lever undertook to act, and did act as trustee of the plaintiff. I think the proof, that he did so undertake and act, is clear and conclusive. His own admissions were too numerous to leave a doubt of the fact. I have not only no doubt that he acted as the plaintiff's trustee, but I am constrained to say I do not believe he fully performed his trust. On the contrary, I am fully pursuaded that at his death he was largely in arrear to the plaintiff. The sums received by him from time to time, were too large to have been absorbed in the plaintiff's annual expenses. It is pretty clear that these could not have so far exceeded the crops, as to have given room for the sums received from Snelgrove and others, and from Caldwell. If he, acting as agent, permitted the expenses to run to such an amount, it wears so much the appearance of neglect and unfaithfulness, that he ought to have secured ample vouchers, either from Michael's creditors, or from Michael himself, to shew that he paid out these exorbitant sums—exorbitant considering the means of Michael. But so far from it, the circumstantial evidence is very strong against him, and particularly to shew, that the money received by him, from Mr. Caldwell, was by him vested in the land now owned by William Lever. These remarks will shew, that I am far from believing the plea of settlement to be founded on fact.

Having this view of the case, believing as I do conscientiously, that the moral justice

of the case is clearly with the plaintiff, I cannot express the regret which I feel in being compelled to sustain the plea of the act of limitations. But I am to declare, and not to make the law.—That is the province of the people. I am bound to decide the case made before me. The case made, in my conception, is one to which the act is a good defence. If

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it *had been alledged, that George Lever vested the sums received by him from Caldwell, in the purchase of Paysinger's land, it would have been worthy of inquiry, whether a trust did not result to the plaintiff. But no such fact is alledged. The case set out in the bill, is one of money received by George Lever, to be expended for the benefit of the plaintiff. It is not denied but that the case is one of trust. Every bailment, every agency, is a trust. But it is a vulgar error to suppose that every trust is exempted from the operation of the act of limitations. On the contrary, no trust is exempted from its operation, but one which is express, technical and continuing; and one, moreover, the remedy for the breach of which is exclusively in this Court.[a] The latter part of this position is what governs in this case.—When there is a concurrent remedy in Law and Equity upon the case made, the limitation is the same in both Courts. Otherwise, a plaintiff by electing his tribunal, might cut his opponent off from a defence, to which the law of the land entitles him.[b] Now there can be little doubt, but that the plaintiff could have maintained an action at law against his father, for each sum received by him as he received it, and to the same extent that he would be bound at law by his laches, is he bound in this Court. He is bound, as to all sums received more than four years and nine months before the filing of this bill. I have paid no attention to the incapacity of Michael, because it was not needed to render it more probable that his father undertook to act for him. The other proof put that matter beyond doubt in my mind.—And this was the only view with which I received the testimony on that point. I could not have received it, if with a view to free him from the rules of law which would have applied to him, if he had possessed the strongest mind. —This is not a question of fraud, but of trust. And as to the Act of limitations, strength or weakness of mind can make no difference, unless there be a total incapacity. If that was intended to be shown, other consequences would have ensued. The same

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proof would have shown that the *plaintiff could not institute this suit, and the bill should be dismissed as having been filed by one incapable of binding himself.

It is Decreed; that the Commissioner take an account on reference, when he shall charge the estate of George Lever, with all sums which shall be proved to have been received by him, as agent or trustee of the plaintiff, within four years and nine months before the filing of this bill—allowing all proper credits and disbursements;—That an injunction do issue to restrain, until the further order of the Court, the collection of the judgment described in the bill as having been entered in the Common Pleas for Newberry District the 10th January 1827, and that the costs of this suit be paid out of the estate of George Lever.

From this decree both parties appealed. The plaintiff appealed from so much of the decree as sustains the Statute of limitations: and the defendant appealed on the grounds, that the Chancellor enjoined the judgment without sufficient evidence that it was fraudulently obtained, and if it had been so obtained, the plaintiff was particeps criminis, and not entitled to relief; and because the Chancellor rejected the notes, on the proof which was offered of their execution.

[For subsequent opinion, see 2 Hill, Eq. 158.]

Summer, for the defendant, insisted, that the judgment was to be considered as founded on a valuable consideration, and as prima facie valid, until the contrary was proved; and that the evidence given to impeach it, was not sufficient to authorize the decree against it. As regards the monies for which an account is claimed, this was but the common case of money had and received, for which the plaintiff could maintain his action at law: Trusts against which the Statute of limitations does not run, must be purely technical—such as are cognizable only in Equity; but the plaintiff's demand is legal, and the statute applies: 7 John. Ch. Rep. 124; 20 John. Rep. 576; 2 Atk. 210. As to the evidence on the execution of the notes, he cited 2 N. & M'C. 364; Strange, 34; 1 P. W. 289; 1 Starkie, 342.

Fair, for the plaintiff, contended that it

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was proven con*clusively, that the defendant's testator acted as the plaintiff's trustee, and his executor cannot disclaim that character or avoid its consequences; that the Statute of Limitations did not apply to this case, which was one of a trust; and in any event, it did not commence running until after a demand of the money, and the plaintiff's rights had been usurped, by a refusal to pay: 2 Bail. 51; 1 Taun. 572; Willison v. Watkins, 1 Law Journal, 132; 5 John. Ch. Rep. 523. As to the effect of the notes, and the proof of their execution, he cited 1 P. W. 289; Salk. 386; 1 Strange, 101; 5 T. R. 371; 1 Starkie, 338.

[a] Kane v. Bloodgood, 7 John's. Ch. Rep. 90.

[b] 20 John. Rep. 576; 7 John. Ch. Rep. 111, 14, 21; Salk. 243, 610; 3 Bro. 639, note; 2 Sch. & Lef. 607; Willes Rep. 404, 405.

Pope, for the defendant, in reply: urged, that the answer of the defendant, as to former accounts and settlements, being positive and uncontradicted, should be regarded as sufficient to sustain this part of his defense. As to the evidence on the notes, he referred to 2 East. 182; and on the Statute of limitations, to Starke v. Starke, 4 Law Journal, 503.

HARPER, J. I shall first consider the complainant's grounds of appeal. We concur with the Chancellor, that "when there is a concurrent remedy in Law and Equity upon the case made, the limitation is the same in both Courts," and the present case is to be considered as at law. But at law, the statute does not begin to run till there is some usurpation of the claimant's right, and a cause of action has arisen. The possession of an agent or bailee, (and a bailment is a trust) is the possession of the bailor or principal, and is not adverse till demand made. In the case of a simple deposite of money, to be left for the depositor, or to be paid according to his direction, there is no cause of action till demand be made or an account stated, and the statute does not begin to run till then. So in the case of an attorney, who receives the money of his client, or a sheriff who receives the money of a plaintiff in execution. So of a steward or factor. Topham v. Braddick, 1 Taunt. 572. And see Chancellor Kent's decision in Coster v. Murray, 5 Johnson's Ch. Rep. 531. On this ground then, we think the Chancellor's decree must be reversed; and this disposes of all the complainant's grounds of appeal.

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*With respect to the defendant's appeal from so much of the Chancellor's decree as regards the judgment confessed by the complainant to George Lever, we are inclined, though the testimony was not very full, to concur with the Chancellor, who could best judge of the effect of the evidence. If the defendant desires it, however, he may have an issue or issues to a jury, to enquire whether the judgment was founded on any, and what consideration, or was voluntary—whether it was fraudulent, or intended as a security, and if intended as a security, how much is due upon it. At the same time an issue may be taken to try the plea of final account and settlement.

With respect to the appeal from the decision of the Chancellor, rejecting the evidence of the defendant's handwriting, to prove the execution of the notes, we concur with the Chancellor. The cases referred to in the argument, do establish, that where a subscribing witness to a note or obligation becomes interested or is appointed executor, it may be given in evidence, upon proof of his hand writing. But in those cases, I take it for granted, the instrument was signed by the maker's own hand, the genuineness of which signature might be the subject of investigation, or that the instrument was shewn to have been in existence, before the witness's interest accrued. The door which would be opened to fraud, is conclusive against the reception of such evidence in a case like the present. Every executor might manufacture as many notes as he pleased, of persons unable to write, and recover them, upon proof of his own hand writing as subscribing witness. It might be different if the defendant had shewn that the notes attested by him, were in the possession of George Lever, in his lifetime, and found by the defendant, among his testator's papers.

The decree of the Chancellor is modified according to the views expressed.

JOHNSON and O'NEALL, JJ., concurred.

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1 Hill, Eq. *69

*WM. CLARKE and Wife v. JAMES SAXON and ANNE SAXON.

(Columbia. Jan., 1833.)

[*Equity* ⇐358.]

The plaintiff should set out in his bill, his title, and the grounds on which he expects to recover, and the proof should correspond with the allegations contained in it; but if parties go to trial, on general statements, contained in a bill or answer, & permit proof to be given which ought to have been exhibited on the record, the Court is bound to decree on the case thus made, if enough appears on the record to warrant the judgment, which the facts proved, authorize the Court to pronounce.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 748; Dec. Dig. ⇐358.]

[*Life Estates* ⇐6.]

On a bill filed to compel defendants to give security for the forthcoming of property, to entitle the plaintiffs to a decree, it is not necessary that a case of trust created by express contract should be made out.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 18, 23; Dec. Dig. ⇐6.]

[*Husband and Wife* ⇐59—*Life Estates* ⇐5.]

Where a feme covert has a separate estate for life in some, and an undivided interest as tenant in common, in others, of the slaves in question, she is a trustee for those claiming in reversion and as co-tenants: and on a bill filed to compel her and her husband to give security for the forthcoming of the property, her coverture cannot be pleaded in bar of the trust, nor in abatement of the suit; nor can her husband avail himself of the Stat. of Limitations; but on proof that they intended to remove the slaves, they were ordered to give security not to remove them beyond the State.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 277; Dec. Dig. ⇐59; Life Estates, Cent. Dig. §§ 12, 21; Dec. Dig. ⇐5.]

[*Husband and Wife* ⇐16.]

[Where husband and wife are in possession of property in which the wife has a life estate, their possession will be referred to such estate, and the husband's possession cannot be adverse until after the termination of the life estate.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 102; Dec. Dig. ⇐16.]

[*Life Estates* ⟸23.]

[One claiming as a volunteer under a tenant for life of personalty is regarded as a trustee for the remainder-man, and may be called on to account in equity.]

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 44; Dec. Dig. ⟸23.]

[*Tenancy in Common* ⟸15.]

[The possession of a tenant in common is presumed to be the possession of all such tenants.]

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 43; Dec. Dig. ⟸15.]

[*Trusts* ⟸161.]

[A trustee may be compelled to give security for the trust property, though the trust results from operation of law alone.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 209; Dec. Dig. ⟸161.]

This bill was filed to restrain the defendants from removing certain slaves out of the State, which the plaintiffs claimed in reversion. The defendant Anne Saxon pleaded coverture, and it was agreed that no other answer should be required of her, and that the costs as to her, should abide by the decision of the Court on her plea. James Saxon by his answer, sets up title in himself by purchase, and under the Statute of limitations.

Chancellor Johnston, before whom the case came to a hearing, at Laurens July 1833, sustained the plea of coverture; and dismissed the bill, on the ground, that a trust was neither charged in the bill nor established by the evidence. From this decree the plaintiffs appealed. The allegations of the bill and the evidence given on the trial, are so fully stated in the opinion of the Court, as to require no further report.

Farrow & Thomson, for the appellants.
Irby & Young, contra.

O'NEALL, J. It appears from the proof, that Edmund Craddock, on the 17th of March 1789, conveyed to James Yancy, in trust for the children of the said Edmund, to wit, Mary, Anne, Edmund, Thomas, John, and Judith, inter alia, two slaves, Reuben and Dave. Some time after the execution of this deed, the said Edmund died, and his widow Anne administered on his estate, and after some time intermarried with James Saxon; the trustee James Yancy is dead, and his children are all either dead or removed from the State.—The slaves remained in the possession of the widow Anne, from the death of the said Edmund until her marriage with the said James, and after her marriage they remained in the possession of herself and her husband, until the 4th of April 1815, at which time James Saxon delivered them to the cestui que trusts, who suffered them still to remain in the possession of their mother (the defendant Anne.) On the 7th day of August 1815, the children of Edmund Craddock exchanged with William Clarke, the man Dave,

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for a girl named *Sylvia and $75 in cash, and agreed that "the said negro and money is to be put to the support of their said mother" (the defendant Anne) "during her life, or more plainly speaking the labor of said negro, and the use of the said money during her life." On the 8th of January 1818, James Saxon executed to the children of Edmund Craddock a deed reciting the trust deed executed by Edmund Craddock, and his delivery of the property described in it to the cestui que trusts on the 4th of April 1815, and by it confirms and re-delivers the property to them. Reuben remained in possession of Saxon and wife until 1825, when Robert Creswell Esq. bought him in the presence of Saxon and wife, from William Clarke, as agent for the children of Edmund Craddock, at the price of 400 or 450 dollars; this purchase of Reuben was for himself; he had previously paid in part of his price $190, which was laid out in the purchase of a boy Frank, who was conveyed in the first instance to Sarah E. Saxon, a daughter of the defendants; but on some dissatisfaction being expressed by the complainant, Wm. Clarke, and some of the children of Edmund Craddock, the said Sarah conveyed the said boy Frank, to Wm. Clarke, in trust for the sole and separate use of Nancy Saxon (the defendant Anne) during her life, and after her death, for the use of her children by Edmund Craddock dec'd. After some time Frank was sold or exchanged for another man named Virgil, and on Clarke complaining about it, it was agreed that Virgil should stand in place of Frank, and Brandon, from whom he had been bought, on the 10th of July 1827, executed a bill of sale for him to the complainant Clarke. On the 13th of January 1825, William Moore conveyed to the complainant Clarke, as trustee for the heirs of Edmund Craddock and Mrs. Anne Saxon, a negro girl named Sally; she was probably paid for, out of the balance of the price of Reuben, for Mr. Creswell's note for it was presented to him by Moore who sold and conveyed her, and he paid it to him. These negroes, to wit, Sylvia, Virgil, and Sally, and their increase, are in the possession of the defendants, and are now claimed by James Saxon as his own; but it is manifest from the proof that this claim is a recent notion, most probably the effect of a loss of

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memory from old *age, and the consequent belief that whatever is in his possession is his own. The testimony of Major Dunlap and Mr. Creswell, most clearly shew, that to the original trust property, and its substitute, the defendant James Saxon did not pretend to have any claim. His schedule in order to obtain a pension from the United States, was sworn to by him at Spring Term 1822, and in it he does not pretend any claim to the slaves the whole amount of the property embraced in it, is about $176. It is not pretended that any of these slaves have been by

him since acquired. The defendants were about removing from the State, and taking with them the said slaves. The complainant Clarke and his wife Judith, one of the children of Edmund Craddock, filed their bill to prevent the removal of the said slaves. To it, the defendant Anne pleaded coverture, and the defendant James Saxon answered, alleging that Reuben and Dave were his own property, and that the other negroes substituted for them he purchased with the proceeds of Reuben and Dave, and $200 of his own money.

The statement in the bill, under which this proof was given, after stating the execution of the trust deed, is as follows, to wit: "that the children, although all come of age long since, have not divided said property among them, but have consented to leave the same in the possession of their mother, Anne Saxon, during her life, formerly the wife of the said Edmund Craddock, now the wife of James Saxon.—That, by virtue of a power given by the deed aforesaid, the property has been to some extent exchanged, and has also increased, so that there are now, as your orator and oratrix believe, eight negroes, subject to the said trust, a fellow, two wenches and children, the names of some of whom are unknown to your orator and oratrix." The bill then charges that the said Anne Saxon and her husband, James Saxon, are about to remove from this State, and carry with them the aforesaid negroes, contrary to the wishes of the complainants.

This statement of the complainants' title to the slaves, and of the character of the defendant's possession, is certainly a very general and loose one; and had the proof

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been ob*jected to, on the ground that it did not correspond with the allegations contained in the bill, it ought not to have been received, and the complainants must have amended their bill, and exhibited the papers on which they sought to recover. But from the report of the Chancellor, no such objection was made, and if parties go to trial on general statements contained in a bill or answer, and permit proof to be given, which ought to have been set out and exhibited, the Court is bound to decree on the case thus made. It is true, pleadings, both at Law and Equity, are intended for the two-fold purpose of informing both the parties and the Court: the former as to the case to be made and answered by the proof; and the latter as to the case upon which judgment is to be rendered. So far as parties are concerned, the value of this rule is to prevent surprise. If a defendant permits evidence to be given, under a general charge, without objecting to it, it is taken for granted that he is not surprised by it. To the Court the only importance of the rule is, that enough should appear on the record, to warrant the judgment which the facts proved authorize the Court to pronounce. If the evidence given to the Court makes a case wholly foreign from that made by the bill and answer, then it follows that no decree can be pronounced upon it, and if it is the complainants' proof, the bill must be dismissed. The inquiry in the case before us must be: first, is the case made by the proof, wholly foreign or different from that made by the bill, and resisted by the answer. The case as made by the bill, is that Edmund Craddock conveyed the slaves Reuben and Dave, to James Yancey, in trust for the use of his children, that the cestui que trusts, instead of dividing the property, and appropriating it to their own uses, suffered it to remain in the possession of their mother, Anne Saxon, during her life; that the property has been exchanged for other slaves; and now consists of a fellow, two wenches and children. The defendant James Saxon, answers and claims not only the substituted slaves, but those conveyed by the trust deed, as his own property, by virtue of a purchase made by him of them, at Sheriff's sale in

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1794 or '95. He admits that the *slaves substituted for the trust slaves, were acquired by exchange, or by purchase, with the proceeds arising from a sale of them, except so far as $200 excess, which he alleges he paid. The proof given by the complainant, certainly establishes the original trust, and that by the consent of the cestui que trusts the original property has been exchanged for the slaves in the defendant's possession, and that in the slaves Sylvia and her increase and Virgil, a part of the property thus substituted, they have given the defendant, Mrs. Saxon, an estate for life; and so far, there is no discrepancy between the proof, and the charge contained in the bill. In answer to the defendant's claim of property, his deed surrendering all right to it, his schedule made out and sworn to, in order to obtain a pension, and his declarations to Maj. Dunlap and Mr. Creswell, disclaiming any interest, were plainly admissible. I am therefore satisfied, that notwithstanding the generality of the statement in the bill, the case must be decided on the proofs before the Court.

I think the Chancellor was mistaken in his conclusion, in supposing that to entitle the complainants to a decree, it was necessary that a case of trust created by contract, should be made out. As to the defendant Mrs. Saxon, this could never have been done, for her coverture might have been a bar to any contract, which she could have made. According to my view of the case, the defendants are trustees in legal contemplation, for the children of Edmund Craddock. They were certainly the owners of the slaves Reuben and Dave, in August 1815, when they exchanged Dave with Clarke for Sylvia, and agreed that her labor should be devoted to the use of Mrs. Saxon for life. She has been in her possession ever since, and when it is asked how she was entitled to hold her, the

answer is plain—by the consent of her owners, she was entitled during her life to the possession of the said slave. This made her tenant for life with reversion to the owners, her donors. From the proof, Reuben was sold by Clarke, as the agent of the children of Edmund Craddock, and by the consent of Mr. and Mrs. Saxon, out of the proceeds of his sale Frank and Sally were purchased.

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The first was originally *conveyed to a daughter of these defendants, Sarah E. Saxon, but she afterwards conveyed him to the complainant Clarke, in trust for the sole and separate use of Mrs. Saxon during life, and after her death, for the use of the children of Edmund Craddock. He was afterwards sold or exchanged for Virgil, and he was conveyed absolutely to Clarke. But a trust resulted from the fact that he was purchased with the trust fund. And Clarke held him subject to the trusts created by the deed of Sarah E. Saxon, conveying the boy Frank.—Mrs. Saxon was therefore clearly entitled to a life estate in him, and her and her husband's possession of him, must be referred to that title. The girl Sally was conveyed to Clarke, in trust for the use of the children of Edmund Craddock and Mrs. Saxon. Her possession of that slave (or if she was exchanged for another called Crees, as I suppose may be the case from the answer of James Saxon,) would be the possession of a tenant in common, of a chattel belonging to several. I have little doubt that it was intended that she should have a life estate in this slave also; but from the proof in the case we should be bound to conclude, that her only interest was that of a tenancy in common with her children by Edmund Craddock. From the statement in the bill, an inference might be raised, that she had a life estate in this slave, as well as the interest in common, which the bill of sale from Moore to Clarke as trustee, gives her. From these views it is apparent, first, that James Saxon has no title to the said slaves; secondly, that Mrs. Saxon is entitled to a separate estate for life in the slaves Sylvia and her increase and Virgil—and that she has an undivided interest as tenant in common with the children of Edmund Craddock, in the slave Sally (or Crees) and her increase, and possibly a life estate in addition thereto. It is clear that her possession, and consequently the possession of her husband, must be referred to these titles. There can be no doubt after the case of Swann v. Ligon, that a tenant for life is a trustee for the remainder man, and the rule must be the same in favor of reversioners. So too in Equity so far as the preservation of the whole property is concerned, a tenant in common is a trustee for his co-tenants; for his possession is their pos-

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ses*sion. In respect to her separate estate for life, and her interest in common, it was necessary that Mrs. Saxon should be a party; her coverture could not be pleaded either in bar of the trust resulting from the nature of her estate, nor could it be pleaded in abatement of the suit, because she was the party in interest. It is true, she could not by any act during coverture, create an express trust for the use of others, but there is no doubt she may acquire and receive an estate in either real or personal property, in fee or for life only. The legal consequences resulting from the estate do not depend on her consent, they arise by operation of law. The plea of coverture ought not therefore to have been sustained. Under the consent entered into on the trial, and reported by the Chancellor, the plea will be overruled, but she will be treated as if she had answered. I have already said that the possession of James Saxon must be referred to the title of his wife. She had a right to the possession of Sylvia and her children and Virgil, for life; and in Sally or Crees, she had a right in common, with the children of Edmund Craddock, and possibly also an estate for life. He had no right at all, but inasmuch as his wife, under her title, was entitled to the possession, he was also entitled to participate in the possession. His possession was in auter droit, and it follows, that he holds them subject to all the trusts to which his wife's possession subjected her. His plea of the Statute of limitations cannot therefore avail him. For in the slaves in which his wife had an estate, there can be no adverse holding by him, until the termination of her estate; so too, as to the slave in which she has an interest in common, the statute cannot commence to run until an actual ouster.

It is admitted that the defendants intended to remove from the State, and take the said slaves with them. This is such an act as may endanger the ultimate rights of the complainants, and according to the well established principles of this Court, they are entitled to security from the defendants, not to remove the property out of the State.

It is therefore Ordered and decreed: that the Chancellor's decree be wholly reversed, and that the defendant James Saxon, and if Anne Saxon should survive him, then that

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*she also) enter into bond and security to the complainants, before the Commissioners in double the value of the said slaves, that neither the said James Saxon and Anne his wife or either of them, or any other person, by their, or either of their consent, shall remove or attempt to remove the said slaves or any of them, from and beyond the limits of this State. The defendants must pay the costs.

JOHNSON, J., concurred.

HARPER, J., absent.

1 Hill, Eq. 76

SUSANNAH LYLES v. EPHRAIM LYLES. Adm'r, and Others, Children and Heirs at Law of Aromanus Lyles, Dec'd.

(Columbia. Jan., 1833.)

[*Witnesses* ⇐395.]

When the credit of a witness is impeached, by proof that he has made declarations inconsistent with what he has sworn to; in reply to such evidence, proof of his declarations on other occasions, consistent with what he has sworn to, is admissible.(*a*)

[Ed. Note.—Cited in State v. McDaniel, 68 S. C. 308, 47 S. E. 384, 102 Am. St. Rep. 661.

For other cases, see Witnesses, Cent. Dig. § 1260; Dec. Dig. ⇐395.]

[*Trial* ⇐140.]

The credibility of witnesses is a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. ⇐140.]

[*Equity* ⇐380.]

That the presiding Judge had expressed to the jury his opinion of the evidence, is not a ground for a new trial.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 820; Dec. Dig. ⇐380.]

[*Equity* ⇐380.]

The object of an issue at Law, is to satisfy the Chancellor as to the truth of certain facts, and he may look at the report of the trial and collect what may satisfy his conscience; and if upon the whole, he is satisfied that justice has been done, he may refuse a new trial, altho' evidence has been improperly rejected at Law.

[Ed. Note.—Cited in Kirkpatrick v. Atkinson, 11 Rich. Eq. 30.

For other cases, see Equity, Cent. Dig. § 820; Dec. Dig. ⇐380.]

[*Evidence* ⇐474.]

The value of rent can only be ascertained by the opinion of witnesses acquainted with the lands; and where the Commissioner had fixed the value of rent, and adopted 10 per cent. per annum, as a scale of depreciation, so that at the expiration of ten years no rent was charged, the Court held it error, and ordered the report back.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196–2219; Dec. Dig. ⇐474.]

[*Tenancy in Common* ⇐28.]

A co-tenant has the right of enjoyment to the extent of his interest, and is not liable for rent, unless he cultivated to a greater extent than his interest, or unless he has expelled his co-tenant, or keeps her out of possession.

[Ed. Note.—Cited in Williman v. Holmes, 4 Rich. Eq. 477, note; Jones v. Massey, 14 S. C. 308; Scaife v. Thomson, 15 S. C. 367; Annely v. De Saussure, 26 S. C. 502, 2 S. E. 490, 4 Am. St. Rep. 725.

For other cases, see Tenancy in Common, Cent. Dig. § 78; Dec. Dig. ⇐28.]

[*Trusts* ⇐308.]

A trustee who has neglected to make annual accounts will be charged for negro hire, at £10 for full, and £5 for half, task hands.

[Ed. Note.—Cited in Rainsford v. Rainsford, McMul. Eq. 20.

For other cases, see Trusts, Cent. Dig. § 428; Dec. Dig. ⇐308.]

[*Executors and Administrators* ⇐91.]

If one obtain possession by force or fraud, and forces another out of the administration, he may be held to account at a higher rate; the rule was intended to apply only to cases where the party stands in an amicable relation, as trustee, guardian, executor, &c. and is a substitute for the regular annual account.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 400; Dec. Dig. ⇐91.]

[*Executors and Administrators* ⇐311.]

The defendants being in possession of negroes of which the plaintiff is entitled to partition, and having employed them as their own, & some of the negroes having been removed out of the State, the Court ordered the defendants to account for the value of negroes, by the appraisement, with interest thereon, instead of the negroes themselves and their hire.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1261; Dec. Dig. ⇐311.]

[*Executors and Administrators* ⇐310.]

The defendants (distributees) made individually liable for what they had received over & above their distributive shares.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1265; Dec. Dig. ⇐310.]

[*Appeal and Error* ⇐1022.]

On doubtful questions of evidence, the Court will not interfere with the decision of the Commissioner and Chancellor.

[Ed. Note.—Cited in Kirkpatrick v. Atkinson, 11 Rich. Eq. 30; Austin v. Kinsman, 1 S. C. 101; Blackwell v. Searles, Id., 117.

For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇐1022.]

[*Costs* ⇐13.]

Costs are so much under the control of the Chancellor, that they are not, of themselves, regarded as the subject of appeal; it is only where the Appeal Court reforms or reverses the Circuit decree, that it will reverse or modify an order on the subject of costs.(*d*)

[Ed. Note.—Cited in Stegall v. Bolt, 11 S. C. 524.

For other cases, see Costs, Cent. Dig. § 21; Dec. Dig. ⇐13.]

[*Costs* ⇐234.]

[Where the principles on which the decree of the chancellor is based are fully sustained on appeal, though varied in their application, the decree will not be varied as to costs.]

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 892; Dec. Dig. ⇐234.]

[*Executors and Administrators* ⇐473, 474.]

[In a suit against an administrator for an account no decree will be made against the sureties, though they be parties to the suit in another capacity, unless they are expressly charged as sureties in the bill.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2042; Dec. Dig. ⇐473, 474.]

[*Landlord and Tenant* ⇐200.]

[The rent of land, in a suit against the occupant for an account, must be determined according to the circumstances of each case; and there is no general rule for allowing a yearly depreciation of 10 per cent.]

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 794; Dec. Dig. ⇐200.]

(*a*) See 1 Mod. 282; 4 St. Tr. 613; Baker & Rowlson v. Arnold, Cain's Rep. 279; Lessees of Wright v. Deklyne, 1 Peters C. C. Rep. 199 [Fed. Cas. No. 18,076]; 2 Hawks (N. C.) 183.

(*d*) McMillan v. Eldridge, Harp. Eq. Rep. 260; and Ib. 261, contra; Lewis v. Wilson, 1 McC. Eq. Rep. 210; Pace v. Burton, Ib. 247.

[This case is also cited in Harley v. DeWitt, 2 Hill, Eq. 369, 370, and Rainsford v. Rainsford, Rice, Eq. 343, 369, 370, regarding the £10 rule concerning negro hire.]

Bill for partition and account. The questions made in this case, and the facts connected with them, are fully set forth in the following opinion of the Court.

Gregg, for the plaintiff.

Clarke & M'Dowell, for the defendants

JOHNSON, J. The complainant is the widow of Col. Aromanus Lyles, and the defendants, the Lyles and Mrs. Moody, are his children, by a former marriage. Col. Lyles intermarried with the complainant in February 1817, and died in the month of September in the same year, leaving no child or children by that marriage. He was possessed at the time of his death of some real, and considerable personal estate, consisting principally of negroes, and administration thereof was granted to the complainant and the defendant Ephraim Lyles, jointly; but Ephraim Lyles took upon himself almost exclusively the management of the estate; and the object of this bill was to obtain an ac-

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count of the estate, *and for partition amongst the parties according to the act of distributions. One of the grounds on which the defendant resisted complainant's right to distribution was, that she was not the lawful wife of Col. Lyles, but of Philip James, to whom it was conceded she had been before married, and who, the defendants charged, was living at the time of her intermarriage with Col. Lyles, and an issue was sent down to the Court of Law, to try the truth of that allegation.

On the trial of the issue, a verdict was found for the complainant, establishing the fact of Philip James's death, and a motion was made before the Chancellor on the Circuit, for a new trial, on the grounds: first, that the presiding Judge at law, had excluded important and competent evidence; secondly, that the verdict was against the evidence; thirdly, because the presiding Judge expressed in his charge to the jury a decided opinion, that there was not evidence enough to shew that Philip James was alive, at the time of the complainant's intermarriage with Col. Lyles. The Chancellor overruled the motion, and decreed for the complainant on that question, and directed an account of the personal estate; and the same grounds have been taken here, on a motion to reverse the Chancellor's decree, and for a new trial.

1. The first ground arises out of the following state of facts. Henry Davis, a witness on the part of the defendants, testified that he had seen Philip James in 1817, near Leaf River, Mississippi, and that he was then alive and well. Lucy Farr, a witness examined by the defendants, stated, that she had been present when one Elizabeth Brown had enquired of the witness Henry Davis, if he had recently seen Philip James: at first "he did not appear to say he had," but after a private interview between them, Davis said he had seen him in going to, or returning from Pearl River. Elizabeth Brown told the witness Mrs. Farr, that she was to be well paid by the defendant Ephraim Lyles, if she could find a person that would swear that Philip James was alive, and that Davis would be well paid if he had seen, or would swear that he had seen him within a certain

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length of time. This witness *did not believe that Davis had ever seen Philip James, but that he was prevailed on by Elizabeth Brown to swear that he had. The defendants then offered Nathan Vincent, to prove that he had heard the witness Davis say, in the latter part of the year 1817, after his return from the Mississippi, that he had seen Philip James. (The Chancellor, it is conceded, was mistaken in supposing that it was the affidavit of James which was offered.) The presiding Judge rejected the evidence thus offered, and the question is, whether it was, or was not admissible.

It does not seem to admit of any question, that the credit of a witness may be impeached, by proof that he has made declarations inconsistent with the facts to which he has sworn; and on that principle, a letter written by a witness was admitted by Lord Kenyon, in De Sailley v. Morgan, 2 Esp. Rep. 691, to contradict what he had sworn to on the trial: and C. B. Gilbert is of opinion that in reply to such evidence, proof of the declarations of the witness, on other occasions, consistent with what he had testified, is admissible to shew he is consistent with himself. (See Gilbert's Ev. 135.) Judge Buller is clearly of opinion that it is not admissible, on the examination in chief, to support an unimpeached witness, and doubts whether it is admissible in reply. Buller N. P. 294; and this opinion is mentioned by Mr. Starkie, in his treatise on Evidence (Vol. 1 part 2, page 148-9.)

My own mind inclines very much to the opinion expressed by the Chief Baron. The only reason urged against it is, that proof of inconsistent declarations made by a witness does not add any thing to his credit, and only tends to lessen the confidence in his credit or memory, and what he has asserted is not entitled to more credit, than what he has sworn. But it does not follow necessarily, that the witness who has testified to the inconsistent declarations, has told the truth, or that he may not be mistaken. For example—suppose that the inconsistent declarations are proved by one witness only, and that twenty others testify, that in the same day, and at other times and places and under every variety of circumstances, they had heard him make declarations consistent with what he had sworn—

would not that raise a well founded doubt,

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wheth*er the witness who proved the inconsistent declarations had sworn the truth or was mistaken? These circumstances would certainly change the character of the issue, by involving the credibility of the last, as well as the first witness, and for that reason I incline to think the evidence ought to have been admitted.

2. Philip James married the complainant about the year 1785, and in a few years after, abandoned her and went away. Some time after, it was reported and universally credited, that he was dead, and about 1800 or 1801 the complainant was married to Joseph Kennerly, a worthy and very respectable man. He died about 1808; and shortly after, she was again married to Cullen Fennel, who died about two years after; and last of all she intermarried with Col. Lyles in 1817; and during all this time, amongst their acquaintances here, no one doubted the rumour of Philip James's death was true. His mother Elizabeth James, who was examined on the part of the complainants, states, that after he abandoned the complainant, and before 1790, he had married another wife; and she saw him for the last time about that period. In 1812 she (the witness) received a letter from his last wife, in which she stated that he died in Tennessee two or three years before, and the truth of it was believed by all his friends. The only doubt as to the death of Philip James, arises out of the evidence of two witnesses examined for the defendants. Henry Davis, the witness before spoken of, who states that he had seen him alive and well near Leaf River in Mississippi in 1817; and James Vessels, who testified that he had seen him on the Tombigby, in 1818, and that he saw his son in 1817 or '18, who told him that he was still alive.

A great number of witnesses (say fifty or more) have been examined on both sides, as to the credit of these two witnesses, who are now both aged men. Those who speak of Henry Davis, generally agree, that the most implicit confidence ought not to be placed in what he would say in ordinary conversation—to use the language of the witnesses, "he is now as he always has been, given to romancing." As many as fourteen, perhaps more, think he is not entitled to credit on his oath; and on the other hand, perhaps

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as many think him *worthy of belief. Taken then in the most favorable view, the credit of this witness is extremely equivocal. He is precisely that sort of witness that one would be disposed to credit or not, as his evidence might be favored by other circumstances of the case; and when opposed by the presumption arising from the evidence of Elizabeth James, and the facts stated by Lucy Farr, whose credit is unimpeached, it is utterly unworthy of credit.

The credit of James Vessels is still more exceptionable.—The late Mr. Solicitor Starke testified, that he knew him a soldier in the revolutionary war when he was too young to have acquired a character, but that immediately after he became notorious for the want of truth. In 1788 he was committed for horse-stealing, at Ninety-six, and pardoned, and on his cross examination on this trial denied the fact. He resided at the time of his examination in Georgia, and several persons who then (in 1826) resided in his neighborhood, testified, that his character was infamous: and on the other hand there were found amongst his general acquaintances who had formerly known him, very respectable men, who testified their belief that he was worthy of credit.

It would be uncharitable to conclude that every one who is suspected, is unworthy of credit; but I have always remarked, that there was very great difficulty in procuring evidence to assail the character of a witness, and unusually rare that a whole community should concur in denouncing him. The more indulgent feelings of some, the partialities of others, and the great disinclination of all, to place a fellow-creature under the ban of public opinion, unless he is utterly lost to all sense of truth and honesty, operate powerfully in his favor. It is not often that we find such a weight of evidence against the credibility of witnesses, as exists here. The Jury were therefore, well warranted in discrediting them altogether.

3. No instance has ever occurred in this Court, in which a new trial has been granted on the naked ground, that the presiding Judge had expressed to the jury, his own opinion as to the truth of the facts. On the contrary, it has been said again and again, that it is his duty to aid the Jury with his learning and experience in arriving at a

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correct *conclusion. There is, I believe, scarcely a considerate member of the profession, who does not concede that public justice is promoted by it. Every one of any experience must have remarked with what difficulty an inexperienced jury arrive at conclusions, in cases depending on contradictory and complicated evidence; and how uncertain the result, unless the Court in a greater or less degree, share the responsibility and assist them in their conclusions; and notwithstanding the improper exercise of this practice might innovate on the trial by the jury, my own experience satisfies me, that the occasional omission on the part of the Judge to discharge this duty, is even more productive of a much greater evil. There is then nothing in this ground.

Having thus disposed of the grounds of the motion for a new trial on the issue at law, it remains to determine what order the Court

will make upon it. The rule at law very clearly is that a new trial ought to be granted, when the Court has rejected competent evidence; and from the view which I have taken of the matter, it must be conceded that the evidence of Nathan Vincent, tendered to prove declarations of Henry Davis consistent with what he had sworn, ought to have been admitted. But this was an issue directed by the Court of Chancery. The object of it, was to satisfy the Chancellor as to the truth of the fact whether Philip James was or was not alive, at the time of the complainant's intermarriage with Col. Lyles. The verdict of the Jury is the result of their opinion upon that question. The opinion of the Law Judge is of great consideration to the Chancellor. In this case he has not, as is usual, formally reported it to the Chancery, but one of the complaints made by the appellant, is, that he expressed his opinion too decidedly, and we are in no doubt as to the opinion of both judge and jury. I think, too, upon a dispassionate review of the facts as they are presented to us here, we should, without hesitation, arrive at the same conclusion. The question then is, whether the Court will order a new trial on the ground of the rejection of the evidence of Nathan Vincent.

As before remarked, the object of direct-

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ing an issue at *Law, is to inform the conscience of the Chancellor; and the authorities generally agree that he may, in his discretion, grant or refuse a new trial, on account of the rejection or admission of proper or improper evidence on the trial at Law. In Pemberton v. Pemberton, 11 Ves. 52, the Ld. Chancellor Eldon says, he may look not only at the report of the trial at law, but at the record of the suit in Equity, and may collect what may satisfy his conscience; and if upon the whole, he is satisfied that justice has been done, though he may think some evidence was improperly rejected at law, he is at liberty to refuse a new trial. In the case of The Warden and minor Cannons of St. Pauls London v. Morris, 9 Ves. 169, the same learned Chancellor asks the question—"Is the Court necessarily to grant a new trial, if material evidence was rejected? Or is it not at liberty, supposing it material, to consider in what degree it is so; and whether its materiality is such that because it was rejected, a new trial must be granted, even if the conscience of the Court is satisfied that the conclusion is right?" And he answers, "In all times, this Court in such a case as this has exercised its discretion upon the whole case." He then enters into a consideration of the question, whether the excluded evidence would or would not have produced a different result, and a new trial was refused, on account of the difficulties with which the case was surrounded in making the necessary proofs. In Hampson v. Hampson, 3 Ves. and Beame, 44, the case is put directly upon the question whether the excluded evidence would have produced a different result, and the Chancellor being of opinion that it ought not, refused a new trial.

The infamy of the character of James Vessels, is such as to justify the Court in putting his evidence entirely out of view, and I confess that in my estimation, Henry Davis is not entitled to much more consideration. His character at best is equivocal, and when we take into consideration the circumstances stated by Lucy Farr, tending very strongly to show, and from which she herself had drawn the conclusion, that he had been suborned by Elizabeth Brown, I am constrained to say, that in my judgment,

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his evidence would *have been but little strengthened by the questionable support it would have derived from the evidence of Nathan Vincent. Philip James had not been heard of in this country for near forty years before the intermarriage of the complainant with Col. Lyles—the defendants alledge that he was then living, and it was incumbent on them to prove it. The only evidence they offer of it, is of two witnesses whose general character and credibility is at best doubtful, and that is opposed by the evidence of Philip James's mother; and it is very extraordinary if Philip James was still alive in 1817 or '18, that some one witness of unimpeachable veracity could not in the course of ten years' litigation, have been procured to prove it. The verdict of the Jury was founded on a disbelief of what these witnesses testified. The Judge who presided at the trial of the issue at law, took the lead in it, and the Chancellor has acquiesced. I do not think therefore, that the evidence of Nathan Vincent, which we must assume was improperly excluded, can vary the conclusion at which this Court would have arrived. The motion for new trial must therefore be refused.

On the part of the complainant, eleven different grounds have been taken to reverse the decree of the Chancellor in relation to the matters of account between the parties; but before I enter upon the consideration of these, it will be necessary to take a general view of the transactions connected with the estate. The complainant was, herself, possessed of a considerable estate, and shortly before her marriage with Col. Lyles, she settled it on her daughter and only child, as stated in the answer of Ephraim Lyles, with the knowledge and consent of Col. Lyles, and upon an understanding that the children of each were to have their respective estates, no children of that marriage being anticipated, being both old.—Before or about the time of their marriage, Col. Lyles executed a writing in the form of a deed, purporting to be a marriage contract, in which he disclaims and renounces all interest in her property or estate, and reserves the whole of his own for his children by a former marriage. It was signed,

however, only by Col. Lyles, nor was there any trustee to take, or other third person named in it; and by a decree of the Court of Appeals in December Term, 1824, it was held that this deed was void (Harper's Eq.

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Rep. .*295.) Upon administration being granted, Ephraim Lyles possessed himself of the principal part of the personal estate, and took upon himself to determine that this paper was valid as a marriage contract, and excluded the complainant from any participation in the estate; and he therefore made distribution of it between himself and the other defendants, the children of Col. Lyles. Long before the intermarriage of Col. Lyles with the complainant, he had made a parol partition of all his real estate, amongst his three sons, James, Aromanus, and Thomas. He put James and Aromanus into the immediate possession of the portions allotted to them, reserving to himself a life estate in that allotted to Thomas, consisting of about 320 acres, on which he continued to reside up to the time of his death. The complainant claimed partition of the whole, but in the judgment before referred to, it was determined that James and Aromanus were entitled to hold under their possession, and that Thomas was not, on account of the absence of a corresponding possession. Ephraim Lyles says in his answer, that on the complainant's going on a visit to Lexington, he placed a tenant in the house, for the purpose of keeping possession of it, but he does not believe that any violence was offered to the complainant by the tenant. This is in answer to an allegation in the complainant's bill, that the defendants turned her out by violence. The Commissioner reports, that there were about 150 acres of the land cleared and inclosed, and it is inferable from the circumstances, that the other defendants acquiesced in the claim of Thomas Lyles, and he took possession of it, and cultivated small portions of it from year to year. It does not appear from any thing before the Court, under what circumstances Thomas Lyles entered, or whether he had any agency in putting in the tenant, or in any instance denied the complainant's right or obstructed her entry.

In his report the Commissioner has fixed the annual rent of the better quality of land, what he calls cotton land, at two dollars per acre, and the inferior quality at one dollar per acre; and establishing ten per cent per annum, as the scale of the deterioration of the land, he deducts that amount annually, so that no rent is charged after the expiration of ten years. The Chancellor has so far

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corrected the report, as to *direct that something shall be allowed, even after the expiration of that period.

The first ground of the complainant's appeal, complains that this is error, and insists that the complainant is entitled to full rent for the whole period.

The rule adopted by the Commissioner and considered as merely arbitrary, is certainly not sustained by any principle. The soil of this country varies from the extremes of fertility, to the most indomitable sterility, so that the rule in one case is wholly inapplicable to another, unless the quantity of the land, the mode of culture, and the crops raised, correspond in every particular—in every case, therefore, the value of rent can only be ascertained by the opinion of witnesses competent to judge, and acquainted with the land. In this country inferior lands depreciate rapidly, under the ordinary, indeed the almost universal, mode of culture—even the provident planter does not so husband his land as to prevent deterioration, and a reasonable abatement ought to be made on that account, but no general rule can meet the case, and the decreased value must be ascertained in the manner mentioned. Land rent must be worth something, as long as it is fit for cultivation. This matter must therefore be referred back to the Commissioner.

In connection with this subject, the questions are raised, who is liable for rent? And to what extent is it due?

Independently of the concession made in the answer of Ephraim Lyles, that in the absence of the complainant he had put a tenant into the house to keep possession of it, there is nothing to shew the fact, that the complainant was ousted of the possession. Houston Goree, the only witness who speaks on this subject, says that he saw one David Dunkin living in the house, shortly after the death of Col. Lyles, who appeared to be the proprietor of it for the time, and thinks he heard him say, that he was put there to keep the complainant out. But it does not appear by whom he was put in possession, or who authorized him to prevent her entering. The answer of Ephraim Lyles would lead to the conclusion, that he did it.—But he claimed no interest in it. The defendants are under-

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stood to have ac*quiesced in the claim of Thomas Lyles, and he is the only person amongst the defendants who has had the use and enjoyment of any part, and it is not probable that Ephraim Lyles would take upon himself to incur the responsibility of turning out the complainant and putting in Thomas Lyles, who was as competent to act, and probably understood his rights as well.

If Ephraim Lyles ousted the complainant of the possession, he is liable for the annual rents to the extent of the complainant's interest, whether the plantation was cultivated in whole or in part, or not at all, for to the extent of her interest, she might have used it herself, or leased it to another; and if Thomas Lyles himself prevented the entry of the complainant, or participated in the act of Ephraim Lyles, in ousting her of the possession, he is liable to the same extent: but if on the contrary, Thomas Lyles neither ex-

pelled, nor kept the complainant out, by any act amounting to force, he is liable only to the extent to which he cultivated the plantation, and not even in that case, to the complainant, unless he cultivated it to an extent greater than the interest of himself and the other defendants. As a co-tenant, he had the right to enter and use it to the extent of his own interest, and with the consent of the other defendants, to the extent of their interest also. This did the complainant no wrong, if the one third part to which she was entitled was left unoccupied, and the possession was not withheld from her. This has been repeatedly ruled by this Court. The case of Volentine v. Johnson, ante, 49, during this term, is an instance.

The questions of fact are involved in so much uncertainty that I am unable to form any satisfactory judgment in relation to them. The evidence on this part of the case appears to have been taken as long ago as 1822, and it is apparent that about fourteen pages are wanting, and it is not improbable that the doubt in which it is involved arises out of that cause. These questions must therefore go back to be examined and reported on by the Commissioner, in connection with the amount of rent.

In the old cases, some of which will be

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found in Equity *Reports, by Chancellor De Saussure, negro hire was rated, at £10 for full task hands, and £5 for half hands.[b] In the prosperous times which succeeded the late war, and when produce sold for great prices, the Courts departed from this rule, and much higher prices were allowed in some cases, but in the case of Moorman v. Foote and others, and Myers v. Myers, [Bailey, Eq. 23,] decided since the present organization of the Court, the rule was resumed upon much consideration; and my own experience and observation is, that it is as much as in general they are worth; and I propose to subjoin to this decree, an estimate upon which it is founded.[c] It never was intended to apply, in those cases where the party accountable, came to the possession and use of the slaves by force or fraud, but when he stood in an amicable relation, as trustee, guardian, or executor or administrator, bailee &c., and is a substitute for the regular annual account which he ought to make. The decree of the Circuit Court has allowed the complainant for a part of the time $80, and for the remainder $70, for full task male hands; and $60 for a part of the time, and $50 for the remainder, for full task females; and in that proportion for inferior hands, the young and the old. In the grounds of appeal, the complainant insists that according to the evidence, even a greater sum than this should have been allowed; and it is very certain that the ordinary estimate of the value of negroes' hire, sustained by innumerable instances, and actually letting to hire, greatly exceeds the £10 rule, and

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occasion*ally, the amount claimed by the complainant, ($85 for males, and $65 for females) but the result of the estimate which I propose to make, will show that the hirer must lose largely at those prices. Possibly one who has a plantation, stock and implements of husbandry, and which must remain unemployed for the want of hands, unless obtained by these means, may find his account in paying these prices, but pursued as

[b] [Webbs v. Bellinger] 2 Desaus. 499; [Stroman v. Rottenbury] 4 Desaus. 270.

[c] [The following is the estimate referred to:] When the case of Moorman v. Foote and others, was under consideration, I took some pains to correct my own limited experience and observation, by inquiries amongst the most intelligent and successful planters of the middle and up-country, as to the value of negro hire; and from the data thus collected, I have made the subjoined estimate. The first object of the planter, is to raise a sufficient supply of provisions and forage for family consumption, and no more. In the middle and up country, the usual habit is to clothe the negroes by the labour of the females, at times when they can be conveniently dispensed with in the field; and upof lands of medium quality, two bags and an half of cotton of 300 lbs. per task hand, is regarded as a good crop, taking a series of years together, and my own experience is, that this is a high average. I have not been able to obtain a precise esti*mate of the average price of cotton for the last ten or twelve years, and have adopted 12½ cents, as approximating it, and as answering the purpose of illustration. Overseer's wages is a usual item of expense, and if one is not employed, the planter himself earns it, and is entitled to it. This I have estimated at $10 per hand—calculating the wages of an overseer of 30 hands at $300. The account then stands thus:

Dr.		
The Planter, for 2½ bags Cotton, of 300 lbs. each, at 12½ cents		$93 75
Cr.		
Overseer's wages per hand	$10 00	
Land rent, say 12 acres per hand, at $1 50	18 00	
Horse hire, per hand	5 00	
Wear and tear of working tools and other implements of husbandry, machinery, &c.	5 00	
1 blanket, $2; 1 pair shoes, $1 25	3 25	
Taxes, $1; Physician's bill, $2	3 00	
Bagging, rope and twine, $1 per bale	2 50	
Freight, per bale, $1	2 50	
Commissions on selling cotton, 2½ cts. pr. cwt.	2 29	
		$51 54
		42 21
Negro hire, £10=$42 86		42 86
Against the planter		65

Salt and other little articles of expense, which force themselves upon the humane master, for which no certain estimate can be made, are intentionally omitted, and in every instance I have intended to put the other expenses, founded on calculation, something below their real estimate. If there is any thing omitted, subsequent experience will bring it to light; the intention of these remarks being to call the attention of the gentlemen of the Law to the subject, with a view to establish a settled rule, if that already established should prove to be incorrect.

a system it must prove ruinous. The counsel for the complainant has however submitted, whether this is a case for the application of the rule, and if the Court should be against

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him on that ques*tion, he asks that the value of the personal estate and interest upon it, should be substituted in the place of the account for slave hire.

The complainant charges in her bill, that she was forced out of the administration by the defendants. But this is not conceded in the answers, nor is there any proof pointed out which warrants such a conclusion. The witness Houston Gorce, says that he saw "Ephraim Lyles and Mrs. Lyles jerk out of the hands of the complainant with violence, some article of clothing made up or not," but I cannot perceive how any unfairness in respect to the administration of the estate can be inferred from this one circumstance. The impression which it has made upon my mind, is that it was a controversy between two old women about some article of clothing, probably a relict, in which Ephraim Lyles suffered himself to participate, and no more. It is no disparagement to the complainant to suppose that Ephraim Lyles, as a man, was more competent than herself to administer the estate; and nothing unfavorable to him can be inferred from the circumstances that he took upon himself the burthen of the administration. It is precisely what might have been expected, and what occurs in almost every administration where a man and a woman are joined in the administration. Divested of the inferences which are attempted to be drawn from these circumstances, the case is precisely that contemplated by the rule, so far as Ephraim Lyles is concerned. It is the case of an administrator in possession and liable to account. But the case is still stronger. The evidence abundantly shews, that there was an understanding between Col. Lyles and the complainant, at the time of their intermarriage, that their estates were to remain and be kept separate, and that the children of each were to inherit their respective estates at their death. The complainant was provident enough to secure her own estate, and the paper executed by Col. Lyles was evidently intended to secure his also. Philip James the complainant's first husband, was confessedly alive down to 1809 or '10, after her marriage with both Kennerly and Fennel, and his *death even then, is only proved by information received by his mother, who resided in North Carolina, and who was probably wholly unknown to the defendants, and they were probably also ignorant of any clue which would lead to certainty. The result has shown, that Ephraim Lyles acted indiscreetly in making distribution of the estate, before the rights of the parties under the deed executed by Col. Lyles, and the fact of the death of Philip James, were judicially ascertained; and considering the doubt and uncertainty in which these matters were involved, it would have been equally unwise in him to have assumed the responsibility of letting the complainant into the partition.—Provident counsels would have suggested the propriety of postponing the partition, until these matters were finally adjusted, and if that had been done, the situation of Ephraim Lyles would have been precisely that contemplated by the rule. It does the complainant no wrong, that she should be put precisely in the situation that she would have been, if the administration had been conducted in the most proper and regular manner, and for these reasons I am satisfied, that the case is one to which the rule is strictly applicable.

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An actual partition of the property of which Col. Lyles died possessed, with an account of the rents issues and profits which it would have produced if prudently managed, is the strict measure of the complainant's rights. But the defendants have made the personal estate their own by the partition and use, and they have no right to complain, if they are made to account for the value at the time they received it, with the interest thereon, as a substitute for the hire of the negroes. The complainant has thought proper to accept the value and interest, as a substitute for the property, and the issues and profits, and it does not appear to me, that the Court can refuse to allow it. In this case there is an additional reason—two of the defendants, it is represented, have removed to Mississippi, or some other of the western States with their negroes, so that the Court has no means of making actual partition of these—Some of the negroes are said to have since died, and others may

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*have been disposed of by the parties, and with respect to these, an account would be indispensible. It is therefore not only equally equitable and just, but infinitely more convenient. The inventory and appraisement of the personal estate, as far as that extends, must be taken as evidence of value, as more likely to furnish the true value than any that could be obtained at so distant a day. If there was property not included in these, other evidence must of necessity, be furnished.

Primarily, Ephraim Lyles the administrator, is unquestionably liable to the whole amount of the complainant's rights; but it is claimed for the complainant, that the other defendants should be decreed to be jointly liable with him, for the whole, on the ground that there was a conspiracy amongst them, to defraud the complainant. I am unable to perceive in the circumstances of this case, any feature that does not ordinarily occur in the mal-administration of an estate. As administrator in possession, Ephraim Lyles had at that time (before the act of 1824) the absolute power of disposi-

tion; and there is no principle in law or equity which would make any one else liable for the manner in which he might dispose of it, nor can I perceive how there could be fraud in the exercise of a legitimate right. This claim is founded on the supposed insolvency of Ephraim Lyles. If that be true, the defendants are clearly individually liable, for what they may have severally received over and above their distributive share of the personal estate. They have received that which ex equo et bono, belongs to the complainant, and upon clear principles of Equity, must account with her for it.

The sixth and seventh grounds of the complainant's motion, complain that the decree of the Circuit Court charges the defendant Ephraim Lyles, with a less quantity of cotton than came to his hands, and that it charges the complainant with the value of a small amount of personal property which she retained, claiming it as a part of her own estate, and as having been included in her settlement on her daughter.

Both of these questions are mere matters

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of evidence, *and the Commissioner and Chancellor have both arrived at the same conclusion. The evidence is, at best, doubtful, and this Court does not feel warranted in reversing their decision.

The right to order partition of the land, was evidently a mere omission, and will be provided for in the decretal order. In the progress of the cause, it seems that a survey was made of the lands, and it is alledged on the part of Thomas Lyles, that a part of the land included in this survey did not belong to Col. Lyles at the time of his death, or at any time during his coverture with the complainant, but to himself. The Court have no means of judging of the truth of this allegation, but if there be any thing in it, the question will necessarily and properly arise on the return of the writ of partition.

The decree of the Circuit Court directs that the costs should be paid out of the estate; and the complainant appeals from that part of the decree, on the ground, that the defendants ought to have been charged with the whole amount of costs.

In Chancery, costs are regarded as discretionary; not as the subject of capricious discretion, but as the result of a reasonable and equitable deduction, from all the circumstances of the case, and are so much under the control of the Circuit Court, that they are not of themselves regarded as the subject of appeal; and it is only in those cases where this Court reverses or substantially reforms the decree of the Circuit Court, that it assumes the authority to reverse an order made on the subject of costs. Here, the principles upon which the Circuit Court decree proceeds, are sustained throughout, and it is only in their application, that this decree varies from it; and on that ground, I question very much the propriety of varying the order with respect to costs. Judging of the case a priori, this question is not free from difficulty. The circumstances before stated, would seem to have rendered it perilous for the administrator to have taken upon himself the responsibility of letting the com-

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plainant into a parti*tion, and without any fault on his part, a suit was almost inevitable. This state of things arises out of the misfortunes of the complainant, Philip James' abandonment of her; and notwithstanding I am strongly inclined to believe that the defendants have conducted this litigation with rather more zeal and acrimony than became the relation in which they stood to her, I cannot see my way so clearly, as to be certain that the Chancellor was in error; the order with respect to costs, must therefore stand.

It was urged in the argument, but I do not observe it stated in the grounds of appeal, that the sureties to the administration bond, who are represented to be some of the other defendants, should be made liable for any defalcation of Ephriam Lyles in the event of his insolvency, but they are not charged in that character in the bill, and upon looking through the whole proceedings, it is no where stated who they were. This would, itself, be a sufficient reason for not making any order with respect to them. The complainant is moreover a party to the bond, and I can well conceive that questions might there arise, deserving more consideration and attention, than has been bestowed on them in argument. No order will be made, therefore, on that subject.

It is Ordered and decreed, that a writ of partition do issue, to make partition of the lands, tenements and hereditaments whereof the said Col. Aromanus Lyles was seized and possessed at the time of his death, between the complainant his widow, and the defendants his children, agreeably to the Act of Assembly in such case made and provided, and that it be referred to the Commissioner to ascertain the rents and profits of the said lands, and the person or persons liable to account for the same, according to the principles of this decree.

It is further Ordered and decreed, that the Commissioner do state an account between the complainant and defendant Ephraim Lyles, debiting him with the value of the personal estate which came to his hands, to be estimated at the value stated in the inventory and appraisement of the estate, filed in the ordinary's office and exhibited with his answer, and deducting therefrom what

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has been ascer*tained to have been paid, laid out and expended in the due course of administration. That he set down to the credit of the complainant, one third part of the nett balance, and deduct therefrom the amount

of assets in the hands of the complainant; and that the said defendant Ephraim Lyles, do pay to the complainant the balance of the said one third part, with interest thereon from the first day of July 1818.

It is also further Ordered and decreed, that the said Commissioner do state an account with each of the other defendants, debiting them severally with one seventh part of the value of the slaves of the intestate, stated in the inventory and appraisement aforesaid, and in default of payment of the sum due to the complainant, by the defendant Ephraim Lyles, after notice of the final order of the Court, that the said other defendants, John Lyles, James Lyles, Thomas Lyles, Aromanus Lyles, Valentine Lyles, and William Moody and wife, do pay to the complainant six sevenths of the sum so as aforesaid ascertained to be due and owing to her severally, in proportion to the amounts they have respectively recovered.

It is further Ordered and decreed, that the costs be paid, one third part thereof by the complainant, and the remaining two thirds by the defendants.

It is also further Ordered and decreed, that the decree of the Circuit Court be reformed according to the principles of this decree, and that it be affirmed so far as it is consistent with this decree.

O'NEALL, J., concurred.

HARPER, J. I concur, except as to the propriety of the judge's expressing to the jury his opinion on the facts. It is his duty to arrange and sum up the evidence; to point out to the jury distinctly the matters of fact which they have to decide, and the evidence which bears on the facts respectively. In doing this, it will sometimes unavoidably happen, that his opinion on the facts will be intimated to the jury. But still it is the judgment of the country, and not the judgment of the Court, on matters of fact, which

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*the institution of the trial by jury was intended to secure. If a decided opinion be given by the judge, the jury are too apt to rely on that, and to throw the responsibility on him. The firm and honest exercise of his own judgment, is what every citizen who is called upon to act as a juror, owes to his country—a duty which he should be accustomed to perform.

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1 Hill, Eq. 95

JOHN PEAY and J. B. PICKETT v. JOHN M. BARBER.

(Columbia. Jan., 1833.)

[*Wills* ⇐858.]

The general rule is, that a lapsed legacy of chattels passes under a general residuary bequest, but the rule does not apply where the residuary bequest is of a particular fund or description of property, or other certain residuum.(*a*)

[Ed. Note.—Cited in Garrett v. Garrett, 1 Strob. Eq. 99; Swinton v. Egleston, 3 Rich. Eq. 205.

For other cases, see Wills, Cent. Dig. § 2183; Dec. Dig. ⇐858.]

[*Wills* ⇐565.]

Testator, by his will, bequeathed to his wife one half of his negroes, household furniture, stock, money, debts, &c.; and to his sister's children [by name] "all the rest of my negroes and their increase," and adds that "all the rest of my property not disposed of, I wish to be sold at public sale," & the proceeds to be divided among the said children, & "the rest of my money on hand and owing, I wish to be disposed of in the same manner," &c.; the testator's wife died in his lifetime, so that the legacy to her lapsed: *Held*, that the words "all the rest of my property," must be understood as exclusive of the negroes, money & debts due; and as covering only the household furniture, stock, moveables and chattels of that class of property; that nothing else of the lapsed legacy but property of this description passed under the residuary bequest, & that the negroes, money and debts due, descended to the heirs general.

[Ed. Note.—Cited in Garrett v. Garrett, 1 Strob. Eq. 99; Swinton v. Egleston, 3 Rich. Eq. 205.

For other cases, see Wills, Cent. Dig. §§ 1233–1238; Dec. Dig. ⇐565.]

[This case is also cited in Jackson v. McAliley, Speers, Eq. 303, 40 Am. Dec. 620, as to facts.]

The defendant had been appointed, by an order of the Court, guardian to his six minor children, to whom a legacy had been left by the last will and testament of Daniel Green, their uncle. The complainants were securities to his guardianship bond, and the object of this bill was to compel an account, and to relieve the complainants, on account of the mismanagement of the legacy.

Daniel Green, by his will, gives in the first place, to his wife Nancy, certain real estate, and then proceeds.—"I also give and bequeath to my wife Nancy, as aforesaid, one half of all the negroes I now possess (fourteen in number) (not including a negro woman, which I have loaned to my sister, Rebecca Barber, named Letty,) which said negroes she is to take at the valuation of legal appraisers, having her choice of the negroes as aforesaid till she may have one half of their whole valuation." Again, "I further give to her, one half of all my stock, of every description; one half of my household furniture, plantation tools, and moveable property of every sort and description, that may be upon the plantation to be valued as before mentioned, and is to have her choice of property, until she may have one half of the whole as aforesaid. I also allow her one half of the ready money I may

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have on hand, as well as one *half of all

(*a*) Sinkler v. Sinkler, 2 Desaus. Eq. Rep. 138; Sutton v. Sharpe, 1 Russ. 146; Flemming v. Burrows, 1 Russ. 276.

that may be owing to me, after my just debts have been paid from the whole amount; the whole of which land and money and personal property, she has the right of disposing of, as she may think meet and proper."

The testator then gives certain specific legacies to sundry persons, and the will then proceeds, "Item, I give and bequeath to" (the defendant's six minor children by name) "all the rest of my negroes with their increase," and prescribes the time and manner of distribution amongst them, and then adds, "all the rest of my property not disposed of, I wish to be sold at public sale to the best advantage, and the money accruing therefrom, be put to interest under the direction of my executors, and that the same both principal and interest, be equally divided between the above named children, and to be received by them when they are entitled to receive their proportions of the negroes above alluded to; and all the rest of my money that is now on hand, or that may be owing me, I wish to be disposed of in the same manner, except $500," &c.

The testator's wife Nancy died in his lifetime, and of course the legacy to her lapsed. The defendant John M. Barber was appointed executor, qualified and took possession of the estate, and some time afterwards was appointed guardian of his minor children. His conduct not being satisfactory to his securities in the guardianship bond, they filed this bill for relief. On the hearing of the case at Chester in 1831, it was ordered (by Mr. Justice Johnson, sitting for Chancellor Johnston) that the defendant should account before the Commissioner, and that his letters of guardianship be revoked unless he gave new securities, and that the complainants on paying the sum reported to be due from the defendant as guardian, should be discharged. The case was again heard at July Term 1832, before Chancellor DeSaussure, on exceptions to the Commissioner's report, and the leading question then made was, whether the legacy of the personal property to the testator's wife Nancy, sunk into the residu-

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um of the estate, and *passed under the bequest of "all the rest of my property" to the children of the defendant, or descended as in a case of intestacy, to his heirs general. The Chancellor held that it passed under the bequest; and from this decree an appeal was taken.

Gregg & Clarke, for the plaintiffs, cited 1 Sup. to Ves. Jr. 189, note 6; 18 Ves. 466; Ambler 577; 2 Jacob and Walker, 405.

De Saussure & Peareson, contra, referred to 1 John. Ch. 498; 2 Mad. 82; 8 Ves. 24; Roberts v. Cook 16 Ves. 451; Ambler, 645; 2 Roper on Leg. 487, 490; 4 Eq. Rep. 459; 4 Ves. 166, 708, 802, 7 Ib. 389; 8 Ib. 12.

JOHNSON, J. The general rule very clearly is, that a lapsed legacy of chattels passes under a general residuary bequest, not (as is said by the master of the Rolls, Sir Wm. Grant, in Cambridge v. Rous 8 Ves. 25) in consequence of any direct or expressed intention; for it may be argued in all cases, that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given from him, for he does not contemplate the case. The residuary legatee is to take only what is left, but that does not prevent the right of the residuary legatee; but the testator is supposed to give it away from the residuary legatee, only for the sake of the particular legatee. It is therefore giving effect to the intention of the testator. It is true, that the English cases go very far to favor the residuary legatee. There, the undevised residuum went to the executor, and it was most apparent, that the construction was often strained, to prevent that consequence. Here, there is no such necessity for perverting the meaning, as the law makes distribution of the residue. But even there the rule does not apply, where the residuary bequest is of a particular fund or description of property, or other certain residuum, which I think may be fairly deduced from this will. —The case of Bland v. Lamb, 2 Jacob & Walker, 399, is an example. The residuary

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bequest there, was in the words—*"Any thing I have forgot I leave at the disposal of Mrs. Bland of Isleworth," and it was held that a legacy subsequently left to him by a relation, did not pass under this bequest; and the Lord Chancellor Eldon remarks (page 405) "that after the cases which had been referred to, there could be no doubt that a gift of the residue may have a limited operation, although the general doctrine of the Court is, that if a person gives all the rest of his personal estate or property, such a gift will pass not only that which he then has, but that which may become his property." The Attorney General v. Johnstone, Ambler, 517, furnishes another example of this sort. Indeed the proposition is so palpable, that it admits, in the abstract, of no doubt. All the difficulties connected with it have arisen in the application.—In determining whether, in the particular case, the bequest was of a general or particular residuum.

In the case under consideration, the intention of the testator is expressed, in the introductory clause of the will, in the following words: "And as to what worldly substance it has pleased God to bless me with, it is my will and wish that it be disposed of in the manner following," &c.—and this circumstance is much relied on in all the cases where it exists, to shew the intention of the testator not to die intestate as to any part

of his estate, and is certainly entitled to weigh much in a doubtful construction; but, as much as the Courts lean in favor of such a construction, it has never been made to supply the place of an actual bequest. Take, for example, the case of a will where there is no residuary clause, and the whole estate is not specifically disposed of; there the general intention cannot prevail, on account of the uncertainty who the testator intended should take. So in the case of a specific residuary bequest of all the rest and residue of cash on hand, where there are other chattels not disposed of. In the case of Bland v. Lamb, before cited, the testator, after alluding to the state of his health, states that he takes this method of shewing how he would have his small property disposed of: and the Lord Chancellor, conceding that these terms were broad enough to pass all the property he had, held that subsequently acquired property did not pass under the residuary clause.

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*The question then is, whether by the terms, "all the rest of my property," the testator meant the general residuum of his estate, or the residuum of a particular description of property.

There can be no question, that the term "property," as was said by Lord Mansfield, in Hogan v. Jackson, Cowp. 299, when unaffected by the contract, is sufficient to cover all that the testator was worth; but upon construing it with reference to the other provisions of this will, I think it will appear that the testator did not intend to use it here in that general sense, but limited it to a particular description of property.

The word "property" occurs in the bequest to the testator's wife, in connexion with his stock, plantation tools, and household furniture, and in that instance, is evidently and expressly limited to whatever chattels he might have on his plantation, not falling within the description particularly expressed. And again, of that "property," she is to have her choice. In this instance, too, it is apparent that it was not intended to include negroes on the plantation, or money on hand, or due and owing: for these are all independently and specifically disposed of. So, too, in the residuary clause, after the general bequest of all the rest of his property, the testator gives the remainder of the money on hand, and the money due, excepting $500, to the defendant's wards; and if he had intended to use the word "property," in its unqualified sense, that was unnecessary. He directs too, in the residuary clause, that all the rest of his property should be sold at public sale.—Money, or debts due, or rather securities for money, may be the subject of public sale; but that is very much out of the usual course of business, and it would never enter into the mind of any one, that by direction to sell property, the testator meant money or choses in action, for the obvious reason, that a sale could not essentially change the quantity or character.—Besides, the testator reserves $500 out of the cash fund, for another purpose. It is clear, therefore, that the testator did not intend to use the term "property," in the unlimited and unqualified sense, in which it is gener-

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ally received; and the *inquiry is, to what did he intend to limit it. The solution may be found, I think, in the use he makes of it in the bequest to his wife. In that clause of the will, it is, as before remarked, evidently used in a sense exclusive of negroes and money, and to enlarge live stock, household furniture and plantation tools, so as to include all other moveables about the plantation, not falling within those descriptions. The same thing precisely, occurs in the bequest to the defendant's children and wards, "I give and bequeath to [them] all the rest of my negroes;" in effect specifically those not before bequeathed, and in the same clause he also gives to them all the rest of his money on hand, or that may be due him. The words "all the rest of my property" must therefore be understood as exclusive of the negroes, for all the rest of the negroes had been before disposed of. Money and debts must also be excluded, because these also are expressly disposed of; and for the further reason that they are not the subject of sale. The word property, which occurs here, is then to be understood in the sense in which it is used in the bequest to his wife, and only as enlarging the particular stock, household furniture, and farming tools, so as to cover whatever else of personal chattels belonging to that class of property, which might be upon the testator's plantation, or used there. It follows, that nothing else of the legacy to the testator's wife which lapsed by her death, but property falling within this description, passes under this residuary bequest to the defendant's wards, and that so much of the legacy to her, as consisted of negroes, money on hand, and debts due, must pass as chattels descended to the testator's heirs general, and is distributable under the act of the Legislature. In this respect therefore, the decree of the Circuit Court must be reversed.

It is understood that the defendant's wards (his children) will be entitled to a distributive share of the chattels descended, being amongst the next of kin to the testator. —If that be true, the defendant, in the statement of his accounts as guardian, must be

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charged with the amount of *their interest in them, and the issues, income and profits arising therefrom.

In other respects, the decree of the Circuit Court is affirmed, and it is Ordered and

decreed, that the said decree be reformed according to the principles of this decree.

O'NEALL and HARPER, JJ., concurred.

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1 Hill, Eq. 101

WM. S. SMITH v. JAS. W. MAXWELL, Executor of George P. Smith.

(Columbia. Jan., 1833.)

[*Husband and Wife* ⟸29.]

Settlements in pursuance of marriage articles, must not always be made according to their legal import, but in conformity with the intention of the parties.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 158; Dec. Dig. ⟸29.]

[*Husband and Wife* ⟸31.]

S., before marriage, executed articles stipulating to make a settlement of his whole estate, for his wife, during his life, and at his death to be equally divided between her and the children of the marriage; the wife died, her husband and one child her surviving: on a bill filed by the child, to carry the articles into effect, *Held*, that he [was] only entitled to the moiety of the property secured by the articles.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 179; Dec. Dig. ⟸31.]

The bill in this case, states that George P. Smith, on the 6th of April, 1813, in consideration of a marriage then about to be had and solemnized between himself and one Rebecca J. Clayton, executed an agreement of which the following is a copy.

"South Carolina—Barnwell District.

"Know all men by these presents, that in consequence of a marriage about to take place between myself and Rebecca J. Clayton, I do agree to make and sign a legal marriage settlement of the following property, to wit, Selah, Betty, Cæsar, Sylvia, Sambo, Ansel, Mary, Hannah, Hester and Sarah; which said property I do hereby deliver unto Joseph Bellinger Esq., as trustee for the said Rebecca J. Clayton, and do hereby bind myself under the penalty of five thousand dollars, to execute the marriage settlement of the above mentioned property, as also two hundred and thirty eight acres of land, lying in Colleton District, to the said trustee, within three months from the date hereof, upon the following conditions, viz. that the property is to remain her's during my natural life, and at my death to be equal-

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ly divided between her and all the *children issuing from said marriage. In witness whereof I have hereunto set my hand and seal, this 6th April, 1813. [Signed,]

George Smith. [L. S.]

Signed, sealed and delivered
in the presence of
H. D. Duncan, Sarah Baxter."

The bill further states, that the said marriage was solemnized, and the said Rebecca subsequently departed this life, leaving her husband and the complainant (the sole issue of the marriage) surviving—that the said George P. Smith afterwards contracted a second marriage, and has lately departed this life, leaving a widow and several children by his last marriage, having first executed his last will and testament containing the following clauses. "I do give to my beloved wife Sarah Smith, this plantation I live on, and the other adjoining to it, all the cattle and hogs, horses, and all the household [furniture] rights and credits during her life, and after the marriage settlement, George P. Smith and his first wife's property to be made good, and the negroes that was deeded, to my son William. I also deed a certain negro girl to my wife, named Sarah, as her own property till her death, and then she is to go to my daughter Caroline"—that the said George P. Smith appointed the defendant executor of his said last will and testament, who has assumed the execution thereof, and in that character has taken possession of the slaves named in the said agreement, and their issue, except two whom the testator in his lifetime sold or disposed of, contrary to the said agreement. The prayer of the bill is, that the defendant may answer, make a discovery of the testator's estate, and particularly of the slaves mentioned in the agreement, and that it may be carried into effect.

The answer admits the execution of the agreement, which comprised the whole of the lands and negroes of which the said George P. Smith was seised and possessed at that time—that the wife departed this life many years ago, leaving her husband and the complainant (the sole issue of the marriage) sur-

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viving—that George P. Smith *subsequently married a second wife, by whom he had three children, all of whom survived him—that after the death of his first wife, Geo. P. Smith sold three of the slaves included in the agreement, for which the defendant insists his testator's estate is not accountable, or for rent or hire. The answer further states, that the said agreement was intended as a provision for the wife and her issue, in the event of her surviving him, which event did not occur, and submits whether under a fair construction of the agreement, the complainant is entitled to more than one half of the property therein mentioned. The defendant alledges that he is, and has been ready and willing to do whatever is just and proper in the premises, denies all combination, &c.

The cause was heard on the bill and answer, before Chancellor DeSaussure, February, 1831, who Ordered and decreed "that the complainant is entitled to the whole of the property comprised in the marriage articles, and that the defendant do deliver up the same to him."

From this decree the defendant appealed, insisting that on a fair and equitable construction of the marriage articles, the com-

plainant is not entitled to more than half of the property in question; and he moves the Court of Appeals to modify or reform the said decree accordingly.

Patterson, for the appellant.
Bellinger, contra.

HARPER, J: It is said by Atterly, in his Treatise on Marriage Settlements, that "articles being often carelessly drawn, settlements in pursuance of them must not always be made in the very words of the articles, nor even according to their legal import and operation; for if that was the case, they would often be of little avail. But they must be made in conformity with the intention of the parties, or at least as near to it as is consistent with the rules and principles of law. In short, in framing settlements in pursuance of articles, the articles must be considered merely in the light of instructions." In the case

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*of Randall v. Willis, to which he refers, where, by articles before marriage, the husband had agreed to settle all his personal estate, of what kind or nature soever; this was held to include only the personal estate he should have at the time of his death, giving him the power to dispose of his personal estate, in good faith, during his life. The Chancellor says, "If a format deed was executed before marriage, containing such a covenant, it is impossible I could do any thing with it. But an article is only the head and minute of an agreement, not to be followed literally." Here the plain and literal import of the terms which related to the personal estate he possessed at the time of signing the articles, was departed from, on account of the unreasonableness of making "every chair and stool, the provisions in the house, &c., the subject of settlement." It is evident that much greater latitude is allowed in executing marriage articles, and adapting their provisions to the exigencies of a family, than in construing wills and other instruments. If a settlement were executed in the words of the articles we are considering, the effect would be to give the wife an estate, for the life of her husband, in the whole of the property, with a vested remainder to herself in one moiety, which, although she might die in the lifetime of her husband, would be transmitted to her legal representatives. But many absurd and unreasonable consequences would follow such a disposition, which we cannot suppose the party to have intended. It is admitted that the whole of the property included in the articles, was the property of the husband, and constituted his whole estate. Under a settlement thus executed, in the event which has happened of the wife's dying first, the wife's estate per autre vie and her moiety in remainder, would be distributable on her death, her husband taking one third of the life estate, and a sixth of the whole estate in remainder, and the complainant taking one moiety in remainder by purchase under the settlement, and two thirds of his mother's interest, by transmission from her. It is unreasonable to suppose that a man could have intended to leave

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himself such *scanty provision out of his own property. If the wife however, had died childless, leaving her husband surviving, then two thirds of her life estate, and two thirds of her moiety, or one third of the whole estate, in remainder would have gone to her next of kin, strangers to the husband. It is not to be supposed that a man intends thus to give his property to strangers during his lifetime. The words of the articles are "that the property is to remain her's during my natural life, and at my death to be equally divided between her and all the children issuing from the said marriage." Though these words, if used in a settlement, would have given the wife a vested remainder, yet this is by giving them a technical and artificial sense. To the popular understanding when it is said "the property shall be her's during my natural life," there will be implied some idea of her living during his lifetime to enjoy it, and when it is given to her at his death, some condition of her being alive to take it. In the natural and popular sense, a gift to her, imports a benefit to herself, which she is personally to enjoy. At all events, the words are capable of such a meaning, and certainly it is the more reasonable and probable one. The general objects of a marriage settlement, are a provision for the wife for her life, and for the issue of the marriage. These are effected by the construction I have given the articles.

It was suggested that the word her's, was inserted by mistake, and that the provision really intended, was that "the property is to remain mine during my life." This may be, but there is no evidence of it. If it was to remain her's I suppose the husband expected to have the enjoyment of the income. If the construction I have given the articles be correct, then the provision for the wife was, that the whole of the property should be her's during the joint lives of herself and her husband, and if she should survive him, a moiety to her absolutely, without any disposition of that portion in the event of his surviving her. The property having been the husband's, every thing that was not disposed of remained his, and having survived his wife, the moiety given to her in remainder,

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*on contingency, became absolutely his, and is disposed of by the will. The complainant is therefore entitled only to the moiety of the property secured by the articles, and to an account of the rents and profits, from the time of his father's death.

It is therefore Ordered and decreed, that

the decree of the Chancellor be modified according to the views herein expressed.

JOHNSON and O'NEALL, JJ., concurred.

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1 Hill, Eq. 106

GEO. HILLEGAS and Wife and Others v. THOMAS L. HARTLEY.

(Columbia. Jan., 1833.)

[*Deeds* ⟸83.]

It is not necessary to the validity of recording, that the probate of the witness should be endorsed on the deed.—(per Chancellor De Saussure.)

[Ed. Note.—Cited in Lamar v. Raysor, 7 Rich. 514.

For other cases, see Deeds, Cent. Dig. §§ 218–221; Dec. Dig. ⟸83.]

[*Descent and Distribution* ⟸52.]

Where a feme covert joins her husband in a conveyance, and renounces her inheritance according to the act of 1795, the renunciation is not "complete & legal" until recorded; and if it has not been recorded within the time prescribed by the Registry Act, (1785) it is absolutely void.

[Ed. Note.—Cited in Campbell v. Moon, 16 S. C. 110; Wingo v. Parker, 19 S. C. 16.

For other cases, see Descent and Distribution, Cent. Dig. § 299; Dec. Dig. ⟸52.]

[This case is also cited, and its holding reversed, in Kottman v. Ayer, 1 Strob. 553.]

Bill for partition of a tract of land, of which, as the plaintiffs alledge, Mary Hartley, dec'd, the defendant's wife, died seized, and in which they claim an undivided interest as her heirs at law, she having left no issue. The facts set forth in the answer, and which were in evidence, are these:

Mary Hartly being seized in her own right of the land in question, on the 12th of February 1825, joined her husband in a conveyance thereof, to Wm. J. Reese, and on the 28th of February 1825, made a renunciation of her inheritance on the deed, in due form, before a justice of the quorum. The deed and renunciation endorsed on it, were recorded in the office of register of mesne conveyances for Sumter District, (where the land lies, and the parties lived,) on the 28th of October 1826: there was no probate of a subscribing witness on the deed, nor any evidence that it had been proved before recording. Mrs. Hartly died soon after executing the deed and renunciation to Reese, and before they were recorded.

The question made in the case, was, whether the deed *from the defendant and his wife to Reese, was such a perfect release of her inheritance as passed the estate.—For the plaintiffs, it was contended that the conveyance, not having been legally recorded, was void, and that consequently they were entitled to a moiety of the estate.—They did not, however, seek to disturb the sale, but only claimed their shares of the purchase money, which the defendant had received.

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The case was heard at Sumter, February 1832, and the following decree pronounced:

De Saussure, Chancellor. All the forms prescribed by the statute have been complied with. But it is argued that there is no probate of the deed, actually attested and endorsed, without which it could not be legally recorded.

I am not sure that it is necessary to the validity of a deed directed to be recorded, that the probate should be endorsed. The officer entrusted with that power and duty, may swear the subscribing witnesses to the deed, and satisfy his own mind, without endorsing the attestation—certainly the statute we are considering does not prescribe it: it is however, generally done, and it is better done.—But to make the endorsement of the attestation by the officer, a ground to invalidate the deed, is to make the act of the parties depend not upon their performance of what is required of them to be done, but upon the omission or neglect of a third person, the officer, in whom the country have placed confidence.

I am strongly inclined to think that as the duty of recording is put on that officer, it will be presumed when he has recorded a deed, that all was done, which was necessary to be done to perfect the instrument and entitle it to record.

Another objection is, that the deed and renunciation not having been recorded till after the death of the wife, the recording afterwards is too late.

This is a grave objection, and may have a most extensive operation. The statute does not limit the time within which the wife is to declare her consent to the release of her interest—It is indefinite, except that it must be after seven days.

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*But the renunciation shall not be considered as being complete or legal, until the same shall be recorded in the office of mesne conveyance. It may be done in three months or three years. Now suppose in the case of a marriage settlement, which the law directs to be recorded within three months, the wife dies in one month, and the deed is recorded after her death, and before the expiration of the three months, would that avoid the deed?—assuredly not, yet the recording is essential to give validity to the deed.

I think this reasoning applies to the case before us—It may be recorded at any time, and when recorded it has full force and effect. It is an act not to be done by the wife—her consent to the recording is not essential.

She has done all that was necessary for her to do—and the recording is good in my judgment, though not made till after her death.

It is therefore Ordered and decreed, that the bill be dismissed.

From this decree the plaintiffs appealed, on the grounds taken below.

De Saussure, for the appellants.

Haynesworth, contra.

HARPER, J. We propose to consider more particularly the first ground of the complainants' motion. The question is one of considerable doubt and difficulty; but from the best view we have been able to take of it, we have come to a different conclusion from that of the Chancellor. The case of Gough v. Walker, 1 N. & M'C. 469, which was principally relied on by the complainants' counsel, did not arise under the act of 1795, which is now in question, but under that of 1731 (P. L. 132),[a] providing that a married woman freely and voluntarily joining her husband in a conveyance, and "acknowledging the same before the Chief Justice before the time being, or before any persons thereunto by him authorized, and certified by the said Chief Justice, and recorded in the office of pleas, shall be deemed as effectual and valid in

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the law, to all *intents and purposes whatsoever, as any fine passed in due form of law in his majesty's Court of Pleas at Westminster, for conveying of lands in Great Britain." As was truly observed in the case of Gough and Walker, the object of the act was to establish a mode of proceeding similar to that by fine in Great Britain. That was a proceeding by fictitious suit in Court, and of course a matter of record. Blackstone after speaking of the commencement of the suit, the licentia concordandi, and the concord, observes "This acknowledgment must be made either openly in the Court of Common Pleas, or before the Lord Chief Justice of that Court, or else before one of the Judges of that Court, or two or more Commissioners in the country, empowered by a special authority called a writ of dedimus potestatem." "If there be any feme covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband."

"By these acts all the essential parts of a fine are completed, and if the cognizor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable, still the fine shall be carried on in all its remaining parts."[b] That is to say, the note of the fine, and foot of the fine, of which indentures are made, and delivered to the parties, are entered. This seems to be equivalent to the entering up of final, after interlocutory judgment in other cases, and might, I suppose, be done at any time within the year and day.—If from any cause it should be neglected for a long period, it is probable that it could not be done without a rule to the parties, to shew cause against it, or if the parties were dead, to their representatives, and after a great lapse of time would not be done at all. The Court however, in Gough v. Walker, determined that where a renunciation of dower had not been recorded during the lifetime of the husband, it could not, under the act of 1731, be recorded afterwards.

The case seems to me to be stronger for the complainants under the act of 1795. 2 Faust.

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6. The act directs, that any *married woman may renounce her inheritance, by going before a judge or justice, and submitting to an examination, of which a certificate shall be made in the prescribed form; "and such renunciation shall not be considered as being complete or legal, until the same shall be recorded in the office of mesne conveyances, or office of the Clerk of the County Court, in the District or County where the land lies." This seems to deprive the proceeding of any analogy to a proceeding of record in Court, and to make it purely a mode of conveyance. What is the meaning and effect of the words "shall not be considered as being complete or legal?" I cannot imagine any other than that the renunciation shall have no operation or effect whatever, even between the parties. Whatever reasons may have governed the legislature in making the enactments, the words are too plain to admit of question. The security and protection of the woman must have been in some way the object of the provision.

It was argued, however, that the act fixes no time within which the recording shall take place, and that it may therefore be at any time short of a prescriptive bar. If the act of 1795 had said nothing about recording, I think the certificate would come under the general provision of the act of 1785 on the subject of recording conveyances of land. This is a mode of conveying land.—The certificate of renunciation is an essential part of the conveyance in which the woman joins her husband, which as to her, is incomplete and null without it. This would not apply to the proceeding, under the act of 1731, considered as a proceeding of record in Court.

The terms of the act are, "that no conveyance of lands, tenements or hereditaments within this State, shall pass, alter or change from one person to another, any estate of inheritance in fee simple, or any estate for life or lives, nor shall any greater or higher estate be made or take effect in any person or persons, or any use thereof, to be made by bargain sale, lease and release or other instrument, unless the same be made in writing, signed, sealed and recorded in the

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Clerk's Office of the county where the *land

[a] The Act of 1731 is entirely superseded by that of '95; at this day few, if any cases, can arise under the former. R.

[b] 2 Bl. Com. 351.

mentioned to be passed or granted, shall be, in manner following; that is to say, if the person or persons who shall make and seal such instrument of writing, shall be resident within the State at the time of making, signing and sealing the same, then the recording shall be within six months &c." If not recorded within the time, the act provides that the conveyance shall only be good between the parties to it. The whole deed—every essential part of it, must be recorded, and without the certificate of renunciation, the law does not regard the instrument as the married woman's deed, nor can it affect her inheritance. The purposes of the law would not be effected by recording the conveyance without the renunciation.

But does the act of 1795 exempt these certificates from the operation of the terms of that of 1785? I do not perceive how this can be said. It directs that the renunciation shall not be complete and legal until recorded; it provides no time for the recording, but leaves that to the general law, on the subject of recording conveyances. It seems to me that we must conclude the act of 1795 to have altered the effect of that of 1785 only in this respect: that leaving the time within which the recording is required to be as before, it provides that unless so recorded, the instrument shall have no operation or effect, even between the parties to it. Although the woman, therefore, should die within one month from the renunciation, still it would be good if recorded within six months; however long she might live, it would be void if not recorded within the six months. It is with some hesitation that we have come to this conclusion; but if we err, we do so in promoting the general policy of the law, which intends the protection of married women.

The defendant objects that William J. Reese, the purchaser of the land, is not a party. But as the complainants express their willingness to confirm the sale to him, and only seek a moiety of the purchase money, received by the defendant, and his interest will not be affected by the decree, that is not necessary.

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*It is Ordered and decreed, that upon the complainants' duly executing a release of all their interest in the land in question, to the said William J. Reese, and depositing the same with the Commissioner, the defendant account for and pay to them, a moiety of the purchase money received by him on the sale of the said land, with interest from the time of receiving the same. The defendant to pay the costs.[c]

JOHNSON, J., concurred.

O'NEALL, J., having been absent at the argument, gave no opinion.

[c] [See also 2 Con. Rep. 12.]

1 Hill, Eq. 112

Ex parte F. F. CALMES.

(Columbia. Jan., 1833.)

[*Trusts* ⇐217.]

No mode of investment having been prescribed by the will, the Court ordered a residuary trust fund to be invested in land and negroes, subject to the trusts and limitations of the will.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 303; Dec. Dig. ⇐217.]

[This case is also cited and explained in Moseley v. Hawkinson, 22 S. C. 323.]

Thomas Beasley, deceased, by his will bequeathed certain negroes in trust for the use and benefit of his daughter, Mrs. Jane Williams, during her life, and at her death, to her children; and after making several devises, he directs his executors to sell the remainder of his real and personal estate, and giving an equal portion of the proceeds to Mrs. Williams, directs that it shall also be held in trust, and subject to the same limitation as the negroes. The husband of the cestui que trust owns no land. Under these circumstances, the petitioner, who is the trustee, filed this petition praying that the residuary legacy may be invested in the purchase of land and slaves. The Commissioner, on a reference ordered for that purpose, reported these facts and recommended the investment.

Chancellor Johnston dismissed the petition, and the petitioner appealed.

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*HARPER, J. The petition is not to make any disposition of the slaves whatever, nor to change any investment directed by the will. It is to obtain the sanction of the Court, for the investment of a residuary trust fund, where no mode of investment has been directed by the testator. On this subject, we must rely on the opinion of the Commissioner, which seems well supported by the testimony.

To prevent future difficulty, it is proper to direct that the conveyance to the trustee, shall be on the trusts of the will. I do not mean that the terms of the will shall be adopted in the conveyance, for the same words have often a different effect, in a deed or a will, but that the will shall be referred to, and the trusts of the deed declared to be the same with those which are created by the will, with respect to the fund in question.

It is Ordered that the order of the Chancellor be reversed, and the report of the Commissioner confirmed and made the decree of the Court.

JOHNSON and O'NEALL, JJ., concurred.

J. J. Caldwell, for the petitioner.

1 Hill, Eq. 113

JOHN EIGLEBERGER, MARTIN KINARD, Sen., and ADAM KIBLER v. MICHAEL KIBLER, Sen., and DAVID KIBLER.

(Columbia. Jan., 1833.)

[*Fraudulent Conveyances* ⇐249.]

The right of a creditor to avoid a voluntary conveyance, arises from the fact that he cannot otherwise be paid; and if a creditor comes into Equity to avoid such a conveyance, it must appear that he had no other means of payment: Certain creditors, (the plaintiffs) with a knowledge of such conveyance, stood by and permitted other and junior creditors to exhaust the debtor's property, & meanwhile the donee had possession, and made permanent improvements on the land; on a bill filed to set aside the conveyance, held that they were not entitled to relief.

[Ed. Note.—Cited in Walker, Evans & Cogswell v. Bollmann Bros., 22 S. C. 528.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 736; Dec. Dig. ⇐249.]

[*Limitation of Actions* ⇐67.]

The statute of limitations runs from the discovery of a fraud.

[Ed. Note.—Cited in Parham v. McCravy, 6 Rich. Eq. 145; McGowan v. Hitt, 16 S. C. 612, 42 Am. Rep. 650; Suber v. Chandler, 18 S. C. 528.

For other cases, see Limitation of Actions, Cent. Dig. § 376; Dec. Dig. ⇐67.]

[*Fraudulent Conveyances* ⇐210.]

A subsequent creditor with notice, is not entitled to have a voluntary conveyance set aside.

[Ed. Note.—Cited in Walker, Evans & Cogswell v. Bollmann Bros., 22 S. C. 528.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 634; Dec. Dig. ⇐210.]

[This case is also cited in Smith v. Smith, 24 S. C. 315, relating to voluntary conveyances.]

The bill states that the plaintiffs, John Eigleberger & Martin Kinard, have lately obtained judgments for considerable sums against the defendant, Michael Kibler, on debts which were contracted as far back as 1816 and '18, and which have been, by successive renewals of notes, continued to the notes on which judgments were obtained.—That the plaintiff, Adam Kibler, also lately obtained judgment against Michael, for a large sum, which was founded in part on a debt contracted in 1816, by note transferred to this plaintiff and renewed to himself in

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1827; and the ba*lance of the judgment was for a note taken to indemnify him for his suretyship for Michael, for debts for which he has since been sued and judgments obtained against him. That Michael Kibler, in 1822, conveyed a tract of land to his son (the other defendant) David Kibler.—That he was then embarrassed—that the sale was voluntary, and intended to defraud the rights of subsisting and subsequent creditors—and that Michael has since become entirely insolvent. The bill prays that the conveyance may be declared fraudulent and set aside, and the land made liable for the payment of these debts.

The answer of David Kibler, admits that the conveyance to him was voluntary, but denies that it was intended to defraud creditors.—That his father, Michael Kibler, at the date of the conveyance, had the ability to pay all his debts, and has since become insolvent, from speculations and misfortunes.—That the plaintiffs well knew of the conveyance to him at the time it was made; and that they afterwards indulged the said Michael, and renewed his note, and permitted the defendant to remain in the possession of the land, and make permanent and valuable improvements on it; and submits whether these facts are not a good bar to the relief sought. The answer also relies on the statute of limitations, and insists that the plaintiffs have an adequate remedy at law. The bill was taken pro confesso, as to Michael Kibler.

The case came to a hearing at Newberry, Jnly, 1832. So much of the testimony as is necessary to a correct understanding of the grounds made and decided, is set forth by the Chancellor, in the following decree.

Johnston, Chancellor. "I will consider the cases of the three plaintiffs separately—first Eigleberger's. It is said he is not a real, but only a nominal plaintiff, that his name is employed by the sureties to the judgment held by him; this cannot vary the decree on his case. Those claiming in his name can claim no more by virtue of that name than he could himself. The rights of a nominal, are the measures of the rights of the real plaintiff who uses his name. The latter is regarded as an assignee. If the sureties have as sureties any equities, they must come

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into *Court in their own name to assert them. None of them but Adam Kibler has done so, and none except him can be noticed. But as his case as surety is distinguished from the case he sets up in the name of Eigleberger, it will not be confounded with it; it will be considered, when we come to examine the rest of the claim set up by him in his own name; at present we will confine ourselves strictly to the claim of Eigleberger. Eigleberger's demand consists, in law, of two judgments signed Nov. 24th 1830; one of which is founded on a note dated Sep. 23d 1828, and due at three days, and the other on another note, dated Jan. 13th 1829. The faces of his notes show him to be a creditor subsequent to the date of the deed to David which he seeks to avoid, and as a subsequent creditor he is not entitled to the relief which he seeks, because according to his own testimony, he became such creditor with full notice of the deed.—But it is said he is entitled to rank as a subsisting creditor. It is alleged that one of his judgments (the one to which Wicker and H. Kinard are sureties) resulted from a debt originating

at Shealy's sale. The proof of this ought to be clear. So far from it, however, if either of the judgments had such origin, there is as much evidence that it was the other judgment as this. There is no other proof of the allegation, than that old Kibler bought to an uncertain amount, at Shealy's sale, in 1817, and that his administrator transferred a note on him in 1823 to John Kibler jr. The date of the note, when it fell due, the consideration, whether it was an original or renewed note—all these things are left in uncertainty. How do we know that the note transferred to Jno. Kibler, arose at Shealy's sale? How do we know it bore date prior to the date of David's deed, December 18th 1822? If it arose out of Shealy's sale, and bore date before the deed, how does it appear that it was not the original note of 1817, and barred at the date of the deed? And if so, if the note which is made the ground of relief for Col. Eigleberger, was barred at the execution of the deed, must not the right to the relief

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itself fall to the ground? I *think so. Here is a fit place to express an opinion as to the effect that old Kibler's acknowledgment of debts, made subsequent to the deed, should have on David to whom he had conveyed. The utmost that any one could contend for, would be, that such subsequent acknowledgments by old Kibler, would, if made bona fide and not collusively, be good to keep alive a demand which was at the date of the conveyance in full force, either on its face or by virtue of prior reviving promises. That as to all subsequent bona fide acknowledgments, such effect would be no injustice to one who taking as a volunteer, took subject to the existing debts; and as between the donor and donee, the latter became from the date of the gift, the trustee of the former, to pay off the incumbrances with the property received; and thus a priority would exist between them, even after the conveyance, sufficient to bind the donee, by the acts of his trustee, if not fraudulently done. Be this as it may, there is no necessity to express an opinion upon it. On the other hand I hold, that David is not bound by any acknowledgments made by his father after the deed, of any debt then barred. My positions then are, that there is not evidence tracing Col. Eigleberger's debt back beyond 1823. That if the evidence does trace it back further, it indicates no time, at which we can say with any confidence that the note transferred to John Kibler had its origin, unless we connect it with Shealy's sale, and then it was barred at the date of the deed—that there is no evidence of any reviving promises before the date of the deed, and if there was, no time is assigned to them; so that even after that, the bar might have been complete, at the date of the deed; that if barred, when the deed was executed, no subsequent act or admission of old Kibler could revive the debt so as to bind David. That Eigleberger being barred on the contract, is incidentally barred of the relief he claims. But I go further, I think he is barred directly as to the relief. Grant that his debt originated before, and was in full force at the date of the deed. Grant further, that the note was in full force, when transferred to John Kibler in 1823.—If Eigleberger goes back to 1823,

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to claim the benefit of *the rights which John Kibler then had, he must put himself in his shoes, and be subject to his disabilities. The act of limitations runs from notice of the fraud. That which is here charged as a fraud, was known to John Kibler in 1822, when he witnessed the deed; and he had notice further when David took possession in 1824. There is still another ground upon which Col. Eigleberger must fail, whether he be regarded as a subsequent or subsisting creditor. It is, that he has full remedy at law. It does not appear, either by the bill or by the testimony that (whatever may be the case with old Kibler) his sureties are not very solvent, and that a fi. fa. or ca sa. will not make the money.

Next, Kinard's case.

This stands on a judgment confessed May 21st 1832, upon a note executed by old Kibler, on the 10th of the same month.

David had been upwards of eight years in possession, with a notorious claim, and his deed had been nearly two years on record; taking things in this situation, Kinard is a subsequent creditor with notice. But in this case, as in Eigleberger's, an attempt is made to trace back the debt, and to show that Kinard was a subsisting creditor at the date of the deed to David Kibler. The proof ought to be plenary; it is very loose—the first step carries us back to a note executed the 1st February 1828, and due at three days. The next, by very flimsy testimony, carries us to what one of the witnesses thinks was a note dated December 26th 1823, and due at three days. Can we go further? The witness says, that note was the renewal of another, of which Kinard retained possession. It was then in his power to produce it, and the verbal proof of its contents, date &c. is competent. The notes produced have no connexion, so far as was shown, with the judgment. The proof then at most, goes no further back than 1823. As to what David Kibler says in his answer, that he had been told that a small part of Kinard's debt was contracted for current expenses, but that he did not know how the fact was, that cannot oper-

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ate as an admission of the *fact. The remarks on Eigleberger's case, touching the bar, both as to the notes and the fraud, will, with modifications which will readily suggest themselves, apply to this case. There was no proof of the credits endorsed on the supposed notes of 1823.

There is another matter; Kinard had surety for his demand. There is no proof that when he relinquished it, it was not available. Can he, after such waiver and relinquishment, hold David's land liable to, and as it were, security for his debt? I doubt it. The testimony of Jacob Kibler has thrown suspicion on this claim. It surely was competent for Kinard to say, whether he held a demand on old Kibler or not. He said he had none. Can it be, that Adam Kibler and his father, after all was settled, raked it up without Kinard's knowledge? Come from what quarter it may, I cannot on the testimony support it.

Now for Adam Kibler's case.

The testimony of Jacob Kibler and Levi Cook shews, that Adam, in 1828, received pay for, and gave up to his father, the note for which the $700 note is substituted. I mean that he received pay for the note he alleges originated at Feller's sale. Circumstances corroborate their testimony, even if they were not, as they are, men of character.—When Adam took the $1,102 note, on the 6th of March, 1832, why did he neglect the other demand? He took the large note for his indemnity, and if the $700 demand would stand in need of renewal in nineteen days afterwards, (it was renewed the 25th) why was it omitted when the large note was taken? Its being omitted then, and renewed in so short a time afterwards, makes the renewal look like an afterthought. I have no doubt it was settled; and why, unless for fraud, was it revived? I cannot support that part of this case. But he says he has had to pay, and is liable to pay, large sums for his father, as surety. Is it not plain that he became surety with his eyes open? Among the persons to whom he became surety, is David Kibler.—He now wishes to make David's own debt liable to pay the debt to himself. This

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would be an extraordinary way *of giving a man security. His becoming security with his eyes open, is enough for his case. But, not to rely on that, he holds an ample indemnity against these securityships in his own hands. He stated to Levi Cook that, after giving his father the Feller's note for his land, he still owed his father a balance, for which he gave him his note. He stated the same thing to Jacob Kibler, on two occasions; and that the note for the balance was either $500 or $600.—take it at the lowest of these sums, and he owes his father more than enough to indemnify him for the balance on his own small judgment, and for what he is liable to Eigleberger, David Kibler and Jacob Kibler, and for what he has had to pay on Herbert's judgment, to say nothing of the four or five bales of cotton he sold last year."

The bill was dismissed with costs, and as among the plaintiffs, Adam Kibler was made primarily liable.

From this decree the plaintiffs appealed on the following grounds:

1. That the debts being in existence at the time of the conveyance of the land, the plaintiffs are to be regarded as subsisting creditors at that time, and entitled to relief against it.

2. That the acknowledgment of the notes by Michael Kibler, would prevent them from being barred by the statute of limitations.

3. That the Chancellor erred in deciding that the statute of limitations barred the plaintiffs' right to relief, after four years from the discovery of the fraud.

4. That the Chancellor erred in deciding that the acts of Michael after the conveyance, could not affect the rights of David Kibler.

Dunlap & Summer, for the appellants.

Caldwell & Fair, contra.

O'NEALL, J. The cases of Eigleberger and Kinard may, it appears to me, be put on the same ground. For, although I concur with the Chancellor, that there was not sufficient evidence of the existence of their debts, at the execution of the deed to David Kibler,

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yet I will concede to them all *that they can ask—that their debts were prior to the accrual of the defendant's right, and still I think they are not entitled to recover. The right of a creditor to avoid a voluntary conveyance, where the possession is in the donee, arises from the fact that he cannot otherwise be paid out of his debtor's estate. It is, hence, a fraud on his rights, and is therefore, as against him, void. But if a creditor should seek to set aside, in this Court, a voluntary conveyance, and it appeared that his debtor had other property, he would be compelled first to exhaust it. This is upon a first principle of Equity, "that he who seeks equity must first do equity." In the application of this principle, we are required to ascertain what would be justice between the parties: and surely there can be no injustice to a creditor, to say to him, "be paid out of that property of your debtor, to which no other person has any claim." If he is paid, it is all that he has any right to ask. In the cases before us, the creditors, with a full knowledge of the conveyance to David Kibler, and his actual possession, have stood by for near ten years, and have suffered others debts, junior to theirs, to acquire prior liens, and the estate of their debtor thus to be consumed. If they has been vigilant, and within any reasonable time after David went into possession of the land, had made the claim to avoid the conveyance, they would have been compelled to exhaust the rest of their debtor's property, before they could have resorted to that conveyed to him, and out of this property of their debtor's, they would have been satisfied. By their supineness, this fund has been taken from them, and they cannot now be permitted

to make their own laches an injury to another. During the time the defendant David has been in possession, he has made many valuable improvements, and this constitutes another reason why the acquiescence of the complainants, for so many years, in his title, must prevent them from now disputing it.

Were it necessary for the purposes of the case, I should have little hesitation in saying that each renewal of the debt, and taking a new security, was a satisfaction of the antecedent one, and that these renewals could

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not operate *to keep in existence, a charge on the land which had been previous to them, conveyed away, and the possession of which had accompanied the deed. So too, I incline to the opinion, that the defendant is protected by the statute of limitations. The statute runs from the discovery of a fraud; and the relief sought is not to recover the land, but to be paid a debt out of it. It is in the nature of an action of deceit. The injury of which the creditor complains, is, that by the fraud of his debtor, he cannot be paid. This is purely a personal, and not a real action; and the statute runs from the discovery of the fraud, as the accrual of the cause of action, and at the expiration of four years, its bar is complete.

As to the case of Adam Kibler, it cannot admit of a question, that he is not entitled to recover. If he is a creditor at all, he is a subsequent one with notice, and as such can have no ground upon which he can say, that the gift is a fraud as to him. But independent of this conclusive objection to his recovery, then is another equally conclusive: all the right of property of Michael Kibler, and the actual possession, had passed from him to his donee, long anterior to the debt to Adam Kibler; he can therefore have no ground, either legal or equitable, on which he can found a claim for relief.

It is Ordered and decreed, that the decree of the Chancellor be affirmed.

JOHNSON and HARPER, JJ., concurred.

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1 Hill, Eq. *122

*JOHN CHESNUT and Wife and Others v. JAS. STRONG and ROBERT STRONG, Executors of John Maybin, Dec'd.

(Columbia. Jan., 1833.)

[*Wills* ⇐630.]

A residuary bequest to be paid when the legatee arrives at twenty-one, gives a present vested legacy, & the legatee will be entitled to the profits or interests (if any accrue) in the interval between the testator's death and her attaining twenty-one.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464–1480, 1486, 1487; Dec. Dig. ⇐630.]

[*Evidence* ⇐441; *Executors and Administrators* ⇐104.]

The testator, by his will, directed the remainder of his estate to be sold, and the proceeds to be equally distributed among his granddaughters, and adds "I allow my under-named executors to retain the aforesaid children's parts in their hands, until the children arrive at maturity;" On a bill filed against the executors to account, it was held, that parol evidence was admissible to shew that the executors retained the legacies in their hands without making interest on them, in consequence of an agreement with the testator that they should not be bound to invest the fund or make interest, nor be chargeable with interest on their failure to do so; & that they accepted the executorship on that condition.

[Ed. Note.—Cited in Dunkin v. Dent, 5 Rich. Eq. 13.

For other cases, see Evidence, Cent. Dig. § 2031; Dec. Dig. ⇐441; Executors and Administrators, Cent. Dig. § 423; Dec. Dig. ⇐104.]

[*Release* ⇐8.]

Where there is something certain due, & there is a doubt whether the creditor may not be entitled to something more, and he thinks proper to accept what is certainly due & give a receipt in full, he is bound by it, notwithstanding it should afterwards turn out that he was entitled to more.

[Ed. Note.—Cited in Clarke v. Jenkins, 3 Rich. Eq. 339.

For other cases, see Release, Cent. Dig. § 8; Dec. Dig. ⇐8.]

[*Wills* ⇐681.]

[It is always intended that an executor takes, under a bequest to him, as trustee, unless the intention to give him a beneficial interest is plainly expressed.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1613; Dec. Dig. ⇐681.]

The testator's will, after certain specific devises, proceeds, viz: "And likewise the remainder to be equally distributed between Sarah, Jennet, and Margaret Maybin, daughters of Andrew Maybin: and I allow my under named executors to retain the aforesaid children's parts that I have herein bequeathed to them, in their hands, until the children arrive at the years of maturity, &c:" and then directs a sale of his whole real and personal estate. The defendants qualified as executors, and sold the estate as directed. The legatees in the above clause, married, and they and their husbands filed this bill against the executors for an account.

The Commissioner made a report, in which the defendants were charged with considerable balances and interest thereon, as to two of the legatees; and as to the other, Mrs. Thompson, he reported in favor of the defendants, on the ground that in 1827, her husband had given a receipt for $1087 in full of his wife's legacy, although if interest had been computed, a much larger sum would have been due.

The case was heard at Chester, July 1831. On the trial, the defendants insisted that they were only chargeable with such interest as they had made; and tendered parol

evidence to prove an agreement with the testator, that they were not to be charged with interest on these legacies, and that they had qualified as executors expressly on this condition. The evidence was rejected, and the following decree delivered.

Johnson, J. (sitting for Chancellor Johnston.) It is objected on the part of the defendants, that the complainants are not entitled to the interest which accrued in the interval between the death of the testator, and their attaining maturity or twenty-one years of age.

It is obvious that this question must be resolved by the enquiry whether the testator

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has disposed of the interest, *growing out of this part of his estate. For it is only in the event of his not having done so, that the law makes any disposition of it. There is certainly no specific disposition of it in the will, but the remainder is devised to the complainants, and if no one else can claim, of course they are entitled.

If there is no disposition of the accruing interest or profits, they fall necessarily into the residuum of the estate, and must go with it according to the will, if there is any disposition of the residuum, or be distributed according to our act of distribution, as in case of intestacy. And in the case of Nichols and Osburn, 2 P. W. 419, cited in 2 Roper on Legacies 212, it was held upon very clear principles, that when the residue is so given, as not to be payable until the legatee attained twenty-one, with a limitation over in the event of his dying within that period, that the accruing interest should go to his legal representatives and not to the remainder; and that too, in the case of a niece and not a child, which seems to be an exception.

The objection has been attempted to be sustained upon the authority of the general rule, that legacies payable at a future period, or the happening of some contingency, would not carry interest; and there is no doubt about the correctness of the rule. That is not, however, a new, or arbitrary rule, but the result of a construction by which the testator's intention is attained. If a legacy be to one of a certain sum, when he shall attain the age of twenty-one, we understand that the testator meant what he expressed—that the legatee should have that much at that time, and not in addition what may have accumulated upon it in the form of interest, or the profits of a fortunate investment; and even in those cases, an exception is allowed in favor of a wife or child who has no other provision for support, founded on the supposition that a husband or father would not will that his wife or child should starve, ad interim, (2 Roper 182 4 6, and the cases there cited.)

The parol evidence tendered by the defendants to prove an agreement between

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themselves and the testator, that *they were not to account for the interest on these legacies, and that they positively declared to him their determination not to qualify, unless they were exempt from this accountability, cannot be received, upon the very familiar rule that the terms of a written trust cannot be varied by parol.

The will creates a direct trust in the defendants to retain these legacies until the legatees shall attain maturity, and the obligation raised by law is, that they should employ the fund, so as if practicable, to make a profit for the legatee. By qualifying, they have accepted the trust, and necessarily undertook to fulfil it; nay, more, they have sworn to do so, and the evidence offered, is intended to shew not only that the testator by his will, gave them the use of this fund during the minority of the legatees, contrary to his intention plainly expressed in the will, but that they did not undertake to do what they have solemnly sworn they would perform.

It is therefore referred to the Commissioner to state the defendants' accounts, charging them with interest on these legacies, according to the principles of this decree.

From this decree the plaintiffs Thompson & Wife appealed, on the ground, that the Commissioner and Chancellor had rejected their claim; and the defendants appealed on the grounds:

1. That by the terms of the will the executors are entitled to retain the legacies in their hands, free of interest, until the legatees arrive at maturity.

2. That the Court rejected the parol evidence offered to shew the terms on which the defendants undertook the trust; the plaintiffs' right to interest being at best but an equity, and as such, liable to be rebutted by parol.

[For subsequent opinion, see 2 Hill, Eq. 146.]

Clarke & McCall, for the defendants, argued that the will authorized the executors to retain the legacies in their hands, and gave them the use of the fund, until the legatees reached maturity; that interest is a mere equity, and formerly was not charged against trustees, except where they made it; that parol evidence is admissible in this

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case, *to rebut the equity, or in aid of a doubtful construction of the will, or to repel a legal inference; and at most, that by the terms of the will the legacies not being payable until the legatees arrive to twenty-one, did not bear interest until after that time. They cited and relied on the following authorities: 3 Bacon, Tit. Legacy B. 446; 2 Bro. Ch. Rep. 500; 1 Swinburne, 358; Harp. Rep. 42; 12 Ves. 386; 1 Eq. Rep. 193; 6 Ves. 324, 397; 7 Ib. 228; 2 Fonb. 475; Amb. 126; 2 John. Ch. 614; 3 Ves.

13,282; 4 Ib. 1; 1 M'C. Ch. 456; 2 Dallas, 171; 1 John. Ch. 231; 2 Roper, 545–6; 3 John. Ch. 369; 5 Ib. 68; Roberts on Frauds, 10, 11.

Williams, contra.

HARPER, J. We agree with the presidlng Chancellor, upon the effect of the bequest in the residuary clause of the testator's will. It would not have the effect of giving beneficially to the executors, the interest on the legacies, until the legatees should attain the age of twenty-one.—The case of Nichols v. Osborne, is sufficient authority for this purpose, and there are many others to the same effect. The case is stronger against executors in this country than in England. Under our statute of distributions, it is always intended that the executor takes as a trustee, and not for himself, unless the intention to give him beneficially, be plainly expressed. The bequest of the residue to the testator's grand daughters, gives a present vested legacy, and the direction that it shall be retained in the hands of the executors till they attain the age of twenty-one, only fixes the time of payment. It is debitum in presenti, solvendum in futuro.

We agree also, with the Chancellor, that parol evidence was inadmissible to shew that the testator intended the executors to take this interest. That would be to alter and add to the will. But as now explained in argument, we understand the parol evidence to have been offered for a different purpose—to shew that the executors did in fact retain the legacies in their hands, without making interest on them, and that this was in consequence

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*of an agreement or understanding with the testator, that they should not be bound to invest the fund or make interest, nor be chargeable with the interest upon failure to do so, and that they accepted the executorship on that condition. For this purpose we think the testimony was admissible. It was not to add to, or in any respect alter the terms of the will, but to excuse themselves for having failed to make interest. This Court habitually receives evidence to shew that there were suits depending against an estate, and that the executor retained funds unemployed in his hands, to meet the demands which might be established, to excuse him from the payment of interest. In the case of Breure v. Pemberton, 12 Ves. 386, the Court refused to charge an executor with interest, on the ground that he acted fairly, under the belief that the balance in his hands belonged to himself as commissions, as in fact it would have done if he had charged commissions properly in his accounts from time to time. If the defendants in this case did have such an understanding with the testator, and accepted the office of executor upon such condition, I think it quite as good an excuse.

The charging of an executor with interest on balances in his hands, is a creature of this Court, and it is by comparatively modern decisions that the doctrine has been fully established. But it is a general rule that parol evidence may be received, to rebut an equity. The distinction between receiving parol evidence for the purpose of altering or explaining a written instrument, and for the purpose of rebutting an equity, is very fully considered in the case of Townsend v. Stangroom, 6 Ves. 328, and Rich v. Jackson, in a note to that case. The first was a bill for the specific performance of a contract to lease.—The Chancellor admitted parol evidence to shew, that the intended lessee knew at the time of the agreement, that part of the lands described in it had been leased to another person. He could not execute any other agreement than that which the parties had entered into; the evidence was received to rebut an equity—to rebut the right to a specific performance, and on it the bill was dismiss-

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ed.—*On this ground, the Court will not execute an agreement under seal, which has been rescinded by parol. Yet such an agreement cannot be discharged by parol, but the plaintiff's equity is rebutted. In Rich v. Jackson, the Chancellor says in allusion to the cases on the subject, "none go further than this, in the decisions and rules laid down; that parol evidence of the conduct of the parties, the manner of conducting the transaction, the unfairness and hardship, may afford a good ground to leave the party in the condition in which he put himself at law, to make what he pleases to make of it, but ought not to make this Court give him any aid." There are other cases proceeding on the same principle of receiving parol evidence to rebut an equity; as to rebut the presumption that an executor is not intended to take the residue, when a legacy is given him, &c. If in consequence of such an understanding with the testator, and believing that the will provided for their doing so, the defendants were induced to accept the office of executor, and retain the fund in their hands without making interest, it would be a case of great unfairness and hardship now to charge them with interest, and I think the complainants, volunteers under the testator, are not entitled to the aid of the Court for that purpose. Of course I can say nothing of the effect of the testimony which is to be produced. But if the defendants should be able to give such testimony as they propose, it will be much strengthened by the terms of the will, which seem to point to such an understanding, though they are not sufficient, of themselves, to express it. Of course the defendants must account for any interest which they have actually made.

With respect to the complainants' ground of appeal, nothing appears but what is stated in the Commissioner's report—the simple fact that the complainant J. V. Thompson did

receive from the defendants the sum of $1087, equal to the principal of the legacy, and give a receipt in full.—It is said that a receipt may be contradicted or explained by parol testimony, a receipt being only a written admission of a previous fact; and if the fact

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be not true, the *party is not estopped by his admission: (see the cases referred to in the American edition of Philips' Ev. 74.) A receipt is certainly evidence against a party, and in general conclusive evidence. But supposing that a mistake may be shewn, I am not aware that any has been shewn in the present instance. The error or mistake is supposed to have been, in admitting the $1087 to have been in full of the legacy, when in fact he was entitled to interest on it besides. That is a matter still doubtful. If a person having a claim against another, thinks proper to forgive the debt, and with this view executes a receipt, this will bind him. It is a gift executed, and cannot be recalled. So, if he receive part of his demand, and give a receipt for the whole. In Martin v. Mowlin, 2 Burr. 979, Lord Mansfield seems to take for granted, that even a mortgage debt may be forgiven by parol; and in case of a bond, where a less sum than the bond was conditioned for had been paid, Chief Justice Marshall said, that although the jury were satisfied in fact that it was not, yet in law they ought to presume that it was, fully paid —5 Cranch, 11. The case seems to me to be still stronger where there is something certain due, and there is a doubt whether the creditor may not be entitled to something more, and he thinks proper to accept what is certainly due, and gives a receipt in full. Such appears to be the present case, and I think this complainant must be bound by his receipt. With respect to the rest of the complainants, it is ordered, that the case be remanded to the Circuit Court, for the purpose of receiving the evidence, and being heard and determined.

O'NEALL, J., concurred.

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1 Hill, Eq. *129

*ROGER LOVELAND and ROBERT WILSON v. JAMES MANSELL and SAMUEL REID, Sheriff.

(Columbia, Jan., 1833.)

[*Execution* ⟸249.]

A tract of land being under levy, the defendant (in this case) had agreed with the debtor and creditor to purchase it at a fair price, and the sheriff was instructed not to sell; and in consequence of this agreement neither creditor nor debtor attended on sale day, and the land was sold by the sheriff & purchased by this defendant at an under value, whereby the debt was endangered: On a bill filed for this purpose, the sale was set aside.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 697; Dec. Dig. ⟸249.]

The bill states, that the plaintiff Wilson being indebted to the plaintiff Loveland and others, a tract of land belonging to him, in Pickens District, of 250 acres, was levied on by virtue of Loveland's execution, and advertised for sale on the first Monday in July, 1829; that pending the levy, the plaintiffs made a contract for the sale of the land to the defendant, Mansell, for $500; and the sheriff Reid was directed not to sell in July, but to continue the advertisement after that, and not to sell unless Loveland or his agent was present.—That on the sale day, in August, Wilson attended at Anderson Court House, according to an understanding with Mansell, in order to remove some difficulties in the title to the land, which was soon after to have been executed.—That, notwithstanding the instructions to the sheriff, and in the absence of the plaintiffs, the land was sold by the sheriff on that day, and purchased by Mansell, for $131. The bill avers, that Loveland's debt is endangered by the sacrifice of the land, and prays that the sheriff's sale may be set aside, and the contract of sale with Mansell specifically enforced.

The answer of Mansell admits the purchase at sheriff's sale, and his parol agreement to purchase the 250 acres at $500; but alledges that this agreement was made in consideration that a mill-tract of 80 acres, which he had purchased of Wilson and received titles for, but which he had failed to record, should be exempt from the lien of Loveland's execution, which, although junior to the title had been levied on this tract. —That, being surprised to learn that his tract of 80 acres was advertised for sale, and no tender of titles for the 250 acres being made, he was induced to believe that the plaintiffs did not intend to perform their contract; and that his tract of 80 acres was actually sold under Loveland's execution, on the sale day in September following. He denies that he knew of any instructions to the

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Sheriff Reid, or that he had any com*munication or acquaintance with him until after the sale of the 250 acres.

The sheriff, in his answer, admits the levy and advertisement, as stated in the bill; and that he was directed not to sell in July, unless Loveland or his agent was present. That, receiving no further instructions, and not knowing of any arrangement between the parties, he sold in August. He had no communication or acquaintance with Mansell until after that sale.

The case came to trial at Pickens, July 1832, and the following facts appeared in evidence:

In the year 1829, the land of Wilson being then under the levy of Loveland's execution, and Mansell being apprehensive that a tract of 80 acres which he had bought, was also

subject to the lien of this execution; it was agreed between Mansell, Loveland and Wilson, (by his agent Dunham) that Mansell was to give his note to Loveland for $500, when a good unincumbered title was made to him, and that Loveland should satisfy his execution. Dunham, the agent of Wilson, also held another junior execution against him; and it was then agreed, that Dunham should attend at Anderson, on the sale day in August, and effect a sale of Wilson's property to satisfy his execution, and thus disencumber the land, so as to leave the agreement in relation to it, to be executed. In order that the agreement might be carried into effect, Loveland wrote a letter to the sheriff Reid, stating that an arrangement had been made concerning the land, and directing him not to sell it, but to continue the advertisement. This letter was read to Mansell, and afterwards sent to the sheriff, before sale day. On Saturday previous to the sale day in August, Wilson, Mansell and Dunham being present together, Wilson stated that there was property levied on and to be sold at Anderson, on next Monday, sufficient to satisfy Dunham's execution, for which purpose they would attend at Anderson, and that Mansell should get titles to the land the next week; and so it was agreed. Wilson and Dunham accordingly attended at Anderson Court House, and had Wilson's execution satisfied. Mansell being

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advised, as it seems, by a *message from some one, through his son, that his land was to be sold, attended Pickens on the sale day in August, when the sheriff, either having forgotten the letter, or misconstruing its contents, exposed the land to sale, and it was purchased by Mansell at $131. Mansell, on this occasion, forbid the sale of the 80-acre tract. It was sold on the sale day in September following, by the order of Dunham. Mansell did not apprise the sheriff of the arrangement with Wilson and Loveland, but he told others, both before and at the sale, that he had contracted for the land; and the sheriff testified, that if he had been apprised of the arrangement, he would not have sold. Dunham procured a title deed from Wilson to Mansell, on the Tuesday after sale day, but on hearing of the purchase at sheriff's sale, did not tender it immediately, nor for a month or two after, when Mansell refused to accept it.

JOHNSTON, Chancellor. I have come to the conclusion, that the plaintiffs are entitled to a decree.

I do not think they are entitled to a specific performance of the contract alledged in the bill, and proved on the trial: the statute of fraud stands in their way, and there has not been proved such performance, as to take the case out of it. But it will not be permitted to the defendant Mansell, to take advantage of an absence of the parties interested, produced by his bargain, to violate that bargain to their injury.

The testimony of Dunham and Osborne, shews that he knew that the sheriff was instructed by letter to suspend the sale. The testimony of Dunham, Holcombe, Osborne and Hunter, shews that he had agreed to purchase the larger tract, and the terms of the contract; Dunham and Holcombe shew, that he knew that in consequence of the bargain he had made, Dunham and Wilson would be at Anderson, and of course absent from Pickens on the sale-day in August. Now grant that the sheriff had not received the letter, or misconstrued it, and that in consequence of this, he, by a mistake on his part, and in perfect innocence, put up the

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land for sale; did not Mansell *know his bargain? did he not know that Wilson and Dunham, on account of that very bargain, were absent? Did he not know, that but the Saturday before he had told two substantial men at least, if not others, that he had bought, and thus, by possibility prevented their attendance as competitors at the sale? Under these circumstances did he ask the sheriff why he proceeded to sell? Did he ask him if he had received the letter? Did he tell him of the bargain, which, as he answers, would have effectually stopped the sale? Was he at liberty to withhold this information, and become a purchaser? He told others at the sale, and just before it, that he had contracted for the land, a thing very well calculated to prevent them from bidding against him; but said nothing to the sheriff to prevent the sale itself. When he forbid the sale of the eighty acres, why did he keep his mouth shut upon these other matters? A word from him would have been sufficient; and if it had not, he would have been free from blame. But he did not utter a word.

It is said he was under an impression that a trick was intended by the other parties. This may be so. But from the evidence, we see nothing to justify his suspicions.—There appears but little ground for his taking up such suspicions, from what his son told him the evening before the sale. He told him his land (the eighty acres) was to be sold. He knew before that it was levied on, and advertised.

But if he did entertain such suspicions, if they were excited for the first time by what his son told him; was he at liberty to proceed upon mere suspicion, in a way which would work a fraud upon others, if his suspicions turned out, as they have turned out, to be groundless? Ought he not to have enquired of the sheriff? Ought he not to have informed him of the real state of the facts? If he had done this, he would have discharged his duty. He would not have been liable to the imputation of an improper suppres-

sion of the truth. And he would have stood justified in purchasing.

There is one point of some difficulty, in the

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way of *the plaintiffs. The deed was not tendered to Mansell until after the smaller tract had been sold. On reflection, I am under the impression this cannot avail Mansell. If the plaintiffs had insisted only on a specific performance of the bargain (putting the statute out of the question) the tender of the land would have been indispensible. But as they go also for setting the sale aside, and of course in that point of view, do not claim the benefit of the bargain, I think they are entitled to it, without tendering the deed as a prerequisite condition.

There is another matter in the way of the plaintiff Loveland. It is insisted that the sale of the eighty acres was a waiver of his rights under the bargain or arising in consequence of it. But he did not order that sale, and there is no evidence that Dunham had any authority from him to order it. He is not, therefore, to be injured by it.

I think Loveland is entitled to relief, by having the sale of the two hundred and fifty acres set aside.—As things stand, the sale was a fraud on him, and as Wilson is insolvent, he will be without redress unless the sale be avoided. To this, Mansell can have no just objection, if his money be refunded with interest. I will not set aside the sale of the smaller tract, but will order the sum which it cost Mansell, in consequence of its sale by the sheriff, to be refunded him out of the proceeds of the resale of the larger tract, if so much remain after satisfying Loveland's execution.

It is decreed that upon the plaintiff Loveland's paying or tendering to the defendant, Mansell, within two months from this time (or within two months after the final decision of this case, in the Court of Appeals, if an appeal be taken) the amount which he paid at the sheriff's sale, for the large tract described in the pleadings, together with the costs of the sheriff's deed, and interest on those sums from the time he paid them, to be ascertained by the Commissioner, the sale thereof to him, by the sheriff, and his title thereunder, be set aside: and that the sheriff of Pickens, do thereupon proceed to duly ad-

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vertise and sell the *said tract of land, under the execution of Loveland; and that if, from the proceeds thereof, enough remains, after satisfying such execution, to repay to the defendant Mansell, the sum which he has been obliged to pay in consequence of the sale by the sheriff, of the smaller tract (including costs of conveyance) with interest thereon, to be ascertained by the Commissioner, the same be paid over to him; otherwise, that it be paid to him by the plaintiff Wilson, for which this is to be considered as a decree. The defendant Mansell, to pay the costs of this suit.

But if the plaintiff Loveland, shall not within the time above prescribed, pay or tender to the defendant the sums above prescribed, as a prerequisite for setting aside the sale of the larger tract; in that case it is decreed, that the bill stand dismissed with costs, to be paid by the plaintiffs.

From this decree the defendant Mansell, appealed.

Burt, for the appellant.
J. N. Whitner, contra.

PER CURIAM. We concur in the views taken of this cause by the Chancellor, for the very satisfactory reasons contained in his decree. It is therefore affirmed, and the appeal ordered to be dismissed.

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT CHARLESTON, IN APRIL, 1833.

JUDGES PRESENT.

HON. DAVID JOHNSON, Presiding Judge.
" J. B. O'NEALL.
" WM. HARPER.

1 Hill, Eq. *135

*JAS. R. PRINGLE and Others, Trustees of Mrs. Cleary, v. WM. ALLEN.

(Charleston. April, 1833.)

[*Husband and Wife* ⟸8; *Life Estates* ⟸6.]

Where a settlement of certain negroes was made to the use of husband and wife during their joint lives, and to the use of the survivor, with a limitation over; it was held, that upon the death of the husband, a legal estate vested in the wife for life, which was subject to levy and sale under execution; but that the purchaser at sheriff's sale, should before delivery, give bond and security for the forthcoming of the property on the termination of the life estate.

[Ed. Note.—Cited in Ford v. Caldwell, 3 Hill, 250; Cleary v. McDowall, Cheves, 142; Pyron v. Mood, 2 McMul. 295, 296; Burnett v. Rice, Speers, Eq. 580, 589, 42 Am. Dec. 336; Ioor v. Hodges, Speers, Eq. 601.

For other cases, see Husband and Wife, Cent. Dig. § 24; Dec. Dig. ⟸8; Life Estates, Cent. Dig. § 18; Dec. Dig. ⟸6.]

The defendant William Allen, recovered a judgment against N. G. Cleary, sued out a *fi. fa.*, and delivered it to the sheriff of Colleton District, who seized two negroes, and was about to sell them to satisfy the debt, when the trustees of Mrs. Cleary filed this bill for

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an in*junction—alleging that the negroes belonged to the trustees. The defendant answered, denying the equity, and insisting that one of the negroes was not connected with the trust at all, and that the life estate of Mrs. Cleary in the other was liable to seizure and sale.

At the hearing, it appeared that one of the negroes was not in the settlement; and the injunction as to that slave was dissolved. As to the other slave, it appeared that she was subject to a trust of a settlement, whereby a large number of negroes were conveyed to trustees, for the use of Samuel C. Graves and Susan M'Pherson his intended wife, now Mrs. Cleary, during their joint lives, and to the use of the survivor for life—and after the decease of the survivor, to the issue of the marriage. Samuel C. Graves died, leaving issue, and the negroes never were in the possession of the trustees.

The Chancellor continued the injunction as to these negroes, and ordered that the plaintiff's debt should be paid out of the income, and if not paid by January following, that a receiver should be appointed.

From this decree the defendant appeals, and insists:

1. That a life estate in negroes is liable to execution at law, and that it makes no difference whether the same be created by deed or will.

2. That the Court does not sit to force upon a creditor who has a right to a common law execution, the unwelcome and inadequate process of this Court, for the attainment of the same object.

JOHNSON, J. Upon looking into the case of Dr. Francis Porcher v. Sarah B. Gist, [Rich. Eq. Cas. 209,] decided here at the last sittings, I find that this case runs all fours with it. There, as in this, the settlement was to the joint use of the intended husband and wife for life, then to the use of the survivor for life, and on the death of the survivor to the use of the issue of the marriage; and it was held that upon the death of the husband, a legal estate vested in the wife for life, which was liable to be levied on, and sold un-

der *fi. fa.* against the wife. The decree of the

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*Circuit Court must therefore be reversed, and the injunction set aside and dissolved, and it is so adjudged and decreed.

In Cordes and Ardrian (vide post, 154), decided during the present sitting, an order was made in the Circuit Court, that the purchaser, at sheriff sale of a life estate in slaves, should give bond and security that they should not be carried out of the State, and that they should be forthcoming at the termination of the life estate; and without some security of this sort, it is apparent that the interest of those entitled in remainder would be jeopardized, particularly on sales by the sheriff, who must sell to the highest bidder whatever may be his character or responsibility. It is, therefore, so reasonable and necessary, that we think it should be provided for, in every case. It is therefore Ordered and decreed, that upon the sale of the negroes taken in execution, at the suit of the defendant Allen, the purchaser shall, before delivery, enter into bond to the Commissioner of the Court, with good and sufficient security, to be approved by the Commissioner, in an amount equal to double the value of the negro or negroes, conditioned that the said negro or negroes shall not be carried or removed out of the State, and that they, if alive, with the increase of the females, shall be forth-coming at the termination of Mrs. Cleary's life estate —costs to be paid out of the sales.

O'NEALL and EARLE, JJ., concurred.[a]

[a] Harper, J., being absent during a part of this Term, Mr. Justice Earle sat in his place.

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1 Hill, Eq. *138

*JOHN J. GREEN v. A. ALEXANDER and Others.

(Charleston. April, 1833.)

[*Execution* ⟸354.]

Where a debtor had been arrested under a ca. sa. and admitted to the benefit of the prison bounds act, from whence he made his escape; Held, that the plaintiff might afterwards take out a fi. fa.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1077; Dec. Dig. ⟸354.]

Quere.—Ought not the fact of the escape to be ascertained in some judicial form before the issuing of the fi. fa? See Aiken v. Moore, 1. Hill's Rep. 432.

Bill for injunction.

On the 23d of April 1824, the defendant obtained a judgment against the plaintiff, upon which a *fi. fa.* was issued, and subsequently a *capias ad. satisfaciendum*; under the latter the plaintiff was arrested, and having given the necessary security, was admitted to the benefit of the Prison bounds. After remaining for some time in the bounds, the plaintiff broke them, and went at large. Some time in 1832, the defendant, under an *alias fi. fa.*, levied upon the real estate of the plaintiff, and advertized the same for sale, to prevent which the present bill was filed.

The cause was heard at Georgetown, before Chancellor Johnston, Spring Term 1832, who dismissed the bill.

From this decree the plaintiff appealed.

1. Because the arrest under the *ca. sa.* at law, exempted the property of the defendant (in the execution) from levy.

2. Because the defendant (the present plaintiff) having been arrested by a *ca. sa.*, and made an escape, the plaintiff (at law) should have proceeded under the act of the legislature, either to retake the body, or to sue on the bond.

Cohen, for the appellant, cited P. L. 457, sec. 11; Mairs v. Smith, 3 M'C. 52; Cohen v. Greer, 4 M'C. 509. 2 Bay 395.

Dunkin, contra, cited 2 Bac. Ab tit. Exon. 719; Tit. Escape, C; Cro. Car. 240; Stat. 8 & 9. Wm. 3, P. L. App. 15, 16, 129.

JOHNSON, J. By the statute of 8 & 9 Wm. 3. P. L. Appendix 15, 16, which is made of force in this State, it is provided that if any person, taken in execution and committed to prison, shall escape from it by any means whatever, the creditor or creditors at whose suit such prisoner was charged in exe-

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cution, at the time of his escape, *shall or may retake such prisoner, by any new *capias ad satisfaciendum*, or sue forth any other kind of execution, as if the body of such prisoner had never been taken in execution: so that if the complainant had actually escaped from the prison, the case would have been precisely that provided for by the statute. He had, however, been admitted to the prison rules, on giving bond conformably to the act usually called the Prison bounds act; and the question is, whether, having escaped from the prison rules, the provisions of the statute apply. The confinement of a party in execution to the prison rules, is a restraint upon his personal liberty, and is but a mitigated form of imprisonment, and that idea is clearly expressed in the preamble to the Prison bounds act, (P. L. 456) wherein it is recited, "that humanity requires that the confinement of persons on civil process should be less rigorous than heretofore;" and the remedy provided, is, that upon giving security to the sheriff, that he will not go without certain prescribed bounds, he shall not be confined within the walls of the prison: indeed all the provisions of the act tend to show, that he is considered as being in confinement and in the custody of the law. Thus if he fail to render a schedule of his effects agreeably to the tenor of his bond; if he be seen without the prison rules;

if he shall have spent more than two shillings and six pence per day, or shall have fraudulently sold, conveyed or assigned his estate; he shall not be any longer entitled to the rules. He is then in confinement, and the prison rules instead of the walls constitute his prison, and if he escape therefrom, it is an escape from prison within the meaning of the statute.

The second ground of the motion, assumes that the plaintiff is entitled to no other remedy than that provided by the Prison bounds act—to proceed to retake him, or against his securities for the bounds, or if they be insufficient, against the sheriff.

There is no clause in the act repealing the statute, nor is there any repugnance which would operate as a virtual repeal; on the contrary, they are entirely consistent: according to the statute, if one in execution es-

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cape from prison, the plain*tiff may retake him by a new capias, or sue out any other form of execution; according to the act, he may retake him, or sue the sureties, or the sheriff. The one (the statute) providing a general remedy, the other (the act) providing for the particular case, and both must stand.

We therefore concur with the Chancellor, and his decree is affirmed.

O'NEALL, J., concurred.

HARPER, J., absent.

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1 Hill, Eq. 140

Ex parte JOHN SMITH, in the Matter of the Executors of Bradshaw.

(Charleston, April, 1833.)

[*Guardian and Ward* ⟸168.]

The Court of Chancery may order the funds of an infant under its control, to be paid to a guardian residing & appointed in another State, but in doing so, will take every precaution to guard against abuse and loss to the infant: The Court will, in such case, order a reference to ascertain the fact of the guardian's appointment, his fitness, and whether sufficient security has been given.

[Ed. Note.—Cited in Ex parte Heard, 2 Hill, Eq. 54; Cochran v. Fillans, 20 S. C. 243; Carr v. Bredenberg, 50 S. C. 485, 27 S. E. 925.

For other cases, see Guardian and Ward, Cent. Dig. § 561; Dec. Dig. ⟸168.]

James Bradshaw died in 1828, having previously made his will, bequeathing his property to his two minor children, about the ages of eight and five years. Geo. W. Egleston and P. G. Gerard were appointed executors.—They qualified, and sold the property, paid the debts and invested the proceeds under the order of this Court, in stock.

Mrs. Bradshaw died before her husband. The children reside with their maternal grand-father, John Smith of New York. He was appointed by the Surrogate of New York guardian of these children, and gave bond and security for the discharge of his duties.

The executors have always paid him the dividends on the stock, and he has recently applied to them to transfer the property to him as guardian.

The executors admit the facts stated in the petition, and are perfectly willing to transfer the estate if they can receive the sanction of the Court; but they are not willing to transfer the property to a guardian

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not appointed in *this State, without such sanction, and this petition was accordingly filed to obtain it.

Chancellor Johnston dismissed the petition —and a motion is now submitted, to reverse the decision, on the ground, that the petitioner having been appointed guardian of the legatees, in the city of New York, now the place of their domicil, was entitled to receive the estate of the minors, and the prayer of the petition should have been granted.

Dunkin, for the petitioner.

HARPER, J. I have no doubt on principle and the practice of the Court of Chancery, of the competency of the Court to order funds of an infant under its control to be paid to a guardian appointed and residing in another State. This must often be a matter of almost absolute necessity, but is subject to the discretion of the Court. It has been held, that where no administration had been granted in the State, a debtor of an intestate, making payment bona fide to an administrator appointed in another State where the intestate was domiciliated at the time of his death, was discharged. The executors might perhaps have been justified in paying over to the guardian, on their own responsibility. With respect to the infants, however, they are trustees, and it was proper that they should take the direction of the Court.

In making such an order, the Court will take every precaution to guard against abuse and loss to the infants.—There must be a reference, not only to ascertain the fact of the guardian's having been regularly appointed, according to the laws of the State in which he and the ward reside, but his fitness for the appointment; and whether sufficient security has been given.

The order dismissing the petition is, therefore, reversed, and a reference ordered accordingly.

JOHNSON and O'NEALL, JJ., concurred.

1 Hill, Eq. *142

*FRIPP v. TALBIRD.

(Charleston. April, 1833.)

[*Husband and Wife* ⇐29.]

A deed or marriage settlement which is good between the parties, but void as to creditors for the want of a schedule, or for not being recorded, is nevertheless valid as to creditors until they choose to avoid it by seizing the property, and the party in possession under it, will not be bound to account for rents & profits during the time such deed was regarded as valid.

[Ed. Note.—Cited in Breithaupt v. Bauskett, 1 Rich. Eq. 468; Ford v. McElray, Id., 475; Kinsler v. Holmes, 2 S. C. 494; Gregory v. Rhoden, 24 S. C. 93.

For other cases, see Husband and Wife, Cent. Dig. §§ 158–168, 205, 882; Dec. Dig. ⇐29.]

[*Husband and Wife* ⇐31.]

A wife, being entitled to a life estate in certain negroes, had them settled to her separate use by marriage settlement which had no schedule annexed and was not recorded; the husband died the wife surviving, who administered on his estate, received her portion of it, married a second time, and died: On a bill filed by the creditors of the first husband against the second husband, it was held, that the life estate of the wife in the negroes, was not assets for the payment of the debts of her first husband, and his creditors were not entitled to an account for their possession by the wife after the death of her first husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 178–195, 883, 884; Dec. Dig. ⇐31.]

[*Descent and Distribution* ⇐122.]

Creditors may follow assets in the hands of legatees or distributees and compel them to refund; and the property may be followed in the hands of one to whom it has been transmitted on the death of a legatee or distributee; there is no limit to this right except that of time.

[Ed. Note.—Cited in Miller v. Mitchell, Bailey, Eq. 437; Singleton v. Moore, Rice, Eq. 130; Lanier v. Griffin, 11 S. C. 582, 583; Bermingham v. Forsythe, 26 S. C. 365, 2 S. E. 286.

For other cases, see Descent and Distribution, Cent. Dig. § 445; Dec. Dig. ⇐122.]

[*Executors and Administrators* ⇐318.]

[A legatee or distributee, when called upon to refund, will not be charged with interest prior to the demand.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1323; Dec. Dig. ⇐318.]

[*Executors and Administrators* ⇐438.]

[In a suit by a creditor against the administrator of a deceased debtor the distributees of such estate are not proper parties.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1775; Dec. Dig. ⇐438.]

[*Husband and Wife* ⇐29.]

[A marriage settlement, void as against creditors for want of a schedule annexed to the deed, may nevertheless be valid as between the parties to it.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 160; Dec. Dig. ⇐29.]

Mary Bell, under her father's will, was entitled to a number of negroes for life. She married William Palmer, and the negroes were settled to her use, but there was no schedule annexed to the deed, and the deed was not recorded. Palmer and Isaac Perry Fripp, joined one William Barns as his sureties in two administration bonds on the estates of Richard and Sarah Reynolds. In November 1817 Palmer died—his widow administered—she sold his estate in 1818, and nine negroes were bought in, and retained by her. The next of kin bought to the amount of his share, and gave an indemnity bond. The debts of Palmer were not then paid. In 1822 she married John Talbird, who acquired in her right the nine negroes above mentioned, and also those bequeathed by her father. She died in 1825, and administration of her estate and also of her first husband's, was granted to John Talbird.

Wm. Barns committed a devastavit—and died in November 1827, leaving John Barns his executor. Administration de bonis non, of the estates of Reynolds was committed to Robert Oswald, and on a bill filed by him against John Barns executor of William Barns, a decree was given against Barns for $6669.50. Oswald sued on the administration bonds against Fripp, and he was compelled to pay $5454.66; he died, having appointed the plaintiff his executor.

The bill is filed by Perry Fripp, executor of Isaac Perry Fripp, against Talbird, as administrator of William and Mary Palmer, for an account of their estates, and contribution; and against John Barns, for an account of the estate of William Barns.

The Court ordered a reference, and the Commissioner at Coosawhatchie took an account, in which he charged Talbird with the nine negroes of Palmer that came to his hands, and with their hire; also with the hire of the negroes which his wife held under her father's will and the settlement, as well before his marriage with Mary Palmer as afterwards.

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*The Court confirmed the report; from the decree, as contained in the order of reference and confirmation, the defendant Talbird appeals—because,

1. He is not liable for any debts contracted by his wife, before marriage; no decree having been obtained against him in her life time.

2. The negroes that came to his hands by virtue of his marriage with Mary Palmer, are not assets to pay the debts of Palmer.

3. The creditors of Palmer could not have an account of antecedent hire for those negroes which she held under the settlement—much less can they have such an account from her husband after her decease.

Pettigru, for the appellant, commented at length on the grounds taken, and cited and relied on 1 Schoals & Lefroy; Toller's Law Ex. 282; Coleman v. The Duke of St. Albans, 3 Ves. Jun. 375; Higgins v. York Buildings, 2 Atk. 107.

Treville, contra, referred to 1 Sch. & Lef. 269; Padgett v. Hoskins, Prec. Ch. 431; 1 Eq. Rep. 427.

HARPER, J. There is no question with respect to the negroes which Mrs. Palmer derived under her father's will; they have been disposed of according to the provisions of the will, and I do not understand them to be in the defendant's possession. With respect to the hire of those slaves which the Commissioner has reported, and which constitutes the defendant's third ground of appeal, I am of opinion the complainant is not entitled to any account.—Admitting the marriage settlement of Palmer to have been void as to creditors for want of a schedule, it was good as between the parties themselves.

When it is said that a deed, good between the parties, is void as to creditors, there is perhaps a want of exact precision in the language. They may treat it as void—they are not compelled to institute any legal proceeding to avoid it, but may seize the property, as if there were no deed. But until they do seize the property, the deed remains perfect-

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ly good. There is no case in which a *person not a trustee, has been held liable to account for the rents and profits of his own property. When a legacy is ordered to be refunded, it is without interest; Gettins v. Steele, 1 Swan. 200; a mortgagor in possession, though the legal title be in the mortgagee, is not accountable for rents and profits. Higgins v. The York Building Company, 2 Atk. 107; Mead v. Orrery, 3 Atk. 244; Coleman v. The Duke of St. Albans, 3 Ves. 32. In a case decided by myself as Chancellor, at Columbia, I held, after very full consideration, that an heir at law in possession, was not accountable for rents and profits; it would operate hardship approaching the effect of fraud, to make one account for profits which he may have expended, in the just confidence of their being his own.

With respect to the defendant's first ground of appeal, it is not contended on the part of the complainant, that any assets of the estate of his wife came into the defendant's hands after her death; nor that a husband is liable for the debt or devastavit of his wife, contracted or committed before the marriage, in respect of her property which he has acquired by the marriage, when his liability has not been fixed, during the coverture. The claim is to follow the specific assets of the estate of Palmer, in his hands. The wife's life estate in the negroes included in the marriage settlement, was claimed as such assets. I have already expressed the opinion that they could not be so regarded. After the death of her husband they were her own property, and after her second marriage her life estate vested in the second husband.

But with respect to the nine negroes derived from the estate of Palmer, I am of opinion that they may be followed as assets of that estate. There is no doubt about the general rule, that if an executor or administrator proves insolvent, creditors may follow the assets in the hands of a legatee or distributee, and compel them to refund, even although the executor may have retained sufficient assets to pay the debts and wasted them. 1 Vern. 94; 2 Ib. 205. It was said, that when the distributee has died and transmitted the property to others, this is too far

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to follow it. *I know of no such limit to the right. In the anonymous case, 1 Vern. 162, the legatees of an executor who had wasted his testator's estate, were compelled to refund, by a creditor of the first testator. There is no limit in such case, but that of time. In the case of Miller v. Mitchell [Bailey Eq. 437] decided by myself, and the decree affirmed by this Court, I held that a legatee who had received his legacy, might protect himself by the statute of limitations. But the statute cannot avail the defendant in this case, the complainant's cause of action arose just before the filing of the bill. It was argued that the other distributee of Palmer ought to have been made a party, and to refund in proportion. If Mrs. Palmer had been merely a distributee, and not an administratrix, there might be something in this. If she were living, the complainant's bill would be properly against her alone; the demand would be established against her, as administratrix, and payment enforced out of this property, or any other in her possession.

Her personal representative stands in her stead. It would only be in the event of her insolvency, that the complainant would be authorized to go against the other distributee. Having paid a debt which had unexpectedly arisen, she might compel the other distributee to refund rateably. It appears too, that she took a bond of the other distributee, to refund in the event which has happened. Of this she might have availed herself, and so may her representative now do, unless it be true as stated, that she received assets of the estate over and above her distributive share, sufficient to satisfy this demand. If this be so, she can never have any claim for contribution against the other distributee.

It is ordered and decreed, that the report of the Commissioner be confirmed, so far as respects the nine slaves in the hands of the defendant derived from the estate of Palmer, but in other respects overruled, and the order confirming the same reversed.

JOHNSON and O'NEALL, JJ., concurred.

*MARY MOTTE v. JOHN S. SCHULT and FRANCIS T. MOTTE, Trustees.

(Charleston. April, 1833.)

[*Equity* ⟸426.]

A Court of Equity may decree between co-defendants, on evidence arising from pleadings and proofs between plaintiffs and defendants.

[Ed. Note.—Cited in Bath South Carolina Paper Co. v. Langley, 23 S. C. 146; Quattlebaum v. Black, 24 S. C. 55; Norwood v. Norwood, 36 S. C. 340, 15 S. E. 382, 31 Am. St. Rep. 875; Beattie v. Latimer, 42 S. C. 320, 20 S. E. 53; Phillips v. Anthony, 47 S. C. 462, 25 S. E. 294; Connor v. McCoy, 83 S. C. 176, 65 S. E. 257.

For other cases, see Equity, Cent. Dig. § 1000; Dec. Dig. ⟸426.]

[*Executors and Administrators* ⟸125.]

[Cited in Johnson's Adm'rs v. Johnson's Ex'r, 2 Hill Eq. 285, 29 Am. Dec. 72, to the point that each coexecutor is primarily regarded as separately liable for his acts and as between themselves always severally responsible.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 508–522; Dec. Dig. ⟸125.]

O'NEALL, J. Upon looking into this case, it appears, that the plaintiff is the cestuique trust of the defendants, and claimed from them an account and investment of the proceeds of four negro slaves, sold by them under the order of the Court of Equity. The defendant Francis T. Motte, received of the proceeds of said sale $739.43, by applying that sum to the payment of his individual debt to his co-defendant, and gave to him as trustee, his bond for the payment of that sum. To secure the payment of it, he gave him a mortgage of several negroes, which he had previously mortgaged to Schult for the payment of his individual debt. After some time Schult foreclosed his mortgage by a seizure of the mortgaged slaves, and sold them in satisfaction of his own and the trust debt, except one who died in jaol before any sale was effected. The debt to himself was entirely satisfied, and upon that to the trust estate a balance was left of $293.55. On the reference before the Commissioner, the defendant Schult being advised, very properly, that he was eventually liable for this sum to the cestuique trust, paid it and claimed a decree for the same, against his co-defendant Motte. The Chancellor gave a decree in his favor, and the question now is, whether the Court possessed the power of making the decree between co-defendants. In the case of Chalmey v. Lord Dunsany, 2 Sch. & Lef. 710, Lord Redesdale says, "but it seems strange to object to a decree because it is between co-defendants, when it is grounded on evidence between the plaintiffs and the defendants. It is a jurisdiction long settled and acted on, and the constant practice of a Court of Equity: so much so, that it is quite unnecessary to state any case in its support." At page 718, Lord Eldon states the rule still more strongly, "when a case is made out between defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a Court of Equity is entitled to make a de-

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cree between the defendants—further, *my Lords, a Court of Equity is bound to do so. The defendant chargeable has a right to insist that he shall not be made a defendant in another suit, for the same matter that may then be decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit, for a matter which may be then adjusted between the defendants. And if a Court of Equity refused so to decree, it would be good cause of appeal, by either defendant."

These views of two of the greatest Chancery lawyers, on a point made for the reversal of the decree, were acquiesced in as correct, by the House of Lords, including Lord Erskine, the then Lord Chancellor, and the decree affirmed. This authority settles the rule, that a Court of Equity may decree between co-defendants; and the only limitation to this power is, that the decree must be upon evidence "arising from pleadings and proofs between plaintiffs and defendants." It is necessary, therefore, to inquire, in this case, whether the decree is made upon evidence arising from the pleadings and proofs between the plaintiffs and the defendants.

In equity, trustees are primarily liable each for his own acts; they may be made jointly liable, so far as they have concurred in any act. This joint liability is, however, alone to the plaintiff—as between themselves, each is bound for whatever he has received, and for his share of the amount recovered against them for any improper joint act. Indeed in equity, I regard all liabilities as in the first instance several; that is, each must account for his wrongful act, and another who may be also liable for it, on account of his concurrence in or assent to it, if he received no benefit from it, stands as a guarantor or security to make it good, in the event of the actor being unable to pay. The pleadings in this cause make the question, how much were the defendants liable to account for separately, or jointly, to the plaintiffs? I say they make this question, because this is the legal effect of a bill against trustees for an account. The proof under these pleadings, was to shew the amount re-

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ceived by one or *both of these defendants. The proof on which the defendant Motte is made liable to his co-defendant Schult, was adduced to fix their joint liability, by showing that although Motte actually received the money by applying it to his private debt, yet that Schult concurred in this arrange-

ment, and actually took an insufficient security for the payment of the sum so received by Motte, to the trust estate.

It is therefore ordered and decreed, that the decree of Chancellor Johnston be affirmed.

JOHNSON, J., concurred.

HARPER, J., absent.

Lance, for the appellant. Finley, contra.

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1 Hill, Eq. 148

Ex parte VIRGINIA GALLUCHAT and Her Minor Children.

(Charleston. April, 1833.)

[*Executors and Administrators* ⇐22, 35; *Receivers* ⇐14.]

The Court of Equity has no power to substitute an executor in the place of another: but where an executor has removed from the State, leaving his cestuique trusts and the trust estate the Court will, on the application of the cestuique trusts, appoint a receiver.*(a)*

[Ed. Note.—Cited in Gadsden v. Whaley, 14 S. C. 215; Wallace v. Foster, 15 S. C. 221.

For other cases, see Executors and Administrators, Cent. Dig. §§ 125, 249; Dec. Dig. ⇐22, 35; Receivers, Cent. Dig. § 23; Dec. Dig. ⇐14.]

[*Executors and Administrators* ⇐121.]

Quere.—Can the Ordinary appoint an administrator, where the executor had made probate & gone without the State?

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 493, 493½; Dec. Dig. ⇐121.]

This was a petition for the substitution of a trustee, under the following circumstances: The Rev. Jos. Galluchat, by his will dated at St. Augustine on the 1st January, 1825, among other bequests and provisions directed as follows, "all the rest, remainder and residue of my property and estate, shall be vested in some safe and productive stock, the interests and profits of which I give to my wife Virginia during her lifetime, or so long as she shall remain my widow." It was further provided, that if either of the testator's children, during the widowhood of his wife, should arrive at full age, or marry, then his said widow should be authorized, at her discretion, to give such child a portion of the estate; and at the death of the widow, the rest and residue of the estate was to be equally divided between the chil-

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dren of the testator. The *executors appointed by the will are Dr. S. H. Dixon and Duke Goodman, of whom the latter alone ever qualified or acted in the management of the estate. At the time of filing the petition, the residue of the residue of the testator's estate consisted of a bond and mortgage of the petitioner, (Mrs. Gallnchat) taken for a loan made to her by the executor, under the authority of the Court, and also of fifty seven Bank shares—It also appeared that the said Duke Goodman, the executor, had recently left the State, and removed to Mobile in the State of Alabama, where he for the future will reside permanently. Before he left the State, he accounted fully before the commissioner for his management of the trust estate, under the will of Mr. Galluchat; and since his determination to settle in Alabama, he has written to request that he may be released from the trusts imposed on him under said will. The Commissioner of the Court, Mr. Gray, also expressed in writing his willingness to be substituted in his stead, as the trustee of the petitioners. The petition was presented in behalf of the widow and minor children of Mr. Galluchat, and prayed for the said substitution of the trustee. It was rejected by Chancellor Johnston, on the ground that he had not power to grant it; that if Mr. Goodman chooses, he may appoint an attorney to act for him under the trusts confided in him as executor by the will, but that the Court had no power to discharge him, and appoint or substitute another. A motion is now made to reverse this decree, on the ground that under the circumstances of the case the Chancellor has authority, and ought to grant the prayer of the petition.

O'NEALL, J. It appears that when an executor is resident out of the State, and has never made probate of the will, the Ordinary may grant administration cum testamento annexu durante absentiu.

In 4 Mod. 14 (1690) sci. fa. was brought by J. Hodge, administrator of A. Hodge, during the absence of N. Hodge, upon a judgment recovered in the Court of King's Bench, upon which there was a writ of error

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brought in the Ex*chequer Chamber, and judgment affirmed; it was, among other things, objected, that the Ordinary had no common-law power to appoint—that his power was by statute; but the objection was overruled Slater v. May, 2 Lord Ray. 1071, recognizes the power of the Ordinary to appoint an administrator durante absentia, when the executor is beyond the realm.

The Stat. 38 G. 3; c. 87, gave the Ordinary power to appoint an administrator, when the executor had made probate, and gone without the realm. Lord Alvanley's judgment in the case of Taynton v. Hannay, 3 B. & P. 30.—Whether the Ordinary may not, in this State, exercise a similar power, it is not now necessary to examine. A case involving some such question, was, it is believed, decided some years ago, in Columbia, and it is therefore intended to leave that matter perfectly open, for future examination. In any event, whether the Ordinary has or has not the power to appoint, there

(a) Haigood v. Wells, ante. 59.

can be doubt that the Court of Equity may, in some shape, give relief to the parties in interest, where the executor has abandoned his trust, and removed from the State; Buchanan v. Hamilton, 5 Ves. 722. I agree, however, with the Chancellor, that this Court has no power to substitute another in the place of, and to act as, the executor of the testator. The act of '96, for the substitution of a trustee, does not apply to such a case.—It is true, an executor is a trustee, yet it is not by this general name he is distinguished and known in our acts of the Legislature: he is always called an executor, as will be seen by referring to all acts in relation to executors or administrators. The separation of executors from trustees, who have no specific legal name, is clearly made by the act of 1745, providing for the compensation of executors, administrators, guardians or trustees, in the discharge of their respective duties and trusts. The act of '96 applies to trustees created by deed or will, to whom estates, real or personal, are conveyed or devised to be held for, assigned to, or managed for, another. The executor is a trustee known by a specific name, designating his office, and is not embraced by the general term trustee, used in the act. His is a general trust—their's special. His au-

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thority *and duty arise both from law and the will—their's from the terms and object of their appointment.

In this case it appears, or rather I so understand from what is stated, that the bank stock stands on the books of the bank, in the name of the executor: and that the bond and mortgage of Mrs. Galluchat are also to him. He has left the scrip for the bank stock and the bond and mortgage, with two of his friends, to be deposited for safekeeping in the Planters and Mechanics Bank. No person, so far as I am able to discover, has any authority from him to recover the dividends of the bank stock, or to see that the security for the payment of the bond, the property mortgaged, is not aliened or removed. Under these circumstances the question is, will the Court not interfere, both for the preservation of the trust fund, and for the correct appropriation of the income? As long as the executor remains within the jurisdiction of the Court, the Court would not, unless under very extraordinary circumstances, deprive him of the management of the trust: yet when he removes from the State, will the Court permit him either to remove the trust estate, or manage it? His removal places him beyond the process of the Court, and he is no longer liable to account to it. His removal of the trust estate might enable him to defeat the trust, and his management of it by attorney, might place it in irresponsible hands, and have the same effect. In some cases, as when the executor and his cestui que trusts remove together, the Court would permit him to remove the trust estate, and it may be that under circumstances shewing that it was for the benefit of the estate, the Court would not interfere to prevent the attorney of an executor who has removed from the State, from managing the trust estate.

But generally, when an executor removes from the State, leaving both his cestuique trusts and the trust estate in the State, it is the duty of the Court of Equity, on the application of the cestuique trusts, to appoint a receiver. For there would, in such a case, be an abandonment of the trust, voluntary, it is true, on the part of the executor, and which cannot therefore benefit him, but

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which *the Court will take care shall not prejudice the cestuique trusts.

In this case the executor Goodman appears to have acted in good faith; he fully accounted under the order of this Court, and invested the balance of his testator's estate agreeably to its order. He, as well as the petitioners, has asked the appointment of some one to act in his place. The Commissioner, Mr. Gray, is the usual and proper person to be appointed receiver, and he has consented in writing to act in the place of Mr. Goodman. I think that the Chancellor, instead of dismissing the petition, ought to have appointed Mr. Gray the Commissioner, receiver for the petitioners.

It is Ordered and decreed, that the decree dismissing the petition be reversed: that James W. Gray the Commissioner of this Court be appointed receiver of the petitioners: and that upon the executor, Duke Goodman, transferring the bank stock, and assigning the bond and mortgage of Mrs. Galluchat, to the said receiver, he (the said Duke) be discharged from any future liability in relation to the same.

JOHNSON, J., concurred.

HARPER, J., absent.

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1 Hill, Eq. 152

Ex parte S. W. LEITH, Executor of Wm. Patterson.

(Charleston, April, 1833.)

[*Wills* ⇐531.]

Where a testator, by his will, devised, viz: "all the residue and remainder of my real and personal estate, wheresoever situated, to be equally divided in the following proportions, that is to say, two shares to my deceased sons' (William & James) children, to be equally divided among them:" it was held, that all the children of William and James took equally per capita.

[Ed. Note.—Cited in Perdriau v. Wells, 5 Rich. Eq. 28.

For other cases, see Wills, Cent. Dig. § 1149; Dec. Dig. ⇐531.]

The Commissioner having been directed to settle with the guardians of the children of Wm. and James Patterson, legatees under the will of Wm. Patterson dec'd, submitted to the Court the following clause of said will, and requested the opinion of the Court, for his direction in making partition among the legatees.

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*"All the residue and remainder of my real and personal estate wheresoever situated, to be equally divided in the following proportions, that is to say; two shares to my deceased sons' William and James children, to be equally divided among them." &c.

The question submitted to the Court, is, whether the three children of William are to receive one share, and the two children of James the other share, or whether the two shares are to be thrown together, and then divided equally between the said five children.

Harper, J. (sitting as Chancellor). I am of opinion that under the devise to the children of William and James, the children of those sons of the testator take equally and per capita, and it is decreed accordingly.

From this decree an appeal was taken.

Mazyck & Frost, for the appellants.
Bailey, contra.

JOHNSON, J. If the clause of the will out of which this question arises, be interpreted according to the natural import of the terms used, there would seem to be no doubt that they must operate as a devise or bequest of the testator's estate, to be divided between the children of his deceased sons, William and James, per capita, and not per stirpes. They are described as one, and not several classes. It is like the case of Butler and Straten, 3 Bro. Ch. Ca. 367, where it was held, that under a bequest to the descendants of two persons, all their descendants, as well grandchildren as children, took per capita. This conclusion is strengthened by the disposition which he makes of the remaining third part of this legacy; that, the testator directs shall be equally divided amongst the children of his son John C. who was still living, and shews that the testator understood the necessity of separating them into classes, where he intended they should take per capita. The same thing occurs in the first clause of the will, and even more strikingly, "I give to my grandchildren, all my household furniture, to be equally divided

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amongst them, that is *to say, one share to the children of my deceased son William, one share to the children of my deceased son James, and one share to my son John's children"; and this has been relied on by the counsel as furnishing an interpretation of the devise of the residuum, but I think the converse follows. If he intended to make the same disposition of the residuum, that he had done of the household furniture, he would have used the same phraseology. His having changed it, is a circumstance to show that he did not intend to make the same disposition; and I contend therefore, that he intended precisely what he has expressed, that two thirds of the residue of his estate should be equally divided amongst the children of his deceased sons William and James.

Motion dismissed.

O'NEALL, J., concurred.

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1 Hill, Eq. 154

SAMUEL CORDES and Others v. WM. ARDRIAN and Another.

(Charleston. April, 1833.)

[*Perpetuities* ⟸4.]

Where the testator bequeathed viz: "to my son Thomas and to him & his heirs and assigns forever, the following negroes, [naming them] and should he die without lawful issue, the said negroes shall return to my other surviving children;" *Held*, that the limitation over was good.

[Ed. Note.—Cited in Brummet v. Barber, 2 Hill, 553; Lyon v. Walker, 8 Rich. 310; Hill v. Hill, Dud. Eq. 78, 79, 80, 82; Mendenhall v. Mower, 16 S. C. 314; Henderson v. Kinard, 29 S. C. 17, 6 S. E. 853.

For other cases, see Perpetuities, Cent. Dig. § 28; Dec. Dig. ⟸4.]

[*Life Estates* ⟸6.]

It has been the constant practice of the Court of Equity, to require security for the forthcoming of property on the termination of a life-estate, or on any other event when the rights of remainder-men or reversioners spring up, whenever those rights appear to be in danger.(*a*)

[Ed. Note.—Cited in Pringle v. Allen, 1 Hill, Eq. 137; Burnett v. Rice, Speers, Eq. 592, 42 Am. Dec. 336; Bentley v. Long, 1 Strob. Eq. 52, 47 Am. Dec. 523; Moon v. Moon, 2 Strob. Eq. 332.

[For other cases, see Life Estates, Cent. Dig. § 18; Dec. Dig. ⟸6.]

The will of Mrs. Charlotte Cordes, contains the following clause: "I give and bequeath to my son, Thomas Evans Cordes, and to him and his heirs and assigns forever, the following negroes; Molly, Chane, Harriet, Maria, Solomon, Feb, Amy, Gabriel and Juliana, together with the present and future issue of the females, and should he die without lawful issue, the said negroes shall return to my other surviving children."

Two of these negroes (Maria and Solomon) were levied on and sold under an execution against Thomas Evans Cordes, and purchased by the defendant, Ardrian. Notice was given at the time, of the plaintiffs' claim. The plaintiffs, the children of Mrs. Cordes, claim the slaves under the above clause of

(*a*) See Hinson v. Pickett, ante, 44; Clarke v. Saxon, 74; Pringle v. Allen, ante, 137.

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her will, in the event of the death of *Thomas Evans Cordes without lawful issue; and they filed this bill to enjoin the defendant from disposing of the negroes purchased by him, and to compel him to give security for their forthcoming, to answer their claim.

An injunction was granted by the Master.

The defendant, Ardrian, in his answer, insisted that Thomas Evans Cordes took an absolute estate in the negroes; and if he did not, that he had purchased his life estate at sheriff's sale, and had a right to dispose of it at pleasure; he also contended that the injunction should be dissolved, because the bill was not sworn to by the plaintiff, but by (Richard Teasdale) a stranger to the proceedings.

Chancellor Johnston, on a motion made before him at chambers, dissolved the injunction, on the ground that the bill was not properly sworn to. After its dissolution, the defendant sold his interest in the negroes.

The case afterwards came to a hearing at Charleston, January, 1833, and the following decree was delivered:

DeSaussure, Chancellor. The briefs of the bill and answer state the case and make part of this decree. Two questions arise in this case.—The first is, whether the limitation over in the will of the late Mrs. Charlotte Cordes, mother of the complainants, is within the prescribed limits, and therefore good; or whether the limitation is too remote, and void? The words in the will are "I give and bequeath to my son, Thomas Evans Cordes, and to him and his heirs and assigns forever, the following negroes:—Molly, Chane, Harriet, Maria, Solomon, Feb, Amey, Gabriel, and Juliana, together with the present and future issue of the females, and should he die without lawful issue, the said negroes shall return to my other surviving children." This whole subject is questio vexata; many decisions have been made in the English Courts which are not at all reconcilable. In our own Courts it has been much mooted—without going through the mass of them, it may be sufficient to notice a few of them. In Guery v. Vernon, 1 N. & M'C. 69, decided in 1818, there was a bequest by a testator of two female slaves and their increase, to his daughter, Florida Guery, "but in case my daugh-

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*ter, Florida Guery, should die without heirs of her body, then the said negro girls, Isabel and Hannah, to return to my son Isaac Guery, and if my son, Isaac Guery should die without issue, then the said negroes to return to my son James Walkers's children." The daughter Florida survived her father, married and died without leaving any issue alive at her death. That learned judge and distinguished citizen, Mr. Cheves, delivered the opinion of the whole Court, that the limitation over was too remote and void.

In Henry v. Felder, 2 M'C. Eq. 333, decided by the Court of Appeals in 1827, the words of the bequest were as follows, "I give and bequeath to Elizabeth Conlietle, a negro girl named Dinah, to her and the heirs of her body lawfully begotten forever, but on failure of issue, to go to the eldest child of my daughter Nancy Connor." Chancellor Thompson held the limitation to be too remote and void, and the Court of Appeals in an elaborate argument sustained the decree. These then are cases where the Court guarded against limitations of too great an extent, and declared them void.

In the case of Treville v. Ellis, (unpublished manuscript case) the testator, after giving to his children different portions of property, goes on to say, "It is my will and desire, that should any of my children die without lawful heirs of their body, that then their part or division of my estate shall be divided equally between the surviving children share and share alike." The Chancellor (DeSaussure) held the limitation over too remote and void. The Court of Appeals held the limitation over to be good, and reversed the Chancellor's decree. In Stephens v. Patterson executor of King, (manuscript case) decided in 1828, the words of the will were "I give and bequeath to my daughter Mary, my negro woman named Rose, together with her increase, to her and the heirs of her body, but should she die without lawful issue, then the said negro girl Rose to go back and be equally divided among the survivors of my children aforementioned." Chancellor De Saussure decreed that the limitation over was too remote and void. The Court of Appeals after

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an elaborate *argument decided that the devise over was good, and reversed the decree of the Circuit judge. It appears to me that the two decisions, of Treville and Ellis, and particularly of Stephens and Patterson, are so entirely applicable to the one we are considering, that they must govern it. It must therefore be decided, that the limitation over is good, and that the complainants will be entitled to the slaves in question, on the death of Thos. Evans Cordes without lawful issue.

The second question in the case is, whether the complainants are entitled, under the circumstances of the case, to security for the forthcoming of the slaves in question, after the death of Thos. Evans Cordes. The circumstances are as follows. The legatee Thomas Evans Cordes, who was in possession of the slaves, being in debt, a creditor levied his execution on two of the slaves bequeathed to him; a sale was made under the execution of the two slaves, (Maria and Solomon) and William Ardrian one of the defendants, became the purchaser; notice had been given at the time of the sale, by Mr. Pettigru, of the interest of the complainants, so that he purchased with a knowledge of

those interests, and that he was buying a law suit. The complainants fearful that all the slaves in the same situation may be sold and scattered over the country, or even carried out of the State, insist on having their interests secured, for the production and delivery of the slaves, on the event occurring which would entitle them to possession. It has been the constant course of the Court to require security for the production of slaves, at the termination of a life estate, or any other contingency when the rights of remainder-men spring up, whenever those rights appear to be in danger. They appear to be in danger in this case, as Mr. Thos. E. Cordes is in debt and embarrassed, and the property is not only in danger of being sold and scattered for his debts, but it has actually occurred with respect to the two slaves now in question. The sheriff, and Mr. Ardrian the purchaser, were both apprized of the right of the complainants at the time of the sale.

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*The dissolution of the injunction makes no difference. It was properly dissolved, because not founded on a proper affidavit. But that does not alter the question of right. The defendants having notice of the right of complainants, were bound to respect it. The sale of the slaves, by the defendant Ardrian after the notice, increases the danger and the necessity.

It is therefore ordered and decreed, that the defendant William Ardrian, do give bond and security to the satisfaction of the Commissioner, in the value of the slaves, for the production and delivery of the slaves Maria and Solomon, if alive at the death of Thomas Evans Cordes without lawful issue, on which event the complainants will be entitled to the said slaves.

The defendant, Ardrian, appealed from this decree, because:

1. Thomas Evans Cordes took an absolute estate under the will.

2. The defendant had an unquestionable right to sell his interest in the negroes.

3. The defendant having sold before the hearing and decree, and this being known to the plaintiffs, he ought not now to be a party to this suit.

Wilson & Whitaker, for the appellants, on the first ground, cited Henry v. Felder, 2 M'C. Ch. 323; and on the other grounds, insisted, that Ardrian, having acquired an interest by purchase, had the right to dispose of his own property without the restraint of any law or judicial proceeding.

Pettigru & Cruger, contra, on the first ground referred to Stevens v. Patterson, (M.S. case) and argued, that the defendant, having bought with notice and sold pendente lite, is not entitled to the protection of the Court; and that it has been the constant practice of this Court to protect the rights of remainder-men or reversioners, when they are endangered.

PER CURIAM. We concur in opinion with the Chancellor, for the very satisfactory reasons contained in his decree.

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1 Hill, Eq. *159

*EUNICE NEUFVILLE v. MARY B. STUART.

(Charleston, April, 1833.)

[*Specific Performance* ⇐28.]

A contract for the sale of land made by letter-correspondence between the parties is valid, & will be enforced if the consideration to be paid, the time of payment, and a description of the premises, appear therein, sufficiently certain to enable the Court to decree a specific performance.

[Ed. Note.—Cited in Peay v. Seigler, 48 S. C. 507, 26 S. E. 885, 59 Am. St. Rep. 731.

For other cases, see Specific Performance, Cent. Dig. §§ 61–68; Dec. Dig. ⇐28.]

[*Contracts* ⇐16.]

The defendant in a letter to the plaintiff's agent, proposed to purchase a plantation at $8000—$6000 in cash, & $2000 in January following, and requested an immediate answer: the agent, by return post replied, accepting the proposal, but added that he presumed the $2000 were to bear interest from the date: *Held*, that this was a contract obligatory on the defendant; and that the suggestion in the letter of acceptance with respect to interest, did not constitute a new and distinct term, which set the contract afloat.

[Ed. Note.—Cited in Kennedy v. Gramling, 33 S. C. 386, 387, 388, 11 S. E. 1081, 26 Am. St. Rep. 676.

For other cases, see Contracts, Cent. Dig. § 72; Dec. Dig. ⇐16.]

[*Frauds, Statute of* ⇐118.]

[A proposal by letter to sell upon terms specified and an acceptance thereof by letter, constitute a sufficient memorandum of the contract, under the statute of frauds.]

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 199; Dec. Dig. ⇐118.]

[This case is also cited in Kennedy v. Gramling, 33 S. C. 367, 11 S. E. 1081, 26 Am. St. Rep. 676, and distinguished therefrom.]

The plaintiff in this case, was possessed of a large body of land in Prince Williams Parish, District of Beaufort, called Graham's neck, which had been divided into four plantations with a view to sell. One of these tracts containing about 869 acres was designated as the home tract or settlement. The defendant was desirous of purchasing a plantation, and during the autumn of 1830 made ineffectual negotiation with the plaintiff for one of the five tracts. Upon the plaintiff's leaving Savannah for New York, James L. Pettigru Esq. of Charleston, was appointed her attorney, with full power and authority to dispose of all or any of the estate on Graham's neck.

On the 1st March 1831, the defendant wrote the following letter to Mr. Pettigru.

"Mr. Pettigru

"Sir:—I will give you for the settled plantation on which Mr. Neufville resided, containing 869 acres, six thousand dollars cash, and $2000 January 1832.—Should this proposal meet your concurrence, you will oblige me by giving an immediate answer. I have just received Mr. Barnwell's letter, stating that you would take ten dollars per acre. But as I offer so large a proportion in cash, I hope it will induce you to let me have it at the price proposed, as I do not think the land is worth more, nor would I give any more for it. Having another place in view, I would be glad of an immediate answer. Please to remember me affectionately to ——— ———; believe me yours, &c.

(Signed) Mary B. Stuart.

March 1, 1831."

By the return mail, Mr. Pettigru gave the following answer.

Charleston, March 4, 1831.

Madam—

I have to acknowledge your letter of the 1st of March, which came to hand by this

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day's mail, offering 8000 dol*lars for the tract of land, being the settled plantation on which Mr. Neufville resided, containing 869 acres, viz: $6000 cash, and $2000 in January 1832. I accept the offer, and will deliver possession as soon as you please.—The deed will be signed by Mrs. Neufville, as soon as a conveyance can be forwarded to her. I will be ready to receive the 6000 dollars when possession is taken, and your bond and mortgage for the 2000 dollars (with interest, I presume from the date) may be delivered when Mrs. Neufville's deed is delivered to you. You have a great bargain in the place, and will have, I hope, a great deal of satisfaction in the purchase. I have written to the overseer, to prepare for giving you possession. &c. &c.

(Signed) J. L. Pettigru.

Upon the receipt of this letter, the defendant made the following reply.

March 9, 1831.

Mr. Pettigru—

Sir:—I am sorry to inform you, that your letter came a day too late—I have made a purchase of Brag's Island.

Respectfully yours &c.

(Signed) M. B. Stuart.

The complainant considered the two letters above exhibited, as constituting a complete and binding contract; made preparation for giving possession, and upon the defendant's refusing to take the plantation, filed this bill for specific performance. The defendant answered and pleaded the statute of frauds, insisting that the two letters did not constitute a complete and certain contract, the answer of the complainant's agent including a term, viz: interest on the $2000 from the date of defendant's bond—not offered by the defendant.

The case came to a hearing at Beaufort, January Term 1832, and the following decree was delivered.

Johnston, Chancellor. The proof satisfies me that there has been no obstruction in the way of the defendant's taking possession; on the contrary, there was, and is, a perfect readiness and preparation to let

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her into possession. So *far there is no reason against enforcing the alleged contract.

Again, I do not think the defendant can be released from it, if otherwise binding, merely because when she made her offer, she expected to receive an answer earlier than she did. Her letter of proposal to the plaintiff's agent fixed no definite time within which the answer was to be given, nor did it contain any thing calculated to apprise him that she labored under any misapprehension as to the existing run of the mail, so as to notify him that he should not consider the proposal open to his acceptance, unless he could make that acceptance known to her by a given day. She simply required "an immediate answer," so as to put her at liberty, if her offer should be refused, to purchase elsewhere. If "an immediate answer" was given, by which the plaintiff was bound, so that she could not sell to another, the defendant ought also to be bound to complete the purchase. The answer was communicated by the return of post; which was as early as it could be.[a]

The only difficulty is this: was there a contract? Can one be made out, by putting together the defendant's letter, of the 1st, and the answer to it, of the 4th of March 1831? Do those letters set forth the subject and terms of a contract, that if put into the hands of a man of business, he could, by a sound legal interpretation of them, without further instruction, reduce the contract to form? Do they shew a treaty, with reference to which mutual assent can be clearly demonstrated; or a proposal met by that sort of acceptance which makes it no longer the act of one, but of both parties?—so closed as to have no essential terms to be afterwards settled? Does the answer, properly understood, amount to an unqualified, single acceptance of the terms proposed, without a variation of them, or the introduction of any new or different term, or terms of a different effect?[b]

The subject and terms of contract are explicitly set out in the defendant's letter of the 1st of March:—the settled plantation, containing 869 acres—6000 dollars in cash,

[a] Kennedy v. Lee, 3 Meriv. 447–8.

[b] 2 Hov.'s Sup. to Ves. Jr. 119; Kennedy v. Lee, 3 Meriv. 451; Stratford v. Bosworth, 2 Ves. & B. 345; & note 2 to Brodie v. St. Paul, 1 Ves. 326; Holland v. Eyre, 2 Sim. & Stu. 195.

and $2000 in January, 1832. The terms are

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as distinctly set *out and accepted in the answer of the plaintiff's agent, if you exclude from that answer the expression about interest from the date on the 2000 dollars. The whole case turns on that expression.

The defendant had not, certainly proposed that the 2000 dollars should bear interest from the date, but only to pay the 2000 dollars in January 1832; and would not have become chargeable with interest on that sum, until that time had come round. With what view then, did the plaintiff's agent, after recapitulating and accepting her proposal, mention this subject of interest? Did he intend to constitute the payment of interest from the date on the $2000, part of the terms accepted by him? Or did he mention it merely in reference to the formal execution of the contract, without intending to shake or effect the contract by it? Did he intend to accept the terms proposed, whatever might be their legal effect, and to suggest, apart from these terms so accepted, that, notwithstanding he intended to stick by the contract, yet according to his view of its legal effect, the sum mentioned would bear interest from the date?—Or did he again intend, whilst on the one hand he distinctly accepted the terms proposed, to suggest on the other without setting the contract again afloat, that in fairness the defendant ought to pay interest on the 2000 dollars?

If he intended to incorporate the matter of the interest with his acceptance, in such manner as that his principal could not be compelled to convey upon the foot of his acceptance, unless the interest should be paid—if this be the proper construction of his letter, taken all together—then he has accepted one set of terms, when another was proposed; and not having accepted the terms proposed, the defendant is not bound. The sum which by her offer, she would be bound for, on the last day of January 1832 (for she would be entitled to the whole month to make the payment) would be 2000 dollars. The sum accepted for, (2000 dollars, with interest from the date of the correspondence) would be 2,128 dollars. If her undertaking, in the agent's acceptation, were

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reduced to the *form of a bond, she would, if she failed to take it up at maturity, be liable for interest on 2,128 from the last of January 1832; whereas by her own offer, she would, in case of failure to pay, only be liable for interest on $2000, from the last of January, 1832. If this be the interpretation of the agent's letter, there is no ground for the bill.—The plaintiff cannot enforce payment of the $2128, because it was never proposed; nor could the defendant compel execution of titles, because she has never bound herself to pay $2128, in consideration of which alone has the plaintiff's agent agreed to convey.c

This was the interpretation I at first put on the letter of the agent. I felt inclined towards it for a considerable time; but I fear I was too much disposed to entertain it, by my conviction that this is a hard case. Still, although I have, upon reflection, adopted a different construction, my first view comes and goes on my mind: and I shall feel real pleasure, if the Supreme Court should reverse my final decision.

The agreement itself, its formal execution, its legal effect, and suggestions of additions to it, are all distinct things.

The plaintiff's agent, in the title under consideration, first of all takes up the proposals made to him, distinctly recapitulates them, and then distinctly accepts them.—This over, and (as I conclude) considering the bargain closed, he, as a separate matter, takes up the subject of its formal execution; and here, casually as it would seem, and not as a substantive part of the agreement, mentions the interest. This mention of interest, I am constrained to think, does not touch the terms already accepted by him. It goes no more to affect the terms distinctly offered, and distinctly accepted, than if it had been made in another letter, of a date subsequent to that containing the acceptance. And if the agent had closed his letter of the 4th March with a bare acceptance, and had, the next day, written concerning giving possession, taking bonds, the interest, &c., no one will contend that the contract would not have stood.

This must be the decision, if we regard the agent, in speaking of interest, as asking directions respecting the formal execution of the contract.

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*Again—I think the same decision must be made, if we regard the agent, in mentioning the interest, as intending to confine himself to the legal effect of the terms he had already accepted. To put the contract by, as it were, he takes the terms up, one by one, and assents to them all.—Having bound his principal to these terms, whatever their legal effect might be—having bound her to take the contract "for better for worse," I do not feel at liberty, upon light grounds, to conclude that he meant, by mentioning the interest, to undo all that he had done: and if he meant to speak merely to the legal effect of what he had done, and gave a wrong opinion, that does not alter or undo what he had done. The opinion is wrong, on the contrary, merely because the act done is too valid to be done away or altered. Now, to test whether a misconception of the legal effect of this contract entertained by one of the parties at the time of making it, is to vitiate it, let us suppose the bill filed against the party who en-

c Gibbes v. Chrisholme, 2 N. & M'C. 28.

tered into the contract laboring under the misconception. Would that party be exonerated from his distinct explicit undertaking, merely on the ground of a mistake in law? Such a doctrine has been once hinted in this Court, and the hint was borrowed from one of the highest sources in the Union. It is not, however, a necessary point in the case. I am not prepared to acknowledge such a doctrine. Even in criminal cases, every man is held bound to know the law: and if guilty of violating it, will be punished, although he does not know it—even if the punishment extends to life. Society cannot go on, if this policy be relaxed. How then, in matters of meum and tuum, in this Court or any other, can any one claim exemption for the legal consequences of his acts? [d]

Once more: the expression about interest, may be regarded as a suggestion that although the terms proposed were distinctly accepted, and would be abided by, yet, in fairness, interest should be added. Now, if A. offer B. in writing, $500 for his land, payable in twelve months, and B. replies in writing, "I accept your offer, but, nevertheless, when we come to draw your bond, I think you should make it bear interest from the date:"

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would this suggestion, en*tirely distinct from the well understood bargain of the parties, set the contract afloat? I think not.

There is one more view: We may regard the agent as accepting the terms, whatever they were; but enquiring whether the defendant understood herself as offering to pay interest; and this, with an intention of ascertaining how the bond was to be drawn. In this interpretation of the agent's letter, the contract must stand.

Upon the whole, I am of opinion the contract is valid. The defendant has, however, questioned the plaintiff's title. A reference must be ordered: on the coming in of the report, a final decree will be pronounced.

It is for the present Ordered, that the Commissioner do enquire and report, whether the plaintiff has, and can convey to the defendant an unincumbered and perfect title in fee, to the land described in the bill, as the subject of contract; in this reference, the plaintiff to be the actor.

I am inclined to throw the costs on the plaintiff, but shall reserve that question, until the coming in of the report.

Elliott, for the defendant, argued that before the Court would enforce a contract by letter, it must be shewn from the letters and not by evidence aliunde, that an agreement in all its parts has been concluded. The letters must be taken together, and considered as constituting a contract complete in itself, and not requiring further terms or explanations. Construe the two letters with each other, and there appears to be something requiring further explanation or stipulation of some sort. The letter of acceptance sets up a new and distinct term from any contained in the proposal, and therefore sets the contract afloat. He cited and commented on Bunch v. Blisby, 2 Madd. 19; Stratford v. Bosworth, 2 Ves. and Beames, 374; 3 Mer. 449; 2 Sim. and Stewart, 194.

Pettigru, contra, insisted, that the letter of the defendant contained the terms of a good contract, and it was only necessary that it should have been accepted, to make it obligatory on both parties. This was done in so many words, by the letter in reply. The objection is taken from the words in parenthesis in regard to the interest: they are in a subsequent part of the letter, after the ac-

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ceptance, *and form no part of the agreement itself. They were used in relation to the execution of the agreement already assented to, and as explanatory of its meaning, or as giving a legal construction to the contract. 3 Ves. 265; 5 Vin. Ab. 527; Sugden's Law of Vendors, 59, 60; 9 Ves. 351; Kennedy v. Lee, 3 Mer. 451.

O'NEALL, J. I agree with the Chancellor, that the defendant is bound to perform her contract of purchase.—A contract to sell and buy land, may just as well be made by letters, as by any other agreement in writing. The only object of requiring written evidence of such an agreement, is to prevent the possibility of fraud or perjury in setting up loose conversations for contracts; so that the consideration to be paid, the time of payment, and a description of the property to be sold, appear from any written memorandum signed by the party to be charged, sufficiently certain to enable the Court to decree a specific performance, it is all that is necessary. The assent of the parties to these essentials, can just as well be gathered from the proposal to buy, and the acceptance, by letters, as if formal articles were executed between them. In the case of Kennedy v. Lee, 3 Mer. 449, the Lord Chancellor states the rule to be "that the party seeking the performance of such an agreement, is bound to find in the correspondence, not merely a treaty, still less a proposal for an agreement, but a treaty, with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance which makes it no longer the act of one party, but of both." According to this rule, which is fully sustained by the cases of Stratford v. Bosworth, 2 Ves. & Beames, 340; and Huddleston v. Briscoe, 11 Ves. 583,—this case was well made out by the letter of the defendant proposing to buy, and that of the plaintiff's agent accepting her proposition.

The only question made, is whether the letter of the plaintiff's agent did not insist

[d] Underhill v. Horwood, 10 Ves. 209, 228; Lownds v. Chisholme, 2 M'C. Ch. 463; Hunt v. Rousmanier, 8 Wheat. 215-16; Lyon v. Richmond, 2 John. Ch. 51, 60.

on a new or additional term to the proposal of the defendant. I entirely agree with the Chancellor, that such a fact, if it were true,

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would *be fatal to the complainant's claim for a specific performance. For then there would be no acceptance of the defendant's proposal on the part of the plaintiff, nor would there be any assent on the part of the defendant, to the new term. In the language of the Lord Chancellor in Huddleston v. Briscoe, "the letters would not import a concluded agreement."

But the proposition of the defendant to buy, is distinctly and in terms accepted, upon the terms which she stated. The agent, in another part of his letter, speaking of the execution of titles, the cash payment, and the security for the payment to be made in January 1832, in reference to the latter says "I presume with interest." These words were obviously used as his construction of the contract which he had accepted, and which he supposed the defendant to have intended by her offer. But they are not made a condition on which the acceptance is to depend. It is what, in common fairness and in the usual course of such contracts, he supposed the defendant to have intended; still, however, leaving it perfectly optional to the defendant to admit or deny his construction, without affecting the legal effect of the contract, which he had accepted in such terms, and so unconditionally, as to prevent the plaintiff from refusing to comply with it.

In Kennedy v. Lee, the Lord Chancellor says, "I do not mean (because the cases which have been decided would not bear me out in going so far) that I am to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition which, be it what it may, de facto, arises out of the correspondence." There can be no doubt that both parties in this case, have assented to the proposition, that the defendant should buy the land for $6000 cash, and $2000 in January 1832. The payment of $2000 in January 1832, the defendant very probably intended should not bear interest until due; and the plaintiff, that it should bear interest from the day on which possession was delivered.—This, however, after the proposition of the defendant was accepted by the plaintiff, was

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a matter of legal construc*tion of the contract to which they had agreed. They might differ about it, as widely as they pleased; one of them could not by setting up what she had intended, destroy the contract. The legal effect of it, and the intention of the parties, were to be gathered from the terms of the defendant's proposal to buy, which the plaintiff had accepted; and not from her construction, expressed even at the time, but after she had given her assent to the proposition.

I am hence satisfied, that the defendant was properly held to be bound to comply with the contract of purchase.

On the argument here, it was conceded that the plaintiff's title was good, and that there was no necessity to refer that matter to the Commissioner. That part of the decree must be therefore reversed.

It is Ordered and decreed, that the complainant deliver to the Commissioner, for the defendant, her deed of conveyance of the land to the defendant, produced on the trial; that she do also deliver, or tender forthwith, the possession of the land to the defendant.

It is further Ordered and decreed, that the defendant do pay to the complainant the sum of $8000, with interest on $6000, from the 5th March 1831, and on $2000 from the 1st day of February 1832; and the costs of this case.

JOHNSON, J., concurred.

HARPER, J., absent.

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1 Hill, Eq. *169

*P. C. PLUNKETT, in Trust for Margaret Wood, v. ED. CAREW, Assignee of John Lewis.

(Charleston, April, 1833.)

[*Assignments for Benefit of Creditors* ⟸176, 185.]

The plaintiff made a shipment on joint account with L. who sold and invested the proceeds in merchandize shipped on board the brig Eliza, and gave the plaintiff a written acknowledgment to this effect; L. stopped payment and assigned his estate, including the cargo of the Eliza, to the defendants, as trustees for the payment of certain preferred debts, who sold the same, & applied the proceeds according to the deed: on a bill filed by the plaintiff against the assignees, *Held*, that the plaintiff was an equitable owner of the cargo to the extent of his investment, and that if the defendants had paid away the proceeds with a knowledge of the plaintiff's equity, they were liable to account to him.—Reference ordered to ascertain whether the defendants had paid away the funds, and if so, whether with or without a knowledge of the plaintiff's claim.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 513, 558; Dec. Dig. ⟸176, 185.]

[*Account* ⟸3.]

[Merchandise was purchased with the funds of A. and B., under an agreement that A. should have an interest in the cargo proportioned to his advances. The goods came to the possession of B., and were assigned by him for benefit of his creditors. *Held* that, as A.'s title to a share of the cargo was merely equitable, he might come into equity for an account by the assignees.]

[Ed. Note.—For other cases, see Account, Cent. Dig. § 10; Dec. Dig. ⟸3.]

The bill states, that the plaintiff made a shipment of 97 whole, and 18 half, tierces of rice on joint account with John Lewis, in

January, 1820; that in March following, Lewis gave him a written acknowledgment, setting forth that the moiety of the sales of the rice amounted to $1225.75, and that the same was invested in the return cargo of the brig Eliza, in which the plaintiff was interested to that amount.—That on the 4th of August, 1820, Lewis stopped payment, and assigned his estate to Joseph Trescott & Edward Carew.—That the cargo of the Eliza came to the hands of the assignees, and they sold it.—That he has often applied to the assignees for payment, but without effect, and that they ought to account to him as a part owner of the cargo of the Eliza. The bill contains many other charges; it was filed the 17th June, 1824.

Lewis died soon afterwards; and Joseph Trescott, one of the assignees, died.

The answer of Edward Carew states, that he is unacquainted with the dealings between the plaintiff and John Lewis, and knows nothing, except that after the plaintiff's bill was filed, this defendant had some conversation with Lewis, on the subject; and to the best of his recollection, Lewis, in a conversation, after the filing of the bill, did not deny that he was indebted to the plaintiff, in the sum mentioned in the bill, or in some such sum, but as a general creditor only.—That he has no knowledge of the shipment. That Lewis was half owner of the Eliza, and one-third owner of the cargo.—That on the 4th of August, 1820, he assigned all his estate to the defendant and to Joseph Trescott, for the payment of his debts in the order therein mentioned.—That they accepted the assignment, and took possession of the goods and effects which they understood, and were pointed out, as his.—The brig Eliza was at sea when the assignment was executed. They placed Lewis' share of the vessel

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and cargo in the hands of Na*pier & Co. for sale, who sold them openly and publicly, and though the plaintiff was in Charleston, he made no claim to the cargo, nor even gave notice of his debt: and the defendant never heard, till after the bill was filed, that Lewis owed him a cent. That the trusts of the assignment were to pay custom house bonds, then promissory notes indorsed by this defendant, and the other assignee Trescott; and the surplus to the other creditors—but the effects did not pay off the notes; and there is a large balance due to the assignees.

The cause came before Chancellor De Saussure, at Charleston, March, 1832.

The plaintiff produced the memorandum referred to in the bill—no other evidence was offered.

The Chancellor's decree declares, that if the cargo of the Eliza came to the assignees' hands, they are bound to pay to Plunkett, as a part owner.—And he ordered a reference, to ascertain whether the whole of the Eliza's cargo came into the hands of the assignees, and what amount is payable to the plaintiff, and to enquire into the fact of the assignment to Mrs. Wood, and in what right Plunkett sues.

From this decree the defendant appealed, and insists,

1. That Plunkett was a general creditor only; that his merchant having invested his money in goods, gave him no lien upon such merchandize.

2. That if the plaintiff could have come in as a part owner, he waived his right, by not making his claim before the goods were sold.

3. That, whether the assignees take a benefit under the assignment or not, the rights of the parties are the same: And that after the assets have been disbursed pursuant to the assignment, the plaintiff can neither make the creditors refund, nor the assignees answerable to him out of their own estates.

4. That the plaintiff's remedy, if any, is by an action at law.

Pettigru, for the defendants, contended, 1. As to the character and effect of the memorandum—It was a mere acknowledgment by Lewis, of his liability and promise to account; it created a debt, for the enforce-

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ment of which *an adequate remedy exists at law; but it vests no right, either legal or equitable, in, and creates no lien on, the cargo. This is not like the case of goods sent to a factor for sale and found in specie at his insolvency: for there, the title is complete in the shipper;—but here, the bills of lading, invoices, &c. are all in the name of Lewis. In the case of consignor and consignee on a credit sale, the right of stoppage in transitu exists, but it could not avail the plaintiff when the goods are in the hands of the consignee, and after a sale or assignment of them: 1 Atk. 245; 1 Wash. C. C. Rep. 212; 6 E. 17.

2. Admitting that the plaintiff has an equity in the goods, can this equity be set up against the assignment? Is not the declaration of trust an assignment for valuable consideration? It must operate as such, or as nothing.—Which is to be preferred, the open or the secret assignment? The acquiescence of the plaintiff in the sale of the goods, shews that he did not regard himself as having an interest in them, and is conclusive against him; 12 John. 301; and the assignee having executed the trust and paid away the funds, should not now be chargeable.

Hunt, contra. The plaintiff's claim is as joint-owner, and for an account of the sale. The grounds of equitable jurisdiction are, that the property cannot be followed at law, and discovery. The defendants, as the assignees of Lewis, take subject to the equity of the plaintiff, as part owner: and, as to the rule that one standing by and seeing his property sold, is concluded; it only means, that the rights of the purchaser shall not afterwards be disturbed by him—but the claim

here, is for the proceeds of the sales, to which the plaintiff, as part owner, is entitled.

O'NEALL, J. The various objections raised to the Circuit decree, make the following questions. 1st. Is the plaintiff on the case proved on his part, entitled to any relief against the defendants? 2nd. If he is, are the defendants bound to account for the proceeds, if they have paid them away before notice of his claim?

I am satisfied that the plaintiff is properly

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in Court, and en*titled to have the benefit of his interest in the cargo of the Eliza, if the fund is still in the hands of the defendants, or if it has been paid away after notice of his claim. This assumes however as true, that the right of action is in Plunkett in the character in which he sues. This assumption may, upon the examination before the Commissioner, turn out not to be well founded, and if so, it is not intended that the defendants should in that respect be prejudiced by it.

1. There can, I think, be no doubt as against Lewis, that the plaintiff would have been entitled to the aid of this Court, to have given him in specie, or in an account, the benefit of his interest in the cargo of the Eliza. For to say nothing of other grounds of equitable cognizance of the case, which I may have occasion to notice hereafter, the legal right to the cargo was in Lewis, and the plaintiff's right to participate in it, rested altogether in agreement. This was clearly an equity. For it is no objection to say, you might have sued on it at law. There are many cases you may sue at law, and yet the jurisdiction in Equity is unquestionable. This is pretty much the case in all cases of specific performance of contracts; at Law, you may have your remedy in damages; or in Equity, for specific performance. So, when there is a contract to divide property in specie, or to divide the proceeds; I should entertain no doubt, that on the party's refusing to perform his contract, an action for damages might be sustained at Law; and in Equity, that a bill would lie in the one case for a partition of the property, and in the other, for an account of the proceeds. Under the agreement of Lewis, the complainant as against him, might possibly have obtained an actual apportionment and division of the cargo. If however that was doubtful, (which I do not think,) there can be no doubt that he would be entitled to an account of his proportionate share of the cargo. I have said that the legal title was in Lewis, and it may be necessary to assign the reasons for this assertion, before I proceed farther. The invoice and bills of lading were in his name, and he had the actual possession; and all these combined together, are more than enough to give a legal title to merchandize. The plaintiff was merely, by a contract on a valuable consideration, entitled to a share,

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*in proportion to the amount of his funds invested. This gave him the right in equity and good conscience, to a share of the adventure. The defendants, as regards their legal rights to the property, stand exactly upon the same footing which Lewis did; and I apprehend they take it subject to the equities which existed against him, and must account for it as he would have done, unless they have paid away the proceeds before notice. This qualification constitutes the only difference between him and them. For they represent him, and are not entitled to any privileges, (with the exception I have already made) which he could not claim. For the purposes of this question, they are to be regarded as volunteers. I proceed now to shew, that as against the defendants, the doctrines of the Court of Equity, sanctioned by the authority of repeated decisions, sustain the position that the complainant is entitled to relief in this Court, on the agreement for a proportionate share of the cargo of the Eliza. In the case of Legard v. Hodges, the Lord Chancellor states the general rule as a maxim in Equity, "that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself and any claiming under him voluntarily or with notice, raises a trust;" 1 Ves. Jr. 478. This as a general rule is perhaps a little too broadly stated, for it is not intended by it to say, that a mere personal contract or agreement would create a trust, and give the Court of Equity jurisdiction. But if the agreement is intended to operate on a subject or property specifically, so as to create an interest in the thing itself, it would fall properly under the rule. In the case in hand, the defendant's principal agrees with the plaintiff, that he should have an interest in the Brig Eliza's cargo, in proportion to the sum of $1225.57 of his funds invested. This agreement was intended to operate on the cargo itself, and makes the plaintiff the equitable owner to that extent, and the defendant's principal, a trustee, holding the legal title for the use created by his own agreement.

This is analogous to the case of a bill filed for an account and distribution of prizes captured by a privateer, among the officers, crews, and owner, according to the articles. In such a case there is no doubt of the Equi-

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ty jurisdiction, and *for a precedent of such a case, I refer to the case of Good v. Blewitt, 13 Ves. 397; and for another of a similar character, where an account was claimed by officers of the army, of prizes under the King's grant, I refer to the case of Brown v. Harris, 13 Ves. 552. The jurisdiction in these cases was sustained on the principle, that the agreement in the one, and in the other the grant, gave the claimants a right to shares in the prizes themselves, and hence

that they were entitled to the account as co-tenants. The principle, I take it, reaches this case; the agreement here, gives an interest in the cargo itself, and in Equity, Lewis and the plaintiff are co-tenants. The case of Weymouth v. Boyer, 1 Ves. Jr. 416, it seems to me is the very case before the Court, and it has the singular advantage of being decided in Chancery, by one of the most eminent of the English Law Judges, Mr. Justice Buller, sitting for the Lord Chancellor. Bryant and Tewksbury were indebted to Weymouth; he pressed Bryant for payment, and he agreed to sell him 45 hogsheads of tobacco, to be accounted for by him in part of his demand. An invoice was mutually signed with a memorandum of the sale, but before they parted, Weymouth proposing Holder as his factor to sell the tobacco, Bryant objected, and it was agreed that the whole should be sold by Williams, factor for Bryant, and an agreement for this purpose was accordingly signed by both. The tobacco was subsequently delivered to Williams, under an order from both Bryant and Weymouth; Williams sold the tobacco, and claimed to retain the proceeds for a debt due to him by Bryant and Tewkesbury. It was contended there, as it has been here, that the remedy was at law, but the objection was over-ruled, and the reasons of Mr. Justice Buller, in support of the jurisdiction, at p. 424, are a full answer to the arguments pressed with so much ingenuity on us, in this case. Upon the merits, his views of the case are so directly applicable to this, that they may be stated and used as argument for the plaintiff.

"I think, upon the whole, this must be considered as a case in which the plaintiff has not the strict legal property, but rests upon an agreement to be properly enforced here. I found that, on observations occurring upon

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this in*voice, signed by the plaintiff and Bryant. The intention was, that there should be an actual sale, and that the property really should pass to the plaintiff; and that is the purport of the memorandum made on the paper stating that the plaintiff had bought 25 hogsheads of tobacco, specified by numbers, which memorandum was signed by both parties. I should have said that was a transfer of the property, if it had rested there. That was dated 1st July, 1785.—But it is apparent upon that, that they altered their plan, and came to a new agreement before they parted, which it was competent for them to do, and the reason was, the question, who should be the factors. The plaintiff had spoken to Holder, Bryant objected to that, and said, "let them all be sold by Williams, and we will account for the 45 hogsheads," and an agreement was accordingly signed for that purpose. That reduces the case, to a case of agreement only, in order to let the friend of Bryant have the selling of the goods. If it rests upon agreement, the plaintiff cannot go elsewhere."

The defendant was held liable to account for the proceeds of the sale of the tobacco. The agreement here, as in that case, was intended to convey property to the plaintiff; but it does not have that effect in law. The plaintiff's rights are in agreement only; and it follows, that his only relief is in Equity; and he is entitled to an account for his share of the proceeds, unless his laches has defeated that right. This brings us to consider the second question.

2. The assignment is to Carew & Trescott, of all Lewis' estate, including the Eliza's adventure, which is set down at $5,500. It may be that this did not include the plaintiff's interest, and if so, that may possibly present another question, whether the defendants, if they have possessed themselves of the plaintiff's share without any authority from Lewis, would not be, in any event, liable for the proceeds? If there is any doubt in relation to this matter, the plaintiff may, on the reference if he choose, shew that the assignment did not authorize the defendants to take possession of his interest in the cargo. But sup-

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*posing, for the present, that the assignment covers his interest, are the defendants liable to account for the proceeds, if they have paid it away under the trusts of the assignment before notice to them of the complainant's claim? The deed of assignment directs the whole proceeds of the assigned property to be applied first to the payment of certain preferred debts, and the surplus if any, to the payment of such other debts as might be preferred within six months. The legal estate in the cargo of the Eliza passed to the defendants; the plaintiff's claim was his equitable interest under the agreement: so soon as this was brought home to the knowledge of the defendants, if they then had the cargo or its proceeds in possession, they became his trustees, and liable to account to him for his interest. But if they had paid away the proceeds before notice, there was nothing in their hands on which the trust could attach. For, it is their possession of that which in Equity belongs to the plaintiff, which turns their legal estate into a trust for him. If, before they knew of his rights, they had, in the discharge of their duties, parted with the fund, they are not liable to account to him for that in which they had a legal estate, without any knowledge of the secret trust in favor of the plaintiff. The facts in relation to this view of the case, can only be ascertained by an examination to be had, on the reference to the Commissioner.

It is Ordered and decreed, that the Chancellor's decree be reformed according to the views expressed in this opinion; that the order of reference, made by the Chancellor, be carried into execution; and that the Com-

missioner do examine and report upon the matters necessary to a correct decision of the defendant's liability to account, under the second question discussed in this opinion, according to the views therein suggested.

JOHNSON and EARLE, JJ., concurred.

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1 Hill, Eq. *177

*L. E. DAWSON v. R. B. SCRIVEN.

THOMAS E. SCRIVEN v. R. B. SCRIVEN.

(Charleston, April, 1833.)

[*Judgment* ⟸772.]

The lien of a decree in Chancery, commences from the day on which it is delivered to the Commissioner, & filed by him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1332; Dec. Dig. ⟸772.]

[*Equity* ⟸428.]

[A decree cannot be entered nunc pro tunc, so as to affect by relation the rights of persons, other than parties or their immediate representatives, acquired before the decree was actually pronounced.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1018; Dec. Dig. ⟸428.]

[This case is also cited in Blake v. Heyward, Bailey, Eq. 208, without specific application.]

Before Harper, J. (sitting for Chancellor De Saussure) at Coosawhatchie, January Term, 1833, who made the following report.

"In the first of these cases, the complainant Lawrence E. Dawson, obtained a decree against the defendant, at January Term, 1830. The decree was signed during the sitting of the Court, and execution was lodged 2d February, 1830. In the other case a full hearing was had at the same Term, to wit, January, 1830; but the case being a very litigated one, and the points numerous and important, the papers were carried home by the presiding Chancellor, and subsequently to the day on which the execution in Dawson v. Scriven was lodged with the sheriff, a decree for the complainant was sent down. From this decree an appeal was made, but was abandoned, in February, 1831.

A motion was made before me, at the present Term, for a rule or order on the sheriff, instructing him to pay to the complainant, in a rateable proportion, whatever moneys he should make by a sale of the defendant's real estate; on the ground, that the decrees should both be considered as having equal liens, as decrees of the same Term.

The motion was refused."

The complainant, Thomas E. Scriven, appealed from this decision: and renews his motion in the Court of Appeals, on the ground taken in the Circuit Court.

Bailey, for the appellant.

Mazyck & Frost, contra.

O'NEALL, J. The case of Blake v. Bolan & others, decided that a decree in Equity for the payment of money, "constitutes a lien on land like a judgment at law." It is now necessary, in following out the principles

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of that *decision, to fix the time at which the lien commences. In considering this question, we can expect but little aid from adjudications of the English Court of Chancery; the doctrine of the liens of decrees is peculiar to this State, and is practiced mainly upon the right given by the Act of 1785 to the complainant to sue forth a writ in the nature of a fi. fa. to make the estate of the defendant, real and personal, liable in satisfaction thereof. It will, however, be of service in examining the question, to ascertain at what time the decrees of the English Court of Chancery take effect. According to strict practice in England, a decree has only the force of an interlocutory order, until signed and enrolled: 2 Fonb. on Equity, 198. According to rule, the decree could not be signed and enrolled, until drawn up, and a copy served on the clerk of the adverse party. The decree so drawn up, if not objected to, is entered or recorded, and then put on the file, denoting the term at which it was pronounced. In the case of Clapham v. Philips, Finch, 169, the Lord Keeper declared, "that the decrees of this Court ought to take effect from the time the judgment of the Court was given and the decree pronounced in the cause: and that the death of the parties ought not to hinder the enrolment thereof in some convenient time: for, otherwise, it might create new trouble and expenses to the party living." This decision, as between the parties to the suit, placed the effect of the decree, as commencing from the time judgment was pronounced in the cause: but, as against third persons, the decree could have had no effect, except from the enrolment. So, in 2 Fonb. on Eq. 200, it was said "a cause was finally heard, and the Court took time to consider of their judgment; and in the meanwhile the party plaintiff died—the Court gave judgment nunc pro tunc, and ordered that their decree should have relation to, and be entered upon the day that the cause was finally heard, and in this decree the plaintiff had relief," Jones v. LeDavid, 1 Hill, T. 1791, in ——. The effect of this was, as between the parties, to make the decree operate from the day on which it was heard: upon the principle that judgments at law, after verdict, are per-

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*mitted to be entered nunc pro tunc, notwithstanding the death of one of the parties. But it never was supposed that a judgment entered nunc pro tunc, could affect the rights of any but the parties to it, before it was actually signed.—And so in the cases in Chancery referred to, the decrees take effect from the hearing, or the time the decree was actually pronounced, as may best promote the

ends of justice, between the parties; but against third persons, until enrolled, a decree would be interlocutory, and could not operate to their prejudice.

In this State it is not the practice to enrol the decrees, and it has been held to be unnecessary, for the reason, that the Chancellor delivers his decrees in writing, signed by himself, which is equivalent to an enrolment. The time when pronounced, as is said in Clapham v. Phillips, would seem to be the proper point of time from which they ought to take effect. The decree may, as between the parties themselves, or their immediate representatives, be ordered to be entered, as of the day on which the cause was heard. But this is as far as I am prepared to give retrospective effect to a decree.

The lien of a decree, as I have before said, arises from the fact, that by law, the party is entitled to a writ of fi. fa., to make the real and personal estate of the person against whom the decree is, liable to its payment. If the right to take out execution is the cause of the lien, can it commence until the decree, which authorizes it to be issued, is pronounced? As long as the judgment of the Court is locked up in the breast of the Chancellor, there can be no lien. There is no sum ascertained, which the party is to pay, and for which his estate may be made liable. It may, or may not be liable: and until this uncertainty is ended, it would be vain to talk of the lien of a judgment existing. A recognizance, until estreated, does not bind land.—The State v. Anderson, decided at Columbia, December Term, 1831. It is a debt of record, but because the right to issue execution is not ascertained and fixed until the order for estreat is made, it has no lien. The principle of that decision applies to the question be-

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fore us. The right *to issue execution to satisfy the judgment, in both cases is what creates the lien.

According to the Statute of Frauds and Perjuries, 29 Car. 2, chap. 3; sect. 13, 14, 15, P. L. 83, the clerk who signs a judgment at law, is required to note the day of the month and year, on which he signs it, both on his judgment docket, and also on the margin of the judgment; and as against purchasers bona fide for valuable consideration, they take date and have a lien, only from the day on which they are so signed. The settled practice and construction of these sections, in this State, has been to regard the lien of the judgment, not only as against purchasers, but as between creditors, as commencing from the day on which it was signed. Whether this construction is correct or incorrect, it is not now necessary to inquire. The provision in relation to purchasers, is sufficient for my present purpose. If the lien of a decree is to commence from the day on which a cause is heard, it may affect the rights of bona fide intermediate purchasers —for it sometimes happens unavoidably, from the intrinsic difficulties involved in a cause, that a decree is postponed for months after the hearing. Is the estate of the defendant to be locked up during this time, and to be unalienable both by himself, and by operation of law? For the effect of the constructive lien of the decree, would be to defeat any sale of his real estate, made after the hearing; and thus, either to prevent a sale, or to perpetrate a fraud on the purchaser. This was the very mischief intended to be guarded against, by the Statute of frauds and perjuries, at law; and are we, in its teeth, in establishing a rule confessedly within our power, in opposition to the declared will of the people, through their representatives, to say, that a decree in Equity shall have a constructive lien, which has been wisely denied to a judgment at law? I think not. The objections to this constructive lien are not yet exhausted. Others present insuperable difficulties to its allowance. Its effect might be, to postpone a judgment at law obtained before it was pronounced, and to defeat a sale under it. If it be true, that it binds from the day on which the case

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is heard, a judg*ment at law, obtained after the hearing, duly entered up, and signed by the clerk, and entitled to be paid perhaps for months, out of the debt or estate, suddenly becomes junior to that which had no existence until long after its own legal existence. This monstrous absurdity arises from allowing construction to stand in place of fact. If under the judgment thus obtained, the land of the debtor is sold under the execution, and the money paid over to the plaintiff, the constructive lien of the decree would defeat the sale and deprive the purchaser of his title. So too, in the cases before us, if Dawson, under his decree, had sold his debtor's estate, and received the proceeds before the decree in Thos. C. Scriven's case, he must, if the doctrine contended for is correct, upon the decree being pronounced in the latter case, have refunded to it its proportion. These consequences of a constructive lien, must satisfy every one of the impropriety of allowing it. But it is said, it is conceded that the decree could not have a constructive lien, as against purchasers, it is only between creditors that it ought to have this effect. There can be no such distinction made. The decree must, for all purposes, take effect from the day on which the cause was heard: or from the day on which it is pronounced. From the time it is legally to be regarded as a decree, it has its lien, and there is nothing in the law which will enable us to postpone it as to one class, and give it effect as to another.

In Equity, there is not as at law, a technical Term within which the Judge is alone authorized to pronounce judgment. The Term in Equity is for the hearing of causes, and

the Court is considered as always open. Hence it is, that the Chancellor may in vacation, as well as during his sittings, pronounce his decrees. He is regarded as in Court, to pronounce judgment, on the day on which his decree is delivered to the Commissioner, and filed by him; and from that time it is a decree, and its lien commences. This rule may operate hardly in this and similar cases, but these partial evils will not bear a comparison with those which would result from giving decrees a lien from the day on which the causes were heard. The pre-

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vention of such consequences as *result from the application of the rule, to the cases under consideration, will in future be in the power of the Chancellors. Cases against the same party at the same Court, in which decrees for the payment of money are expected to be made, can very properly be held under advisement together, until judgment at the same time, can be pronounced on them. It is Ordered and decreed, that the Circuit decree be affirmed.

JOHNSON and EARLE, JJ., concurred.

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1 Hill, Eq. 182

H. MUCKENFUSS v. JOHN DESIL HEATH and Another.

(Charleston. April, 1833.)

[*Trusts* ⟸316, 321.]

A trustee under a deed, who has the management of the estate of a minor, is entitled to commissions under the Act of 1745, although he has failed to make returns to the office of the Secretary of State.

[Ed. Note.—Cited in Baker v. Lafitte, 4 Rich. Eq. 395; College of Charleston v. Willingham, 13 Rich. Eq. 203.

For other cases, see Trusts, Cent. Dig. §§ 445, 468; Dec. Dig. ⟸316, 321.]

[*Principal and Agent* ⟸81.]

[A private agent is not entitled to commissions upon money passing through his hands, in the absence of any stipulation therefor.]

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 197; Dec. Dig. ⟸81.]

[*Principal and Agent* ⟸81.]

[Cited in Poag v. Poag, 1 Hill, Eq. 287, and Lever v. Lever, 2 Hill, Eq. 166, to the point that a private agent is not entitled to commissions unless by contract.]

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 194–214, 219, 223; Dec. Dig. ⟸81.]

The plaintiff, as a trustee under a deed, held certain real and personal estate for the use of the defendant Heath, during his minority. On his attaining full age, and demanding an account and transfer of the estate, this bill was filed to obtain the order and sanction of the Court, to authorize such transfer to the cestuique trust. The only question in the case, was as to the allowance of commissions to the plaintiff. From the report of the Master, it appeared that he had kept a regular account of his transactions, and that the funds had been promptly and faithfully invested. The plaintiff claimed as a compensation for his services, (under the act of 1745, 1 Brev. Dig. 392) 5 per cent. on his receipts and payments; and 10 per cent. on the dividends of the stock invested. The claim was resisted on the ground that regular returns had not been made to the office of Secretary of State.

Chancellor De Sausure held, that a trustee cannot demand compensation for his services, unless by positive agreement, or under some statutory provision—that the act of 1745 allows commissions, on condition that the trustee makes returns to the Secretary of

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State's office, and the plaintiff not *having complied with the condition, was not entitled to commissions.

From this decree the plaintiff appealed.

Pepoon, for the appellants, referred to A. A. 1745, P. L. 201; 1 Brev. Dig. 392; P. L. 495; 6 Dane, 602; 6 Bacon, Ab. Tit. Stat. K. 392; 2 John. 379; 4 Mas. T. R. 318.

De Saussure, contra, cited 1 Ball & Beatty 185; 1 John. Ch. 27, 38; Ib. 527.

HARPER, J. The Act of Assembly of 1745, speaks of all guardians and trustees who shall have the care, management or custody of the estates, real or personal, of any infants or minors; and by the eleventh clause, it is enacted, "that all and every executor, administrator, guardian or trustee" shall receive commissions. The trustee in the present case seems to come under the very letter of the act. He has had the custody and management of the estate of minors. It has been supposed that the allowing of commissions would be inconsistent with the determination of this Court in the case of Ravenel, administrator of Cripps v. The Assignees of Charles Pinckney. In that case it is said "that the act of 1745, allowing commissions to executors, administrators, guardians, trustees &c. embraces only that species of agents or trustees therein specifically mentioned, or such as are under the authority of the law, and the control of the Courts. Factors, commission merchants, commercial agents, and assignees, are entitled to commissions, from the usage of trade. But the private agent or assignee of an individual, is not entitled to any such claim, unless he makes it part of his contract." We are of opinion, that in this case the trustee is such an one, as is specifically mentioned in the statute. There is an obvious distinction between the agent or assignee of individuals of full age, and capable of contracting for a proper compensation for the particular services he requires to be rendered, and the trustee of an infant, whose services may be required for a number of years. It is true, that the donor who settles

property on an infant, might, if he thought
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*proper, provide for a compensation to the trustee. But still the trustee's services are rendered not to him, but to the infant, and he being incapable of contracting, the law fixes the compensation. The law favors provisions for infants; and trustees in such cases, are to be encouraged to accept and act. But, whatever the reason for the distinction may be, the law seems plainly to have made it.

We think the Chancellor mistaken in supposing that the making of regular returns to the Secretary of State's office is, by the law, made a condition on which the trustee's title to commissions will depend. By the executor's law, it is expressly provided, that executors or administrators, who fail to make returns, shall forfeit their commissions. But there is no such provision in the Act we are considering. This Act provides that executors or administrators, who fail to return an inventory and appraisement, shall be liable for all the debts and legacies of the testator or intestate; but no penalty or disability is imposed on a guardian or trustee, who shall fail to return his accounts. A default in this respect, may subject him to the censure of the Court. Perhaps, if it appeared that the estate had suffered injury from his neglect, it might be within the competency of the Court to deprive him of commissions, as a punishment. But in the present case, it appears that the estate has been managed skillfully and faithfully: and satisfactory accounts regularly kept, though not returned.

The motion to reverse the decree on this point, is therefore granted.

O'NEALL, J., concurred.

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1 Hill, Eq. *185

*SKILLING v. JACKSON, Adm'r.

(Charleston. April, 1833.)

[*Equity* ⇐128.]

Under the Act of 1791, when the amount claimed does not exceed £100, the proceeding may be by petition instead of bill, whether the cause be litigated or not.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 307; Dec. Dig. ⇐128.]

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1 Hill, Eq. 185

The Administratrix of PETER D. FOOTE, Decd., v. C. W. VAN RANST, Administrator of Asa & John Foote, Decd.

(Charleston. April, 1833.)

[*Equity* ⇐410.]

Where a party has neglected to file exceptions to the Master's report, within the time prescribed by the rule of Court, he will not afterwards be permitted to file them, unless he shews by affidavit, that he was prevented from filing them by accident, mistake or surprise.

[Ed. Note.—Cited in Sinclair & Kiddle v. Moore, 1 Hill, Eq. 444; Gibbes v. Elliott, 5 Rich. Eq. 331.

For other cases, see Equity, Cent. Dig. § 906; Dec. Dig. ⇐410.]

[*Appeal and Error* ⇐843.]

[Where a decision of the chancellor, refusing leave to file exceptions to the report of a master, is sustained on appeal, the appellate court will not notice any errors in such report.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. ⇐843.]

[This case is also cited in Davis v. Wright, 2 Hill, 563; Dixon v. Hunter's Distributees, 3 Hill, 207; Jordan v. Hunt, 2 Hill, Eq 145, without specific application.]

O'NEALL, J. The defendant neglected to file exceptions to the Master's report, within the 26th rule of Court; at the succeeding Court he moved the Chancellor for leave to file exceptions, but made no affidavit, setting out the causes why they had not been filed; the Chancellor refused the motion and confirmed the report. This is an appeal from his decree, on a great variety of grounds, arising out of the manner in which the Master has stated and made up the accounts. But in the view which we have taken of the case, it will only be necessary to consider that which questions the correctness of the Chancellor's decision, on the motion for leave to file exceptions. For if the Chancellor's decision was correct in that respect, it is useless to talk about errors in the Master's report on the accounts. They can only be brought regularly to the view of the Court by exceptions. Were we now to notice them, when they were not presented as exceptions regularly filed to the Master's report before the Chancellor, we should, in effect, abolish the settled practice of the Court. It is better, therefore, that injustice should even be done, than that we should unsettle a practice as old as the Court of Equity itself. I have no doubt that on a proper case being made, the Chancellor
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had the power, and would have *permitted the exceptions to have been filed. But to have entitled the defendant to this indulgence, it was necessary that he should have shewn by affidavit, that he was prevented from filing the exceptions, by accident, mistake or surprise. The case of Bowker v. Nickson, 3 Mad. Ch. Rep. 226, is an authority to this point. The Vice Chancellor, Sir John Leach, says—"It is necessary objections should be taken to the draft of the report, before the party can except, in order that the Master may have an opportunity of reconsidering his opinion, and it is not form, but substance; but if, by accident or surprise, that has not been done, the Court will give the party leave to except. It is sworn by the attorney, that the clerk in Court did not send to him the warrant which had been

served fixing a day for setting the draft of the report. If that be so, it would not be just to exclude the party from objecting to the report, because the clerk in Court was negligent. Let the clerk in Court make an affidavit that he did not send the warrant to the attorney, or give him any communication of it. If such affidavit is produced, the plaintiff may take his motion, paying the costs of it, but if no such affidavit is produced, the motion must be dismissed with costs."

The practice in this State requires notice to be given of the report to the parties; and in Charleston, the party dissatisfied is allowed ten days after notice, to file his exceptions. Upon these being put in, the Master may, and ought to report upon them, sustaining or over-ruling them. If objections to the draft of the report are matters of substance and not of form, the exceptions are also, for the very same reason, matter of substance and not of form. They ought to be filed with the Master, within the time limited by the rule of the Court, in order to give him the opportunity of recording his opinion, before the Court is called on to pass upon it. If they are not filed within the rule, the party in default can only be relieved from the consequences of his neglect by shewing on oath that he was prevented from filing them, by accident, mistake or surprise.

The defendant's solicitor had ample notice of the report, and abundant time afforded

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to him, to put in his excep*tions—none were filed, and at Court, he moved for leave to file his exceptions without stating a case which made out either accident, mistake or surprise. The plaintiff's counsel insisted on his legal advantage, and I think the Chancellor was right in refusing the motion and confirming the report.

It is therefore ordered and decreed that the Chancellor's decree be affirmed.

JOHNSON and EARLE, JJ., concurred.

Hunt, for the defendant.

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1 Hill, Eq. 187

JOHN WHITE and B. F. HUNT. Assignees of Thomas W. Price, v. CHARLES FOLLIN and CAROLINE C., His Wife, Adm'r and Adm'x of John Trescott, Dec'd.

(Charleston. April, 1833.)

[*Bonds* ⇐82; *Executors and Administrators* ⇐417.]

Where an insolvent debtor rendered in a schedule of his estate, in which was included a bond on the defendant's intestate, & was discharged according to law, but inadvertently omitted to execute an assignment of the schedule.—*Held*, that under such circumstances, this was a good equitable assignment of the bond, which a Court of Equity would set up & decree on: but that the insolvent or (in case of his death) his legal representative, should be made a party to the bill.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 85; Dec. Dig. ⇐82; Executors and Administrators, Cent. Dig. § 1647; Dec. Dig. ⇐417.]

O'NEALL, J. It appears that Thomas W. Price was arrested by the sheriff of Charleston under a ca. sa., at the suit of Philip Moore and others; that he filed his petition for the benefit of the insolvent debtor's act, with a schedule of his whole estate and effects, in which was included the bond on the defendant's intestate.—That he was ordered to be discharged, on executing the usual assignment, and that B. H. Hunt, John White, and Dr. Burgoyne were appointed the assignees; the latter declined to act. Price did not execute the assignment from some mistake or omission of the clerk, but was discharged. He is dead and insolvent. The bill is against the defendants, as administrator and administratrix of the intestate, Trescott, for the payment of his bond, which the plaintiffs have in their possession. The defendants demurred to the bill, and amongst other causes, they insist, that the administrator or other legal representative of Thomas W. Price, should be a party. The Chancellor [Johnston] sustained the demurrer on this

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*ground, and the question now is, whether such a party is necessary.

The case stated in the bill, makes out an equitable assignment of the chose in action, now the subject of controversy. The 2d section of the Insolvent Debtor's Act, after directing the manner in which the Court shall order the assignment, to be made "by a short indorsement on the back of his or her petition, signed by the petitioner," &c. provides, "and by such assignment, the estate interest and property, of the lands, goods, and effects so assigned, shall be vested in the persons to whom such assignment is made, who may take possession of, or sue for the same, in his or their own name or names, in like manner as assignees in commissions of bankruptcies can or lawfully may do, by the laws or statutes of Great Britain." P. L. 248.

To have passed a legal right to the bond to the plaintiffs, and to have enabled them to sue on it at law in their own names, it was necessary that the assignment should have been executed according to the act. This constitutes their only legal title, and not being able to make it out, there is, of course, no assignment of the bond at law.—But, in Equity the facts, that the formal execution of the assignment was omitted by mistake, that the insolvent was ordered to be discharged on the condition that he should make it, that he has the full benefit of the order, and that he delivered the bond to the assignees appointed by the Court, constitute a good equitable assignment. But can the equitable assignment be set up and decreed upon,

until the assignor, or his representative, if he be dead, is a party? I am satisfied it cannot. It may be admitted, as the law certainly is, that neither at Law nor in Equity, would a payment or release by the obligee of the bond, be good as against the equitable assignment, after notice of the assignment to the obligor: Leigh v. Leigh, 1 Bos. & Pul. 447, Baldwin v. Billingstry, 2 Vern. 539; so too, the bond would not, after such an assignment, pass under a commission of bankruptcy, Winch v. Kesley, 6 T. R. 619. But still these positions do not conclude the question. They only shew, that the equitable

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rights of the assignee, will be preserved *both at Law and in Equity, against the fraud and combination of the obligor and obligee. At Law, the bond must have been sued in the name of the obligee or his legal representative, the legal interest being in him: and yet, there he is regarded as suing for the benefit of the assignee, and a payment to, or release by him, after notice, would be adjudged void. In Equity the assignor must be a party, as was ruled in the case of Cathcart v. Lewis, 1 Ves. Jr. 463. That was a bill by the assignee of a judgment; the Lord Chancellor held, that the assignor was a necessary party. The reason of the rule appears to be, that no decree can be given upon the equitable title, until the legal one is before the Court. The proof to establish the assignment cannot be heard, until he, who is thereby to be deprived of the legal interest, is legally a party. For, however, improbable it may be, yet we must regard it as possible, that he may shew cause why he should not be divested of it.

In this case it might be said, how is it known that Price has not paid the debts, and if this be so, he or his representative would be entitled to receive payment of the bond, instead of the assignees. This is, it is true, a mere possibility which I am sure will not turn out to be true in this case, but this case is to constitute a precedent for future cases, in which instead of being conjecture, it may be fact, and hence here, as in the case which may occur, the assignor or his representative, must be a party. I admit the rule, that when the legal estate or interest is represented by one or more parties before the Court, that it is not in all cases necessary that every one having an interest shall be a party. As in the case of the executors of Brashers v. Van Courtland, 2 J. C. R. 247, where the committee of a lunatic were made parties, it dispensed with the necessity of making the lunatic a party; for they were, in Equity, his proper representatives and alone entitled to be heard in defence of his rights. So in the case of Cockburn v. Thomson, 16 Ves. 321, where a bill was filed by several persons on the behalf of themselves and all others, proprietors of the Philanthropic association, it was held that the non-joinder of some of the proprietors, would not prevent the Court

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from giving relief to the *parties before it. In that case all had an interest in the dispute, yet any one was the representative of the entire legal interest. But I am not aware of any case in which the Court of Equity has given relief upon the equitable title or interest, where the party in whom the legal title or interest was, was not a party.

It is ordered and decreed, that the Chancellor's decree, sustaining the demurrer, be affirmed, and that the complainants have leave to amend their bill, by making the administrator or executor of Thos. W. Price, decd. a party, complainant or defendant, as they may think proper—the costs of the demurrer and amendment to abide the event of the cause.

JOHNSON, J., concurred.

HARPER, J., absent.

H. A. DeSaussure & Pettigru, for the plaintiffs.

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1 Hill, Eq. 190

MARY I'ON KINLOCH, and Her Infant Children v. JACOB BOND I'ON, and the Devisees of Cleland Kinloch, Decd.

(Charleston. April, 1833.)

[*Trusts* ⇐362.]

Where a husband in pursuance of a marriage contract, purchased lands and had the titles made to the trustees under the settlement, but the deeds were absolute, not declaring any trusts, and the husband afterwards sold the lands, and the trustees at his request, conveyed to his purchasers, and he received & squandered the proceeds; it was held, that the trustees were liable, altho' they did no other act shewing their acceptance of the trust.

[Ed. Note.—Cited in Walker v. Fraser, 7 Rich. Eq. 241.

For other cases, see Trusts, Cent. Dig. § 560; Dec. Dig. ⇐362.]

This case came before this Court on appeal from the decree of Chancellor Johnston at Charleston, making the defendants liable for a trust fund which had been wasted. The facts of the case and the questions made, are so fully set forth in the following opinion, as to render any other report unnecessary.

Grimkie & Toomer, for the defendants, cited and relied on Kipps v. Dennison, 4 John Rep. 23, 24, 26; 3 Atk. 480; 4 Ves. 628; 2 Mad. 121; B. P. C. 293; 2 Bro. C. C. 114, 7 Ves. 186.

H. A. De Saussure & Pettigru, contra, cited and commented on, 7 Bacon Ab. tit. Uses

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and trusts, B. 1 Saunders on *uses and trusts, 246–7, 253; 1 Mad. 256; Com. Dig. 1010–11; Whistler v. Newmand 4 Ves. ——; 2 Cox's cases, 1; 4 John Ch. Rep. 234; 11 Ves. 319; 3 Ves. Jr. 696; 11 Ves. 319; 3 Bro. C. Rep. 90; 9 Ves. 103; 1 Atk. 59; 3 1b. 323; 10 Ves. 511.

JOHNSON, J. In this case, as in most others of the same character, various minutiae are mixed up with the important facts, which serve rather to embarrass than elucidate: divested of these, this cause lies in a very narrow compass. In contemplation of a marriage between the complainant, Mrs. Kinloch, and her husband, Frederick Kinloch, a marriage contract was entered into, to which the intended husband and Thomas Lowndes, the father of Mrs. Kinloch, and the defendant, Jacob Bond I'On, and Cleland Kinloch, as trustees, were parties. By this contract, Thomas Lowndes covenants to advance £3,000 to Frederick Kinloch, the intended husband, to be invested by him in property and conveyed to the trustees, for the uses and trusts declared in the contract (for Frederick Kinloch and wife, for life, and then to the issue of the marriage). Thomas Lowndes paid the £3000 to Frederick Kinloch, and he invested a part thereof, (according to the statement in the bill, about $11,100, and, according to his answer, $7,265) in lands, and procured the title deeds to be executed by the persons of whom he purchased, directly to the trustees, Jacob Bond I'On and Cleland Kinloch. These deeds do not set out the object, or declare the trusts, but are general. Frederick Kinloch afterwards sold these lands, and procured the trustees to join in a deed to the purchaser, and he received and squandered the proceeds, and is now insolvent; and the object of the bill, is to compel an account from the trustees of this fund, and that they may reimburse the trust estate the sum laid out in the purchase of lands.

One ground of defence common to all the defendants, is, that the trustees had not done any act, making themselves liable, because the property never had been conveyed to them, as trustees under the settlement. An agreement had been entered into between Thomas Lowndes, Frederick Kinloch, and his

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fa*ther, Francis Kinloch, in which, among other things, Thomas Lowndes undertakes, in consideration that Francis Kinloch would make a bond to Col. I'On, for $15,000 as trustee to the use of Frederick Kinloch and wife, to indemnify him (Francis Kinloch) against his guaranty under the marriage settlement; and it is insisted, that the liability of the trustees to account, is discharged by this contract. Jacob Bond I'On lived at a distance, and had no agency in the investment of the fund, nor did he, in any manner, interest himself concerning the trusts, except to join in the conveyance of the land in pursuance of the sale made by Frederick Kinloch, and on that account, it is insisted in his behalf, that he is not liable. The trust reposed in Frederick Kinloch, by the deed of settlement, was, that he should invest his wife's portion in property, and procure the same to be vested in the trustees, to the use of the settlement: this was so far fulfilled, that the lands purchased were vested in the trustees, but the conveyances are defective in not setting out and declaring the uses. Courts of Equity, it is said, have, from a very early period, taken upon them the power to supply the defective execution of powers, as a cherished branch of Equity jurisdiction. 1 Mad. Ch. 53, 4. It is said too, that it is a rule in Equity, that if one comes into possession of trust property with notice of the trust, he shall be considered as a trustee, and with respect to that property, bound to the execution of the trust, 2 Mad. Ch. 125.

Now, it is not pretended, that either of the trustees were ignorant of the true object of the conveyances to them; indeed all the circumstances conspire to shew that they could not be, and the legal estate was in them. The Court of Equity would therefore have either supplied the execution of the trust confided to Fred. Kinloch, or enforced a declaration of the uses in conformity to the trusts. By the conveyance to the purchaser from Frederick Kinloch, the trustees have parted with their dominion over the property, and by suffering Frederick Kinloch to dissipate the proceeds, so much has been lost to the trust estate, and upon every principle of Equity, they are responsible. I cannot perceive how the contract between Thomas

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Lowndes, Francis Kinloch *and Frederick Kinloch, can in any way influence the determination of the Court. In the first place, it is not apparent that it had for its object the indemnity of the trustees against this liability; but supposing it had, that would not discharge them, for Thomas Lowndes had no authority to release them—he was not himself beneficially interested in the trust estates. By joining in a conveyance of the land, Jacob Bond I'On contributed to put the fund in the power of Frederick Kinloch, who has wasted it; and on that ground he is liable. His not having otherwise intermeddled with the estate, so far from being a merit, is a violation of the trust; having accepted it, he incurred the responsibility of discharging the duties which it imposed.

Motion dismissed.

O'NEALL and HARPER, JJ., concurred.

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1 Hill, Eq. 193

MORTON A. WARING, Ex'or of Thomas Smith, Jr., v. ANNE PURCELL, Ex'trix of Thomas Smith, Jr.

(Charleston. April, 1833.)

[*Executors and Administrators* ⇐42.]

The testator, by his will, directed his debts to be paid out of the debts due him, and gave certain specific legacies, & then devised the residue of his estate to his sister for life, remainder over, &c., and died in September,

leaving a crop on his plantation: *Held*, that the crop growing on the land, and which was severed before the last of December, was assets in the hands of the executor, for the payment of the debts and pecuniary legacies.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 284; Dec. Dig. ⟸42.]

[*Annuities* ⟸4.]

Where the testator bequeathed an annuity to be paid on the first of March in every year, and he died in September, it was held, that the legatee, on the first of March after the testator's death, should be paid a proportion of the annuity, equal to the time which had run after his death.

[Ed. Note.—For other cases, see Annuities, Cent. Dig. § 13; Dec. Dig. ⟸4.]

[*Executors and Administrators* ⟸124.]

The defendant, an executrix, with the consent and approbation of the plaintiff, her co-executor, delivered a bond due to the testator to a legatee, under the belief that the testator so intended; afterwards the plaintiff discovered circumstances which induced him to believe that they had mistaken the testator's wishes, and filed a bill for settlement & relief: *Held*, that the plaintiff, having given his consent to the delivery of the bond, was concluded by it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 498; Dec. Dig. ⟸124.]

This case came to a hearing before Chancellor De Saussure, at Charleston, April Term, 1831. The following extract from his decree presents the facts and the questions arising out of them:

"The late Thomas Smith, Jr. made and duly executed his last will and testament on the 11 October, 1821, and departed this life on the ——day of Sept. 1830, leaving the same in full force and virtue.

"First. By that will the testator desired that his sister Mrs. Ann Purcell, should enjoy the profits of his estate as free from incumbrance as possible.

"Second. He directed his debts to be paid

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from such monies as *might be due to him at the time of his death, in preference to any part of his estate, or the income thereof.

"Third. He bequeathed to his aunt, Sarah Hutchinson, a female slave, a riding chair and horse, and five hundred dollars annually, to be paid out of the income of the estate on the first of March annually during her life.

"Fourth. He bequeathed to his cousin Thomas Smith Waring, two slaves whom he names.

"Fifth. He devised and bequeathed all the rest and residue of his estate, real and personal, to his sister Ann Purcell, for and during her natural life, and after her death to his cousin Morton A. Waring, his heirs &c.—subject to the payment of a legacy of two thousand dollars to his cousin Horatio Smith Waring within twelve months after the decease of Mrs. Ann Purcell.

"Sixth. He nominated Ann Purcell, Morton A. Waring and Horatio Smith Waring, to be executors of his will. The two former proved the will and qualified thereon as executors.

"The cause was argued and several questions were submitted to the consideration of the Court.

"First. As to the crop growing on the estate of the testator at the time of his death, in 1830.

"Second. As to the fund for the payment of debts.

"Third. As to the payment of the annuity of five hundred dollars, to Mrs. Ann Hutchinson. * * *

"On the first question there is some difficulty. The general law under our statute of 1789, (sec. 23) appears to be clear, that the crop of the year in which the testator or intestate dies, shall be assets subject to debts legacies and distribution. And I think it is applicable to all cases, notwithstanding the ingenious distinction of the counsel, founded on the wording of the statute, between the tenant for life or holding absolutely, going out of possession or coming into possession. In any question between creditors and legatees or distributees, the general law must prevail, but in the case of an ample estate, where the question arises between different devisees and legatees, the general, may give way to the particular, provisions of the will.

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In the case before us the tes*tator manifests the most decided desire to favour his sister. It is the first clause of his will, that she should enjoy the profits of his estate as free from incumbrance as possible, and after some particular dispositions, he devises the whole of his real and personal estate to her during her life. He also provides a special fund for the payment of his debts; for he directs that his debts should be paid from such monies as may be due to him at the time of his death, in preference to any other part of his estate or the income thereof. The crop of the year in which he died was the principal part of the income of his estate; and by the family law of his will it is not to be applied to pay the debts—and as between his legatees, it is to be obeyed whilst other funds are to be found.

"The second question is, what is the proper fund to pay the debts. The testator says they are to be paid out of the debts due to him. It appears that these do not amount to more than $2,000, whilst the debts due by him amount to $4,000. The deficiency must be supplied in some way out of the estate, with great attention to the testator's desire that the income should not be diminished to the prejudice of the sister of the testator; and to the interest of the remainderman that, the estate itself may not be broken down and exhausted. The Court is not sufficiently in possession of the facts relative to the situation of the estate, its productive funds, its unproductive stock, &c. &c. It is therefore

ordered, that it be referred to the Master in Equity, to examine and report the situation of the estate; its productive and unproductive funds, and the proper part of the estate to be applied, to aid in the payment of the debts of the testator.

"The third question relates to the payment of the annuity of $500 to Mrs. Ann Hutchinson. She was the kinswoman of the testator, and this provision of his bounty was intended for her subsistence. It appears to me, as the testator has himself fixed the first day of March as the day for the annual payment, that we should come nearest his intention by directing such proportion of the annuity as accrued between the testator's death in 1830, and the first of March 1831, to be then paid, and afterwards each succeeding annuity to be

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paid on *each succeeding first of March—and it is so ordered and decreed. Another question is, out of what fund is it to be paid. The will answers that question, by providing expressly that the annuity should be paid out of the income of the estate, and it is subsequent to this direction, that the residue and rest of the estate is bequeathed to the testator's sister for life."

From this decree the plaintiff appealed, on the grounds:

1. That the crop on the land at the testator's death, should be applied to the payment of the debts.

2. That Mrs. Hutchinson's annuity ought to have been paid in full, on the first of March after the testator's death.

I. E. Holmes, for the appellant, cited Toller Ex'rs. 149; A. A. 1789; P. L. 494.

Pettigru, contra, referred to Toller, 129, 202; Gilb. Ev. ——— 6 E. 604; 2 Black. 122.

JOHNSON, J. The testator, Thomas Smith, is represented to have died in September, 1830, and the first ground of this motion arises out of the following clause of his will, which is preceded by divers specific bequests, to wit:—"I also give devise and bequeath all the rest, residue and remainder of my estate, real and personal, of what nature and kind soever the same may be, to my sister Ann Purcell, for and during the term of her natural life: and from and immediately after her death, over," &c. At the time of his death, the testator owned and possessed a plantation and negroes, which passed under this clause of the will, but being indebted, the question is, whether the crop growing on the plantation at the death of the testator, is assets in the hands of the executor, or passed to the defendant under the devise.

It is enacted by the act of 1789. Pub. Laws, 494, that "if any person shall die after the first day of March in any year, the slaves of which he or she was possessed, whether held for life or absolutely, and who were employed in making a crop, shall be continued on the lands which were in the occupation of the

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deceased, until the crop is finish*ed and then be delivered to those who have the right in them: and such crop shall be assets in the executor or administrator's hands, for the payment of debts, legacies, and distribution," the current expenses being paid out of it.—The same clause of the act further provides, that "emblements growing on the land, and which shall be severed before the last day of December, shall likewise be assets in the hands of the executor or administrator; but that such as may be growing on the land at that day, or at the death of the testator, if that happen between the said last day of December, and the first of March, shall pass with the lands;" and if any person shall rent or hire lands or slaves of a tenant for life, and such tenant for life dies, the person having such land and slaves, shall not be dispossessed, until the crop of that year is finished, he or she securing the payment of the rent or hire when due.

According to the common law, the annual productions of the soil growing at the death of the testator, went to the executor and not to the heir; and thus far our act is in affirmance of the common law; but this rule did not sufficiently provide for the state of things existing here.—In England, the executor had the same means of providing for the cultivation of the crop that the testator had, by hired labourers, over whom the testator had not the power of disposition. Here it is, for the most part, done by means of slaves belonging to the testator, which he may dispose of by will, and in case of intestacy, are distributable in the same manner as lands or chattels. If they were removed from the land after the crop was planted, and before it was finished, it would, in general, and especially on large plantations, be impossible to supply their places, and the crop would be lost. In cases of intestacy, without this act there would be nothing to restrain the administrator from making immediate distribution of the personal estate to the destruction of the crop, and thus a fund might be lost to the distributees or creditors. The object of the Legislature obviously was to guard against these consequences, by making it the duty of the executor or administrator to retain the slaves and lands until the crop

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was finished; the estate *in the land and negroes vests, as at common law, in the devisee or distributee, and the possession only is postponed by this act. Regarding the provisions of this act as merely arbitrary, it operates in cases of intestacy with perfect equality and for the benefit of all concerned; by this means, the growing crop is preserved, and is so much added to the general fund. The supposed injustice of applying it to a case of testacy disappears, when it is recollected that the testator may order it other-

wise if he will. His power of disposition is unlimited, and the act can only operate when he is silent, and doubtless many inconveniences are remedied by it. The rule which it prescribes appears to me to be wise and salutary.

If the land had been devised to one, the slaves to another, and the beasts of the plough to a third, there could have been no doubt that the rule prescribed by the act should prevail; and I cannot perceive how the circumstance that the whole is devised to one, can vary it—the act contains no such exception. The inference, that by the devise of the whole to one, the testator intended that she should also take the crop, would equally apply when it was to several; there would be the same facility in making distribution of the crop, as of the corpus of the estate. It will be perceived by reference to the last member of the clause of the act above recited, that when lands or slaves are hired from a tenant for life, he shall retain them until the crop of that year is finished, "but shall secure the payment of the rent or hire, when due;" and it has been contended, that under this provision, the executor or administrator shall pay rent and hire for lands and slaves retained by him under the first member of this section. But that is utterly inconsistent with the crop's being assets in his hands, for the payment of debts or legacies. Besides that, it is most obvious that it was intended to provide for an entirely different case, the case of lands or slaves hired from a tenant for life—whilst the other was intended to provide generally for the case of one dying possessed of lands and slaves in his own right, for both of which a perfect and entire system is provided, without the aid of the other.

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*In a preceding clause of this will, the testator directs that his debts shall be paid out of "such monies as may be due to me at the time of my death, in preference to any part of my estate or the income thereof;" and reliance, I observe, is placed on this, in aid of the intention of the testator, that Ann Purcell should take the growing crop, there being a fund set apart for the payment of debts. If I am right in supposing that the crop did not pass under the devise of the lands and negroes, it is wholly immaterial whether the fund set apart for the payment of debts was sufficient or not. If it was not, then the proceeds of the crop would go in aid of it; if it was, then it would be applicable to the payment of pecuniary legacies, and the remainder, if any, would sink into the residuum.

On the second ground, we concur with the Chancellor. The bequest to Sarah Hutchinson is of "five hundred dollars' annuity to be paid her out of the income of my estate, on the first day of March, in every year." The bequest could not take effect until the death of the testator. He died in September, and the whole annuity would not be due until the September of the following year. But it was to be paid on the first of March in every year; and we think it comports best with the intention of the testator, that she should be paid, on the first day of March next after his death, a proportion of the annuity equal to the time which had run after his death.

It is, therefore, ordered and decreed, that the decree of the circuit Court be reformed according to the principles of this decree.

O'NEALL & HARPER, JJ., concurred.

After the first decree, this case was again heard at Charleston in January 1832, on exceptions to the Report of the Commissioner, on the reference previously ordered. The following decree presents the only question then raised, and the facts connected with it.

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*De Saussure, Chancellor. A decree was formerly delivered in this case on some of the points in it. It was referred to the Commissioner to report on certain facts, out of which certain questions might arise. The Commissioner has made a report on which the questions anticipated have been argued. It appears briefly that the testator, the late Mr. Thomas Smith, by his last will and testament duly executed, bequeathed $2000 to Mr. Horace Waring, and some other legacies to others. The rest and residue of his estate was bequeathed to his sister Mrs. Purcell, during her life, with a remainder to Col. Morton Waring and family. Some very short time before his death, the testator stated to his sister (as she testifies) that he had thought he had given a legacy of $5,000 to Dr. Horace Waring, but on recurring to his will he found he had bequeathed only $2000; that he wanted to alter his will and give him $5,000. He died suddenly within a few weeks of that conversation. In his coat pocket was found a bond on Mr. W. S. Smith, which it was believed he intended to deliver in part of such additional legacy. Mrs. Purcell, under such an impression, communicated her ideas to Col. Morton A. Waring, and proposed to him to deliver the bond to Dr. Horace Waring. To this Col. Waring did not object, and said he would not thwart any of the wishes of his testator. The bond was delivered with his knowledge and approbation to Dr. Waring. Col. Morton Waring was also sworn, who testified that the testator, Mr. Tho. Smith, had conversed with him about a legacy to Dr. Horace Waring, to the amount of $4000, but that in looking into the will he found he had given him but $2000, that it was his desire to double it, but was unwilling to alter his will. He stated that he had reason to believe that Horace was in a pecuniary difficulty, and the testator wish-

ed the additional provision to be immediately available and proposed a plan for that purpose; the plan was carried into effect, and the witness, Col. Waring, afterwards heard that stock was transferred to Dr. Horace Waring, to about the amount of $2000. Col. Waring states that he never, before the death of Mr. Smith, had any intimation, from any quarter, that Mr. Smith intended

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Dr. *Waring a bounty or benefit of $5000. From the report and the evidence it is obvious that neither of these executors desire to defeat or thwart the expressed wishes of their testator and benefactor—they would not dishonor themselves by doing so, after his kindness to them. It is not necessary to go into the question, how far the claim of Dr. Horace Waring to this enlargement of his legacy, could be sustained under the declarations of the testator. Some very strong cases exist on the subject, but they need not be referred to. Dr. Horace Waring is not a party to these pleadings—the bond of Mr. W. S. Smith has been delivered to him by one executor, with the approbation of the other, and that cannot now be distributed. The bill is filed by Col. Waring, as executor, against Mrs. Purcell, as executrix, to have a settlement of the estate, as between themselves and those they represent. Col. Waring insists that the testator meant to give Dr. Horace Waring only $4000, and that the legacy of $2000 actually bequeathed under the will, with nearly $2000 paid from a bond sold for the purpose of enlarging that legacy, made up the amount intended for Dr. Horace Waring; and that the bond of Wm. S. Smith ought to have been retained as assets of the estate, applicable to pay the debts, and for distribution among the legatees.

To this there seems to be two objections. First, at all events Col. Waring had been present and assenting to the delivery of the bond of Wm. S. Smith to Dr. Horace Waring (who had refused to receive it without his assent). It is not for him to insist that his co-executor should bring into her account of the estate, a bond transferred with his approbation, especially as there are no creditors to be affected. Secondly, that it is sufficiently proved that Mr. Thomas Smith did intend to enlarge the legacy of $2000 (by gift or otherwise) to Dr. Waring, to the amount of $5000. The two respectable witnesses, each entitled to perfect credit from high character, do certainly differ in their statement of the amount intended for Horace Waring. The one states $4,000, and the other $5,000, as the sum intended by Mr. Smith. Each statement is affirmative, and each entitled to

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*credit. The testator must have stated the one sum to the one, and the other sum to the other, and he seems to have acted on the largest sum, for he caused to be delivered to Dr. Waring the proceeds of a bond which he sold, which, with the actual legacy, amounted to nearly $4,000, and then was preparing, as Mrs. Purcell believes, to deliver up the bond of Wm. S. Smith to Dr. Waring, when he was surprised and prevented by death. It appears to me there should be no feud in this case; both parties are beneficiaries of Mr. Thomas Smith, both would abhor and repel the imputation of desiring to defeat his wishes—they have expressed that good feeling which must be acted on to its full extent.

It is therefore decreed, that the bond of Wm. S. Smith was property delivered by Mrs. Purcell, to Dr. H. Waring, with the approbation of Col. M. Waring, and that no account should be taken thereof in the settlement of the estate.—Costs to be paid out of the estate.

From this decree the plaintiff appealed, on the ground that his Honor the Chancellor erred, in decreeing that the delivery of the bond to Horace Waring, under the circumstances as stated in the decree, was proper.

Holmes, for the appellant, cited 2 Eq. Rep. 279.

JOHNSON, J. The evidence on both sides establishes that the bond of W. S. Smith was delivered to Dr. Waring by the defendant, with the consent and approbation of the plaintiff, in the belief that they were doing what the testator intended to do, and would, in all probability, have done, if he had not died suddenly. The plaintiff has since discovered circumstances which induce him to believe that they had mistaken the wishes of the testator, and that he had done, in his lifetime, what they supposed he would have had done after his death. Suppose this to be true, that gives him no cause of complaint against the defendant.—The act done was his own act, for he consented to and approved it; and as to her, he is concluded by the maxim, volenti non fit injuria.

If there be any liability, it must then devolve on Dr. Waring; and it is not readily

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perceived how he can be *responsible. He had no legal right to the bond, and the delivery to him was a voluntary gift from these parties, who as executor and executrix and legatees, had a right to give; and if a mistake should be alleged as a ground for setting it aside, there would be some difficulty in making proof of a mistake, in a voluntary gift. Besides, the defendant still maintains that there was no mistake, and that they did precisely what the testator intended to do; so that, in point of proof, the odds is against the complaint.

The motion must therefore be dismissed.

O'NEALL and EARLE, JJ., concurred.

1 Hill, Eq. 203

P. W. FRAZIER and Wife v. PERCIVAL E. VAUX, Ex'or of John Pawley.

(Charleston. April, 1833.)

[*Trusts* ⇐211.]

The £10 rule for the hire of negroes, does not apply to a case where there has been an account kept of the proceeds of their labor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 297½; Dec. Dig. ⇐211.]

[*Executors and Administrators* ⇐102.]

An executor, in the management of a planting interest, applied the avails of the crops to the purchase of negroes for the estate, & worked them for several years on the plantation, & kept regular accounts of the proceeds of each crop; the investment being unauthorized, the legatee refused to receive the negroes: on a bill filed against the executor for an account, he was put on the footing of a part owner, and held entitled to a proportionate share of the crops, after making allowance for the rent of the land.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 420; Dec. Dig. ⇐ 102.]

[*Equity* ⇐405.]

The Commissioner, in making up accounts, must conform to the directions of the Court; and if from any cause, he cannot, he should apply to the Court for fresh instructions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 885; Dec. Dig. ⇐405.]

[*Executors and Administrators* ⇐500.]

An executor is not entitled to commissions for the years in which he has failed to make returns; & such default deprives him also of the right to recover compensation for extra services.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2134; Dec. Dig. ⇐500.]

John Pawley, of Georgetown, by his will, dated 17th August, 1810, devised all his estate to his infant daughter Mary, now Mrs. Frazier, the plaintiff, and appointed the defendant, Percival E. Vaux, his executor. Mr. Vaux, from time to time, laid out the surplus income of the estate in negroes, for the use of his ward, and in the year 1822, bought of J. P. LaBrace, for her, twenty-five negroes on credit, at $500 per head. These negroes were placed on the young lady's plantation, and very good crops were made for the estate, by their labor, as well as the others. On the marriage of Miss Pawley, a considerable sum was still due on this purchase, which Mr. Frazier refused to pay, and the negroes were taken under the mortgage, and sold. Mr. Frazier became the purchaser, and the proceeds of the sale merely satisfied the residue of the debt. The bill filed against Mr. Vaux, for an account, charged this purchase as unauthorized, and that the

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defendant was accountable for *the sums he had paid out of the estate for that purpose. The defendant filed with his answer, a full account of his administration.

In April, 1828, the case was heard before Chancellor De Saussure, who held that the purchase was unauthorized, and ordered an account, in taking which he directed a liberal allowance to be made to the defendant for the negroes, and that he should be charged with the monies he had paid on the purchase. The defendant appealed, and the Court of Appeals directed the account to be taken both ways, to enable them to judge whether the purchase had been beneficial to the estate.

By his report, (January 1832) the Commissioner charged the defendant with $8,102, paid towards the purchase, and allowed him for the labor of 12½ full hands, at the rate of £10 per hand per annum. To this report the defendant excepted, among other things, "because Mr. Heriot [the Commissioner] has allowed for the use of the negroes that the defendant bought of J. P. LaBrace, only $44 per annum; whereas it is submitted, that upon principles of justice, as well as on the terms of the decree, the Commissioner should have allowed the defendant a portion of the crops, according to the number of these negroes: and that the sum of $44, for hire, is inadequate." This exception was sustained by his Honor Chancellor De Saussure, who held that, "the defendant is entitled to credit for whatever was made by the slaves, deducting therefrom a very moderate sum for land rent."

From this decree the plaintiff appealed; and in April 1832, the cause came again before the Court of Appeals.—The Court, after disposing of the questions raised by the appellant, directed the account to be taken in the following manner.

"The defendant cannot be regarded as hiring the negroes to his cestuique trust—he supposed they were her property, and charged himself with the whole income derived from these slaves, and the rest of the estate. It has turned out that she and her husband have refused the slaves, and they must, for

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the purpose of this question, be regard*ed as the property of the executor, employed with the property of the cestuique trust, in producing the annual income. How much of it arose from the trust estate, and how much from the property of the executor, are the only questions for decision. The Commissioner will have little difficulty in deciding these questions. Any planter acquainted with the subject can easily say what proportion of the annual nett profits of the years 1822, '3, '4, '5 and '6 ought to be allowed to the defendant, for the services of the twenty-five slaves, by him employed with the slaves of his cestuique trust in making the crops of those years:—It is, therefore, Ordered and decreed, that the cause be remanded to the Circuit Court, with instructions to the Commissioner to make up the account between the parties, according to the views contained in this opinion."

Mr. Vaux was summoned to a reference, in

January, 1833, which he did not attend; and Mr. Cohen was present, but having been recently engaged, and being without any instructions took no part. Mr. Heriot, the Commissioner, by his report, disallows the defendant's commissions amounting to $2,500, on the ground that he had not passed his accounts till after the bill was filed; and allowed him only $50 per head annually, for ten negroes—and annexed two schedules, one allowing, and the other disallowing, the sums paid by the defendant towards the purchase of the negroes. The defendant objected to the report, because the account had not been taken according to the directions given by the decree. But the Chancellor overruled the objection, considering the allowance to Mr. Vaux, of a portion of the crops, an indulgence which he had forfeited; and confirmed the report, but without making any further decree.

From this order, confirming the report, the defendant appealed, and moves to reverse it on the following grounds.

1. The Commissioner has not followed the directions given by the Court, whereby he is ordered to take the account between Mr. Vaux and his cestuique trust, as between part owners; nor is there any difficulty in following those directions, as the accounts filed show what the crops were—and 12½

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hands were before allowed as the quota *of the defendant, in the crops of 1822, '3, '4, '5 and '6; and the number of the other hands would have been shown by complainants, into whose possession they all passed, and where they now are.

2. That the reduction in his last report of Mr. Vaux's hands, from 12½ to 10, is arbitrary and without evidence.

3. That the defendant, being by the will a trustee, is entitled to commissions; but if not, he should be allowed the benefit of an action at law, to recover a compensation for his services, which, according to all the evidence, were faithfully and diligently rendered, and by which the estate was greatly improved during the long minority of the devisee.

Pettigru & Cohen, for the appellant.
Hunt, contra.

O'NEALL, J. The opinion of the Court at the last Term fixed the rule by which the Commissioner should have made up his report. The case was then regarded as one in which hire for the slaves, as ascertained by the £10 rule, or by an estimate of what their hire was worth, would not be a proper allowance to the defendant. He was put on the footing of a part owner with his cestuique trust, and held to be entitled to a proportionate share of the crops. The opinion then expressed, was not a hasty one—it was formed with great care, a proper sense of what was due to the parties, conformably to the established rules of the Court. The £10 rule never was applied to a case in which accounts of the proceeds of the labor of the slaves were kept; nor can it be applied to cases where there is proof shewing that they have been employed but a few years, in which the crops were uniformly good, and the prices not subject to material diminution. If, in neither of these cases, the £10 rule could have an application, it follows that the opinion of witnesses, of the price for which similar negroes could have been hired, constitutes no guide to ascertain the value of their labor.

The true question is, how much did their services yield? This, in the case before us,

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is susceptible of an easy an*swer. Ascertain the whole number of negroes employed on the plantation, during the years 1822, '3, '4, '5 and '6, and the amount of the crops, and state a proportion—as the whole number of the negroes employed is to the amount of the crops, so will the 25 belonging to Mr. Vaux, be to the share of the crops made by them. From this, must be deducted, in the same proportion, their share of the rent, and the balance will be the gross allowance to be made to the defendant. This, divided into five parts, will constitute the annual allowance to be made to him, in each of these years, for the services of the slaves.

It is however objected, that Mr. Vaux forfeited all benefit of this allowance, by not attending the commissioner on the reference. To say nothing of the short notice of the reference, and the hasty manner in which the Commissioner thought proper to conduct and close it, it will be enough for our present purpose to say, that the defendant's default did not authorize the Commissioner to reverse the opinion of the Court of Appeals, and set up a rule of accounting of his own, not authorized by any thing in the cause. It was his duty, if he went on ex parte, to have made up the accounts on evidence furnished by the complainants; but in doing so, the rule fixed by the Court should have been his guide.

It is said, it was impossible to allow Mr. Vaux a proportion of the crops, unless he attended and furnished the evidence of the number of slaves belonging to the estate. To me it appears that the complainants could easily, had it been necessary, furnished that evidence. They are the present owners and have them in possession, and if they had shewn how many they received on their marriage, exclusive of the twenty-five, the Commissioner might have taken that as the number, during the previous years, and made up his accounts accordingly. But there was no necessity to have gone beyond the papers in the cause. It is stated, in the defendant's answer, that the negroes of the estate amounted to seventy-three, when he turned them over to the complainants. This was

either inclusive or exclusive of the negroes now in dispute, and without proof, the Commissioner might very well have concluded

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that it was exclusive, and this *would have made the whole number of the negroes employed ninety-eight; and thus, one part of his proportion was ascertained. The amount of the crops for '22, '3, '4 and '5, he has ascertained and reported from the defendant's accounts; the crop of '26 was partially made when the complainants married, and the complainant Frazier received it; the amount of it he could and ought to have furnished, and thus the second part of the proportion could be obtained, and then nothing remained but to set down the 25 negroes belonging to the defendant, and the proportion was completed; and any one acquainted with the rule of three could have produced an answer shewing the gross allowance in favor of the defendant, from which would be deducted his proportion of the rent; and the nett result would be the whole allowance to the defendant for the labor of his slaves.

But whether the problem was of hard or easy solution, it was the business of the Commissioner to pursue the directions of the Court, and not undertake to adopt his own notions of what was right and proper. If he could not get on without Vaux's presence and he had refused to attend, he ought to have applied to the Court for fresh instructions, or he might have been authorized by the Court to attach the defendant until he did attend. The rule is a familiar one, that the Commissioner must conform to the instructions given to him by the Court.

In Remsen v. Remsen, 2 J. C. R. 501, Chancellor Kent says—"Orders of reference should specify the principles on which the accounts are to be taken or the inquiry proceed, as far as the Court shall have decided thereon, and the examination before the Master should be limited to such matters within the limits of the order, as the principles of the decree or order may render necessary." The Commissioner, according to these observations, ought to have confined his examination to such matters as were within the limits of the order. He was directed to inquire what sum out of the crops the defendant should receive as a part owner entitled to a share; and instead of making an attempt to ascertain it, he recommends the allowance of hire, which the Court had before repudiated, and in its place had di-

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rected the account as be*tween part owners. To allow such a report to stand, is to make the Commissioner the appellate jurisdiction, instead of the Court.

In Lupton v. White, 15 Ves. 432, the Master reported that he could not make up the accounts, on account of the uncertainty of the evidence. It was contended in that case, as in this, that the Master ought to have charged the defendants with the whole produce of the mines, inasmuch as they had not kept clear and distinct accounts, which they ought to have done. The Lord Chancellor held, that it was the subject of further directions, and not of exception. He remarks, "If the result is that the Master cannot take the account, it is clearly not for him, without a further direction, to apply the great principle familiar both at Law and in Equity, that if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must, at Law and in Equity, be taken to be the property of the other, until the former puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorized mixture upon his part. There may be cases upon which the Master may charge parties upon that principle; but it must be under the direction of the Court, whether the case is proper."

From the case of Lupton v. White, this principle is to be extracted—that the Commissioner has no right to depart from the instructions by which his account is directed to be made up, if it is even impossible, by the default of the defendant, to conform to them. He must report the fact, and let the Court give him fresh directions. If the case proceeds ex parte, it is the business of the Commissioner to examine the case more minutely, and attend more particularly to see that justice is administered to the defendant, than if he had attended in person. The proposition is very well enforced by Lord Redesdale, in the case of Carew v. Johnston, 2 Sch. & Lef. 300, in which he says, "The decree having been obtained, the matter proceeds before the Master, and he makes a report which I must consider as the report of the party, and not of the Master. I am afraid reports of this kind are too often made, when no person appears on

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*one side. I think that very improper, for it is the duty of the Master to take the account, though the parties who might resist the claim do not attend, with as much care as if they did, and even with more jealousy; for when the parties do attend, it is to be expected that they will attend to their own business."

In the case before us, the Commissioner can have no difficulty in making up his report according to the directions given, if he will take the trouble to read this and the former opinion before he commences his examination.

The defendant is clearly not entitled to commissions on the receipts and expenditures of years in which he did not make returns to the Ordinary. In those years in which he made returns, he is entitled to commissions. This Court has no power to order an issue, to ascertain what extra compensation should

be allowed to an executor, when he has failed to make regular returns. This default deprives him of the commissions allowed by law, and also the right to recover extra compensation.

It is Ordered and decreed, that Chancellor Johnston's decree be reversed, and that the cause be remanded with instructions to the Commissioner, to make up his report according to the principles contained in the former and this opinion.

EARLE, J., concurred.

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1 Hill, Eq. 210

GEO. W. PRESCOTT and ROBERT EASON v. SEARS HUBBELL, GEO. TIMMONS and Others.

(Charleston. April, 1833.)

[*Limitation of Actions* ⇐110.]

The 10th section of the Insolvent Debtor's Act, which incapacitates the debtor from pleading the Stat. of Lim. relates only to demands existing at the time of exhibiting his petition.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 520; Dec. Dig. ⇐110.]

[*Equity* ⇐87.]

Lapse of time in Equity, in analogy to the Stat. of Lim. at Law, will be a bar to relief against fraud.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 242; Dec. Dig. ⇐87.]

[*Equity* ⇐87; *Limitation of Actions* ⇐100.]

The difference with regard to the Stat. of Lim. as applied to a case of fraud at Law or in Equity, is in the time at which the cause of action is considered to accrue: at law, the cause of action is regarded as accruing from the perpetration of the fraud, in Equity from its discovery; and therefore in Equity the statute will bar relief against fraud in four years after discovery; & to take the case out of the statute it should be stated in the bill that the fraud was not discovered until within four years before the bill was filed.

[Ed. Note.—Cited in Myers v. O'Hanlon, 12 Rich. Eq. 208; Beattie v. Pool, 13 S. C. 384; McGowan v. Hitt, 16 S. C. 612, 42 Am. Rep. 650; Smith v. Linder, 77 S. C. 541, 58 S. E. 610.

For other cases, see Equity, Cent. Dig. § 244; Dec. Dig. ⇐87; Limitation of Actions, Cent. Dig. § 480; Dec. Dig. ⇐100.]

[*Equity* ⇐267; *Limitation of Actions* ⇐189.]

The Court refused to permit the plaintiff to amend his bill, so as to allege that the fraud was discovered within four years, when it appeared the fraud was known to the plaintiff before that time.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 545, 561; Dec. Dig. ⇐267; Limitation of Actions, Cent. Dig. § 697; Dec. Dig. ⇐189.]

[*Limitation of Actions* ⇐10.]

[Section 10 of the insolvent debtors' act, prohibiting a discharged insolvent from setting up the statute of limitations against one who did not participate in the proceedings, will not prevent his pleading the statute against one who did participate, when sued with others to set aside a conveyance made prior to the insolvency proceedings, which is alleged to have been made in fraud of creditors.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 33; Dec. Dig. ⇐10.]

[*Limitation of Actions* ⇐172.]

[Where a beneficiary is entitled to the benefit of the statute of limitations, the trustee may set it up in his right, though he could not plead it in his own right.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 657; Dec. Dig. ⇐172.]

[This case is also cited in Sibley & Morrison v. Tutt, McMul. Eq. 328, without specific application.]

The defendant, Hubbell, having been arrested under a ca. sa., applied to the Court of Common Pleas for the benefit of the Insolvent Debtor's Act; and, in conformity

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*with its provisions, filed a schedule of his estate. The creditors being dissatisfied, filed a suggestion alledging fraud on the part of Hubbell, in the conveyance of his property, and in the transfer of funds which were invested in property and settled on his family. It did not appear that the issue on this suggestion was made up or tried, but the defendant amended his schedule, so as to include all his "right, title, and interest in the property mentioned in the suggestion;" and on executing an assignment to the plaintiff, Prescott, in trust for his creditors, he was, on the 3d October 1821, discharged by the Court.

The plaintiffs are judgment-creditors of Hubbell; Prescott's judgment was obtained prior to the discharge, and is that on which he was arrested; Eason was a suing creditor at the time of the discharge, and obtained judgment afterwards.

The bill was filed in March, 1829: its object is to set aside the conveyances by Hubbell to the defendants, as fraudulent, and to subject the property, which it is alledged was purchased with his funds, to the payment of the plaintiffs' demands.

The defendant, Hubbell, in his answer, relied on the statute of limitations.

The cause was heard at Charleston, January 1832, by Chancellor De Saussure. A great deal of evidence was then given on both sides, for the purpose of proving and disproving fraud in the defendants, but which it is unnecessary, under the view taken by the Court, to state.—The Chancellor overruled the plea of the statute, and ordered an issue at law to try the questions of fraud.

The defendant appealed, and moved to reverse this decree, on the ground, that the statute of limitations is a bar to the plaintiff's bill.

Smith, for the motion, cited Booth v. Earl of Warrington, 13 Vin. 642; 3 P. W. 143; 1 M'C. 314; 6 Pet. 61.

Hunt, contra.

O'NEALL, J. From the view which I have taken of this case, it will only be necessary that our opinion should be *expressed on the statute of limitations which has been relied upon by the defendants, as a bar to the claim of the complainants.

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The Chancellor over-ruled the plea, on the ground that "an insolvent debtor is not at liberty to plead the statute of limitations in cases of alledged fraud." This disability, if it exist, must arise out of some provision of the "act for the more effectual relief of insolvent debtors" &c. The 10th section provides, that "whereas, many creditors of the person so sued and petitioning for his or her discharge, may not be inclined to accept a dividend of such petitioner's estate, but will rather wait in hopes of securing some fuller expectation from the said petitioner's future better fortune; but in as much as the said creditors by note, book account or contract, who through indulgence or better expectation may delay suits against such petitioner, may become barred by the act of limitations of this Province; be it therefore enacted, that any person or persons whatsoever who shall be hereafter in the custody of the Provost Marshall of this Province, or of his goal keeper or deputy, and who shall once petition the Justices of this Province for his or her discharge, every such person or persons, his or their executors or administrators, shall be incapacitated ever afterwards to plead the act of limitations of this Province, in bar to any action that may be afterwards brought against him or them, by any person or persons that were his or their creditors, for any demand or cause of action that existed at the time of exhibiting the petition for the discharge of the said person when in custody. And in case the act of limitation of this Province shall afterwards be pleaded by any such person or persons, the said plea shall be set aside by the Court where such action shall be brought, upon motion made by the plaintiff or his attorney in such action, upon producing the petition before exhibited by the defendant for his having the benefit of this act." P. L. 251. It is only necessary that the clause should be stated, to satisfy every one that it does not apply to this case. The preamble, which is said to be the key to the enactment, shews that it was intended for the protection of such creditors who might neither sue nor accept a *dividend of the debtor's estate. The very next clause provides the means whereby evidence of such debts may be perpetuated, and repeats the denial of the benefit of the statute of limitations. The present plaintiffs were suing creditors, at the time the defendant Hubbell took the benefit of the insolvent debtors act, and one of them is his assignee; they cannot therefore claim that as against them he cannot plead the statute of limitations. His discharge under the insolvent debtors act was a discharge from their debts, and the only claim which they can have against him, is under the assignment. The "demand or cause of action" arising from it, did not exist "at the time of exhibiting his petition for his discharge;" it is subsequent thereto, and is not even within the letter, much less the meaning of the section quoted. But it must be remembered, that Hubbell in this case claims to hold the property in dispute not for himself, but as a trustee for his wife and children; they are parties, and if the defense of the statute of limitations was not even competent for him, it would be for them, and if sufficient to protect them, would prevent a decree from being made which would defeat their title. It is therefore perfectly immaterial in what way it is interposed, whether by Hubbell or his cestuique trusts, its legal effect must be considered and decided, in precisely the same manner as if Hubbell had never taken the benefit of the insolvent debtors act.

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It is true, that the words of the act of limitations do not in terms provide a time within such suits for relief against frauds must be brought; yet lapse of time in Equity, in analogy to the statute, has been held to bar relief for fraud. If an action at law were brought to recover damages for a fraud, it would be an action on the case and barred in four years, by the provisions of the act of 1712. The gravamen of the action at law is the deceit and the injury consequential on it. To entitle a party to relief from a fraud in Equity, he must shew that he is prejudiced by it, and in consequence of this prejudice or injury it is that the Court proceeds to decree against the fraud. The analogy between the action on the case for a fraud, and a bill in Equity to be relieved against it, is as direct as can exist between a case *in a Court of Law and a case in a Court of Equity.—

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When does the cause of action for a fraud accrue? In Equity, there is no doubt that it accrues from the discovery of it. The party may then proceed and obtain relief, and if he fail to do so for four years, is not the reason just as strong, that he should be barred in Equity, as at Law? The only difference perhaps in the law in this respect, as applied to a case at Law or in Equity, arises from the time at which the cause of action is considered as accruing. Generally, the legal cause of action is regarded as accruing from the time the fraud was perpetrated; the equitable cause of action, from the discovery. This seems to me the only distinction; and the statute would run against relief from a fraud from the time of its discovery, wherever an action at law, if it could be brought for the same, would be within the act. I myself regard a bill in Equity for relief against a fraud as a personal action, accru-

ing to the party in consequence of the injury done to his rights; and that generally, he would be barred in four years from the discovery of the fraud. The rule in Equity is when more than four years have elapsed before filing the bill for relief, that the complainant should state in his bill that the fraud was discovered within four years before the bill was filed. In Vin. Ab. 13, 542, it is said, "where fraud is, no length of time can bar. And it was admitted by the counsel on the other side, that no time will bar where there is a fraud, but said that that is to be understood where the fraud is concealed. For if it be known, it certainly may, and of this opinion Lord Chancellor King seemed to be." The same doctrine is sustained by the South Sea Company v. Wymondsel, 3 Pr. Wm. 143.—The case of Black & Wife and others v. M'Junkin, executor of Thomas, et al., decided at Columbia by the Court of Appeals in Equity, proceeded upon the principle that after a lapse of four years from the discovery of the fraud, the statute would bar the relief. In that case, an insolvent debtor who had taken the benefit of the act, just before applying to be discharged fraudulently conveyed certain slaves to his father. The

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bill was filed by the suing *creditor, but there was no allegation in the bill that the fraud had been discovered within four years before the filing of the bill. The original bill abated by the death of the elder Thomas, and was revived after four years, against his executor, and the legatees of the slaves fraudulently conveyed to him by his son, the younger Thomas. It was held, by the whole Court, 1st. That it was necessary that it should have been alledged that the fraud was discovered within four years before the filing of the bill, to prevent the operation of the statute: and, 2dly. That the plaintiffs were barred. In VanRhyn v. Vincent, 1 M'C. Eq. Rep. 310, Judge Nott remarks. "And even in cases of fraud, the Court of Equity will allow the statute to run from the time the fraud is discovered."

These authorities put it beyond all question, that the statute will run against relief claimed in cases of fraud, from the time it is discovered; and that to take the case out of the statute, it is necessary that it should be stated in the bill that it was not discovered until within four years before the bill was filed. The application of these principles to the case before us, is plain and obvious. For it is plain, that whatever was the fraud existing in the conveyance of the property to the defendant Hubbell, in trust for his wife and children, it existed and was known to the assignee, Prescott, at the time the defendant was discharged under the Insolvent Debtor's Act. The suggestion which he then filed to prevent his discharge, incontestably proves that fact. It is not set out in the bill, that the fact of fraud in the conveyances was discovered within four years before the filing of the bill. The defendant Hubbell, as trustee, and his family his cestuique trusts, cannot be regarded as holding by a secret fraud. If a fraud exists in the transaction, it was well known, and they cannot, therefore, be said to have held apparently in one right, and secretly in another, which would have deprived them of the benefit of the statute. Their rights were adverse to the rights of Hubbell's creditors. But it is said, the statute cannot be pleaded to the judgment obtained by Prescott against Hubbell. To say nothing of the effect of the assignment and

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discharge under *the Insolvent Debtor's Act, which is itself a discharge of the debt to Prescott, and of course of the active lien of the judgment, it can, I think, be demonstrated, that the bar to the relief claimed here is no bar to the judgment.—The party does not come here, to have execution of his judgment, or to recover upon it, as his immediate cause of action; if he did, then, it is true, the statute would not apply. His remedy, in both these respects, is at Law. If legally the property in dispute is subject to the lien of the judgment, the complainant has no business in this Court—his execution would have given him ample relief. But the title to the property claimed to be subjected to the payment of the plaintiff's debt, never was in Hubbell in his own right.—He is a mere trustee, to whom the conveyance was made. There can therefore be no legal lien of the judgment. The plaintiffs' equity is, that the money of Hubbell, which ought to have been applied to the payment of their debts, was vested in the purchase of the property. This at most is a mere resulting trust, and the right to set it up as against the defendants, must depend upon the fact whether the money which is the foundation of it, could be recovered by the assignee from the cestiuque trusts, (to whose use it is alledged to have been applied) if it were in their hands as a donation from Hubbell. No one I presume will doubt that at law he could not recover it after four years, and in this Court the only difference as to the operation of the statute of limitations, would be the substitution of the discovery of the fraud, for the accrual of the cause of action at law. It was known to him in 1821, as he alledges in his suggestion that the property was purchased with Hubbell's money. Seven years and four months after his knowledge of it, he files this bill, virtually for the recovery of the money invested in the purchase of the property. To a claim for an account for the money applied by Hubbell in the purchase of the property, the statute would be a good defence by his cestiuque trusts; and it seems to me it must be so likewise against the claim to set up the resulting trust. This is not depriving the judgment of any of its legal effects—it is merely refusing to suffer fraud or a result-

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ing trust, to be set up to defeat a *legal title, when more than four years have elapsed, after the plaintiffs have a knowledge of the fact on which their claim to relief is predicated. I am, therefore, satisfied that the statute is a protection to the defendants. A motion was made for leave to amend, by alleging that the fraud was not discovered until within four years before the filing of the bill. This is an application to the discretion of the Court—and we should not hesitate, even at this late stage of the case, to allow the amendment, if any good could result from it. But the facts are all before us, and we are perfectly satisfied that they shew conclusively that the fraud was known to the plaintiffs more than four years before the filing of this bill. It may be, that they had not all the evidence of it then which they have now; but that is not the point on which the question turns—it is, whether they knew of the fraud, not whether they could prove it. The motion to amend, must, therefore, be refused.

It is Ordered and decreed, that the Chancellor's decree be reversed, and the bill be dismissed.

JOHNSON and EARLE, JJ., concurred.

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1 Hill, Eq. 217

THERESE BENOIST, Administratrix of J. L. Sompeyrac v. PETER POIRIER, Adm'or of Louis Devillers.

(Charleston, April, 1833.)

[*Executors and Administrators* ⊂⊃303.]

One who was authorized by power of attorney, to demand and receive a legacy for his principal, became indebted to the executor in whose hands the legacy was, and failed: afterwards, by letter to the executor, he acknowledged that he was indebted to him a balance of $2,891, & promised to account to his principal for this sum, as so much of the legacy; but he gave no discharge to the executor, nor did he receive one from his debt, nor was there any agreement that one demand should go in payment of the other: *Held*, that this was not a payment by the executor, which would discharge him for that amount.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1229; Dec. Dig. ⊂⊃303.]

[*Set-Off and Counterclaim* ⊂⊃47.]

It seems, that even if there had been an agreement between the executor and the attorney, that the debt due from the latter to the former should be regarded as so much payment of the legacy, and mutual acquittances given, it would not, under such circumstances, be a compliance with the power, and therefore void.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 101; Dec. Dig. ⊂⊃47.]

Theodore Sompeyrac, by his last will, bearing date the ——— day of ———, 1822, gave the residue of his estate, to be held by his executors, liable to the draft of his father, or, in the event of his death, of his mother —of which will he appointed Louis DeVillers and A. Fourgeaud, his executors, and soon afterwards died, leaving his father, Jean Louis Sompeyrac, and his mother, Desire Sompeyrac him surviving. De Villers and

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Fourgeaud proved the will and *administered the assets; the residue in their hands, after paying the debts and legacies, was $4,098, which in February, 1829, De Villers passed to the credit of De Villers & Poirier, assignees of Sompeyrac & Petitpain, upon the supposition that Jean Louis Sompeyrac was indebted to them in an equal or greater amount; but in fact, Jean Louis Sompeyrac was not so indebted. The said Jean Louis Sompeyrac died in ——— at Bordeaux, in France, and by his last will gave all his estate to his widow, Desire Sompeyrac; but the will was never proved in America. The bill is filed by Therese Benoist, to whom administration of the estate of J. L. Sompeyrac has been committed by the Ordinary of Charleston District, for an account and settlement of the estate of Theodore Sompeyrac.

The defendant, Peter Poirier, by his answer, admits the balance of $4,089, for which the estate of Louis DeVillers is accountable; but insists that a part of the sum, to wit, $2,891 has already been received by Desire Sompeyrac, who, as executrix of J. L. Sompeyrac, had a right to receive it, and is also the party beneficially entitled in this suit. In support of his defence, the following case was made at the trial.

Jean Louis Sompeyrac and Desire Sompeyrac, his wife, about the 12th day of February 1823, gave to their son, Melisse Sompeyrac, a general power of attorney, "to demand and receive all such sums and property as they, or either of them, were entitled to, under the will of their son, Theodore." Melisse Sompeyrac came to Charleston, and entered into business with Hyppolite Petitpain, under the firm of Sompeyrac & Petitpain. DeVillers became their endorser to a great amount; and while Melisse Sompeyrac was in Mexico, Petitpain executed a deed, by which he assigned all the goods, monies, and effects belonging to Sompeyrac and Petitpain, to DeVillers and Poirier, in trust, in the first place, to indemnify them, and in the next place, to satisfy the creditors generally of Sompeyrac & Petitpain. Notice of this assignment was communicated to Melisse Sompeyrac, who assented to it, and acknowledged that he held

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*in his hands $2,891, for which he was accountable: but insisted on retaining it, as the attorney of his mother, who was entitled, as the legatee of J. L. Sompeyrac, to the residue of Theodore Sompeyrac's estate, in the hands of DeVillers; as appears by the following letter:

[Translation.] "Mexico, 15th April, 1828.

"Dear Sir:—I have received your friendly letter of the 21st November, by Mr. Giraud.

I will not repeat to you what I have said in my former letters, on the subject of the enormous losses that we have sustained in this country. It is sufficient that they have been, in part, the cause of our ruin." [Here follows a detail of circumstances which it is unnecessary to state.] "I saw Mr. Giraud yesterday, to whom I gave all the accounts relating to our unfortunate affairs.—You will see, by the result, that there is a sum of $2,891.51, that I am answerable for, as a balance." [A statement of his partnership accounts and commercial transactions here made, is omitted.]

"You will see, my dear sir, that I am accountable for the above mentioned sum, which I hold, subject to the order of whoever is entitled. But by the letters, which I have received from Charleston, I am informed that you have received from the estate of my brother, five or six thousand dollars, more or less. From this sum must be deducted the amount due to Messrs. Lel'rince & Dumont, which I consider perfectly just. And as to that of the Messrs. Benoists, you can have an understanding with them. The residue will belong to my mother, who is legally the legatee, under my father's will; and as I have been authorized by their joint and several power of attorney, which is deposited in the French Consulate at Charleston, I shall be obliged to give an account of the sum which you will have received.—Have the goodness to hand to Mr. Giraud a statement of what you have received, in order that we may ascertain the balance. You can come to an understanding with friend Fourgeaud, to whom I will write on this subject; and will speak to Madame Benoist, to whom I have sent a copy of my power of attorney." * * *

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*"I received Mr. Poirier's letter at the same time with yours. You may communicate this to him. I have the honor to be &c."

The assets of Sompeyrac and Petitpain fell short of the sums for which DeVillers was responsible for them; and a very large sum is still due him on that account. To prove that this sum had been actually paid to Desire Sompeyrac, the following letter from her was produced.

[Translation.] "Bordeaux, 28th June, 1831.

"Sir—I have received your letter of 16th May, which informs me that you are administrator of the estate of the late Mr. De Villers, and that you have in your hands the sum of 4,089 dollars, arising from the estate of my deceased son Theodore, of which sum you say that my son Melisse ought to account to me for $2,891.55, and that you have no objection to pay the difference to my attorney. My son Melisse has been a long time absent, I presume in England. I have just had his papers examined by one of my friends. He has found in effect an account of his agency, dated Mexico, 29 February 1828, balanced by $2,891.51; but my friend remarked that this account had no connexion with the estate of my son Theodore, but only with the house of Sompeyrac & Petitpain, of Charleston. These gentlemen owe to my deceased husband a large sum for advances and shipments which he made for their account, and the above named sum would be but a small set off. However sir, as I am an enemy of law suits, I write to my mother by the same opportunity, and engage her and give her full authority to settle with you definitively and amicably, and to see if necessary some mutual friends, who can decide the matter. I recommend to her in my behalf, to avoid the expences of the law. Be pleased sir, to see her on the subject, and believe me your devoted servant, &c."

At May Term 1832, the case came before his Honor, Chancellor De Saussure, who made the following decree.

"It appears by the answer of Mr. Poirier that on settling the affairs of Theodore Sompeyrac, there is a balance of $4,089 due by the executors to the estate of Theodore Sompeyrac, which is ready to be paid over to the

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legal representatives of *Jean Louis Sompeyrac, the legatee, unless the Court should be of opinion that the estate of DeVillers is entitled to retain the whole or part of the above sum, under the following circumstances: After the death of Theodore Sompeyrac, his father and residuary legatee (and mother) gave a power of attorney to his son Melisse Sompeyrac, to collect and receive whatever might be coming to him from the estate of his son Theodore. Melisse came to this country, formed a copartnership with Mr. Petitpain, carried goods to Mexico, and failed in debt to De Villers.

"The administrator of De Villers claims the right to deduct from the balance due by the executors of Theodore Sompeyrac to the estate of John Louis Sompeyrac, the amount due by Melisse, or rather by Sompeyrac and Petitpain, to De Villers.

"It appears to me that these demands are entirely in distinct rights, and cannot be set off as claimed. The administratrix of J. L. Sompeyrac is entitled to be paid the above balance to be applied in the course of administration; and if Melisse is entitled to any part of the funds, the administratrix to apply his share to pay his debt. It is therefore Ordered and decreed, that the defendant pay to the complainant the balance admitted to be due to the representatives of John Louis Sompeyrac, with interest and costs of this suit."

From this decree the defendant Peter Poirier appeals, and insists that the real question is whether Desire Sompeyrac, the widow and executrix in France, of Jean Louis Sompeyrac, received, through her attorney and son Melisse Sompeyrac, the sum of $2,891.

That this question is by the evidence set-

tled in the affirmative, and that of course the plaintiff in this action, suing for the benefit of Desire Sompeyrac, can only recover the residue, after deducting $2,891.

Pettigru, for the appellant.

EARLE, J. The Chancellor refused to allow the defendant the benefit of $2,891, which he claimed to have deducted from the plain-

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tiff's demand, as so much received by *Melisse Sompeyrac, the agent and attorney of Desire Sompeyrac, for whose benefit the suit is brought. It is alledged that the Chancellor is mistaken, in saying that the "demands are entirely in distinct rights, and cannot be set off as claimed:" for the defence is not set up by way of discount, but of actual payment; and that this defence is supported by the evidence. Passing by any objection which might be raised to the validity of the power itself, as having been executed by a married woman, at a time when she had no subsisting interest: or admitting that there may be evidence of a subsequent confirmation, it is not very clear that the Chancellor is mistaken in supposing this to be a naked offer to set up against the demand of the plaintiff, a debt due to the defendant's intestate, from the plaintiff's agent. Melisse Sompeyrac, the agent and attorney of Desire Sompeyrac, at the utmost only acknowledges himself to be indebted to DeVillers in the sum of $2,891, which he is answerable for, as a balance; and after referring to the assets of his brother, in the hands of De Villers, and to his power of attorney, professes to be accountable to Desire Sompeyrac, his mother, for that sum. This would be giving his letter a most liberal construction for the defendant. There is no evidence that DeVillers ever assented to this proposition—he did not discharge Melisse Sompeyrac, nor receive from him any acquittance, from the demand of the plaintiff. So far as there is evidence, it is the reverse; from the letter of Desire Sompeyrac three years after the date of that of Melisse Sompeyrac to himself, he seems to have stated to her, (and the evidence comes from himself,) that her son ought to account for the sum of $2,891. There is not even an agreement, between the attorney and DeVillers, to regard the balance due the latter from the former, as a payment of so much of the legacy.

If it were otherwise, and admitting, for the sake of argument, that there was an agreement to that effect, and mutual acquittances, yet it would not be a compliance with the power, and therefore void. The terms of the power are certainly as various, and the authority given is as comprehensive, as can well be imagined. Yet, in giving it its true

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*interpretation, and in deciding upon the conformity of this act, under it, we must have regard to the object originally had in view, and the means contemplated through the agency of the attorney. The power is dated 12th February, 1823, very soon after the death of Theodore Sompeyrac, their son, and the primary object was to recover for them and in their behalf, his estate; and the general authority, first given, is to seek for and recover all property real and personal, which may belong to the estate of the said Theodore Sompeyrac. The subsequent specification of powers, as minute as it is possible, seems to contemplate that the attorney is to take upon him the actual administration of the estate, perhaps without knowledge of the will; for many things he was appointed to do, could only be done, without doubt, by an executor or administrator—when, therefore, power is given to renounce claim to the debts and credits of the estate, and "in all cases where it may be necessary, to compound, compromise, covenant, and appoint arbitrators," these taken in connexion with other powers, as to "sue for all sums of money, pay all that may be due," evidently have reference to a general course of administration, for the purpose of realizing the assets, and certainly do not contemplate the intervention of an executor or administrator, from whom alone the attorney could receive the fund, and whom alone it would be necessary to sue. The power to renounce, to compound, to compromise, had relation only to debts and claims, existing for and against the estate. It is true, the power must be regarded as both general and special; and after the estate had been fully administered by the executors, who alone had control over it, Melisse Sompeyrac, as attorney under the power, had unquestionable authority to receive the legacy from them. But in that state of things, with full knowledge that the whole estate was actually in the hands of the executor, as he admits, upon the most liberal construction of the power he had authority only to demand and receive payment, and, as a consequence, on non-payment, to institute proceedings. If the power were to receive payment only, it is clear that nothing but an

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actu*al receipt of the money would suffice. The attorney, under such a power, could not accept a note of another, in discharge. Such an acceptance would not bind the principal; and if the principal would not be bound in that case, certainly he would not be bound where the attorney agrees to accept in discharge an unliquidated claim or demand upon another, an insolvent person. Here the case is still stronger against the defendant and attorney, for the claim and demand alledged to be accepted in discharge was one upon the attorney himself, which the former had no other means of securing, and the latter no other means of paying. This can never be allowed—and if we construe the words, "compound and compromise" in their most enlarged sense, and as applying as well

to the claim upon the executors as to claims previous to administration, it would be equally a violation of law, and a fraud upon the principal, to permit the attorney to compound or compromise the right of the principal, by accepting in discharge of a claim which he knew to be perfectly good, a debt upon himself, an insolvent person according to his own acknowledgment. a

The decree of the Chancellor is affirmed.

JOHNSON and O'NEALL, JJ., concurred.

a 11 Mod. 71, 87; 2 Ld. Ray. 928.

1 Hill, Eq. 224

SARAH M. DRAYTON v. THOMAS S. GRIMKE, Administrator, and Others.

(Charleston, April, 1833.)

[*Wills* ⇐733.]

The testator, by his will disposed of his whole estate, and amongst other things, bequeathed certain negroes to his son, W. H. D. during life, remainder over; and by another clause, directs his estate to be kept together until his debts are paid: it was held, that the testator meant no more than that the absolute right of the legatees should not vest until his debts were paid; that the restrictive clause applied only to the mass of the estate, and not to the specific legacy; and (the tenant for life being dead) that the legatee in remainder was entitled to the immediate possession of the negroes, altho' the debts were not paid, and could retain them until the rest of the estate should prove insufficient to pay the debts.

[Ed. Note.—Cited in Lawton v. Hunt, 4 Strob. Eq. 8.

For other cases, see Wills, Cent. Dig. § 1823; Dec. Dig. ⇐733.]

[*Wills* ⇐565.]

A bequest of "Driver Dick & his family, to wit, his wife & children," includes only the wife then living, and the issue of their cohabitation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1233–1238; Dec. Dig. ⇐565.]

[*Wills* ⇐733.]

Where a contingent legacy in remainder was given on the legatee's attaining 21, and assuming the surname of the testator, and there was nothing in the will shewing an intention on the part of the testator to provide a fund for maintenance and education: *Held*, that the legatee in remainder was not entitled to the intermediate profits of the legacy, from the death of the tenant for life until the estate vested in him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1819; Dec. Dig. ⇐733.]

EARLE, J. The questions presented for the consideration of the Court, arise under the will of Thomas Drayton, decd., and relate to the contingent legacy bequeathed to Thomas Drayton Grimke, in remainder, on his attaining the age of 21 years, and assuming the surname of the testator, the event having occurred, and the condition being complied with. The clause is in these words.

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"Item. I give and bequeath *my driver Dick, and his family, to wit his wife and children: also my carpenters, Robert, Joe and Jim, and my house servants George and Daniel, with the future issue of the females, from this date, to my son William Henry Drayton during his naural life," with limitation over, and on failure thereof, a portion of the said negroes the testator bequeaths to his grandson, on the event and condition above stated. Having attained 21 years of age and assumed the name of Thomas Grimke Drayton, the previous limitation having failed, and the legacy having vested, he claims the present possession of the negroes; and the question, which is confined by the case made to driver Dick and family, George a coachman and Robert a carpenter, is whether he is entitled to the immediate possession of them, or whether they are embraced within the general provision of the first clause of the will in these words, "I will order and direct, that my estate be kept together until my just debts are fully paid and satisfied;" it being admitted that this has not yet been accomplished. It is conceived that this question has been concluded by the opinion of the Court of Appeals, on other clauses of the will containing bequests to the daughters of negroes, of a similar character and using the same phraseology: as "I give and bequeath the following house servants, to wit, Sam, London and Carpenter Abram, with the increase to such of my daughters as are unmarried at my death, as long as they shall continue unmarried;" and as in this clause, "I give and devise to such of my daughters as shall continue unmarried at my death the use of my plantation on Ashley called Magnolia, and the adjoining tracts." Upon these, and other similar clauses containing bequests to the daughters, this Court held on Appeal from the Circuit decree of the Chancellor, that this property, Magnolia and the other tracts of land, as well as the negroes, were exempted from the operation of the general clause declaring the estate to be kept together—that the testator did not intend to deprive the objects of his affection and bounty of the immediate use of the property, that they were entitled to present possession. It is conceived, that all the reasoning of the Court in that case, applies with

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equal force to the *clause now in question; and I think the Chancellor in the present case has been led into some misapprehension in the view he has taken of that decision. Magnolia, a place no longer cultivated, and the carriage and horses, were, it is true, considered as unproductive, not available to any extent in paying off the debts; and it seems to be insisted, that the testator could not have intended to deprive his daughters of the present use or to postpone the enjoyment until the legacy might be no longer beneficial. But it could not be well or truly said, that the negroes, although not field hands, were unproductive,

for there were three fellows, one a carpenter, and three grown women, contained in the clause in favor of the unmarried daughter. The Court say, "by the clause 'kept together until the debts are paid' the testator meant no more than that the absolute right of the legatees and devisees in their respective shares should not vest until the debts were paid, because although the productive part of the estate was competent to the payment of his debts at that time, yet by some casualty this expectation may have been disappointed, and in that event the specific legacies may have been necessary for the payment of the debts, and this is by no means inconsistent with the present use by the respective legatees. They may enjoy the property until that event shall happen, or until the claims of creditors are enforced, which the testator would not have restrained by any provision in his will."

I think therefore, that the Court intended to decide that the general clause, directing the estate to be kept together, was not intended to embrace the specific legacies—and that all the negroes specifically bequeathed, passed immediately. Having so held in relation to the devises and bequests to the daughters, a different rule of construction cannot now be adopted, in relation to a clause using the same phraseology, and bequeathing negroes of a similar description. It will be borne in mind, that they formed but a small portion of the estate, and the Court seems to have considered the respective clause as intended only to apply to the mass of the estate, which forms the residue for final dis-

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tribution. This view is strengthened by *the fact that William Henry Drayton, the first taker, had but a life estate. And as he had no other estate than this, and the mass of property intended for him constituted the fund for the payment of debts, it is most likely that the special provision in this clause was intended for his immediate use—a portion of this legacy having now vested in Thomas Grimke Drayton, it is the opinion of this Court that he is entitled to the immediate possession of the negroes in question. The decree of the Chancellor, on this part of the case, is therefore reversed.

Another question relates to the meaning of "Driver Dick and his family, to wit, his wife and children;" and as Dick, at the date of the will, had children by former wives then dead, it is asked whether they pass under the term 'children.' The testator, by adding the words "to wit, his wife and children," has clearly put the same construction on the word "family," which the Court would have done after the case of Pringle v. Ex'ors of McPherson, 2 Desaus. Eq. Rep. 524, and obviously intended only the wife then living at the date of the will, and the issue of their cohabitation, as the Chancellor has decided. There being grand children born after the execution of the will, it might be questioned, since the case of Tydiman v. Rose, decided here last Term, whether they would pass. But the terms of the bequest avoid this question, for they expressly include the children of Dick, with the future issue of the females, from the date.

The last question relates to the intermediate profits, from the death of William Henry Drayton, the first tenant for life; and it is asked, whether Thomas Grimke Drayton is entitled to receive them, or they become a portion of the residue for the payment of debts. This question was fully considered by this Court, on a former occasion, in relation to this very legacy, and it was decided, that as the legacy to the present claimant, and others standing in the same relation, was contingent, and there was nothing in the will to indicate an intention, on the part of the testator, to provide a fund for their maintenance and education, they were not entitled to

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interest. The intermediate *profits stand under the will in the place of interest; if Mr. Drayton was not entitled to interest until the legacy vested, he is not entitled to the profits. On the two last questions presented, the decree of the Chancellor is affirmed.

JOHNSON and O'NEALL, JJ., concurred.

King, for the appellant.
Pettigru, contra.

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1 Hill, Eq. 228

MAGWOOD & PATTERSON v. AGNES JOHNSTON and others.

(Charleston. April, 1833.)

[*Trusts* ⇐225.]

How far and under what circumstances, trust estates will be held liable for debts contracted for their benefit, or in furtherance of the objects of the trust.

[Ed. Note.—Cited in Culleton v. Garrity, 11 Rich. Eq. 328.

For other cases, see Trusts, Cent. Dig. § 322; Dec. Dig. ⇐225.]

[*Trusts* ⇐222.]

The equity of a creditor to render a trust estate liable for his debt, is that he has advanced his money, or given his credit to effect the objects of the trust, and in charging trust estates with such debts, every estate must bear its own burthens.

[Ed. Note.—Cited in Hastie & Nichol v. Baker, 3 Rich. Eq. 216; Adams v. Mackey, 6 Rich. Eq. 77; Welsh v. Davis, 3 S. C. 116, 16 Am. Rep. 690.

For other cases, see Trusts, Cent. Dig. § 319; Dec. Dig. ⇐222.]

[*Trusts* ⇐225.]

To expend money for the benefit of a trust estate, means either adding to its value or defraying charges to which it would be liable.

[Ed. Note.—Cited in Welsh v. Davis, 3 S. C. 117, 16 Am. Rep. 690; McKee v. Mobley, 3 S. C. 247.

For other cases, see Trusts, Cent. Dig. § 322; Dec. Dig. ⇐225.]

[*Husband and Wife* ⟸151.]

The wife's separate estate, in general, is not liable for the expenses of herself and family—the husband, if he be of ability, is bound to support his family: & if he contract debts for the support of his wife & children, & the credit is given to him, neither the separate estate of the wife, nor the remainder to the children, is liable for such debts, although the husband should prove insolvent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 276–278; Dec. Dig. ⟸151.]

[*Husband and Wife* ⟸162.]

Although the wife cannot by her own mere act, charge her separate estate, if she is under the necessity of supporting herself and family on the credit of her estate she may do so, but the Court, before making her estate liable, will see that such necessity existed, and that the advances of money or goods were proper: & with respect to such an account, the dealings should appear to have been bona fide with the wife, and not with the husband: Therefore where, by marriage settlement, the fortune of the wife was settled to her separate use during life, remainder to the issue of the marriage: & the husband's estate was settled on himself during life, remainder also to the issue, subject to an annuity to the wife; & the husband, during coverture, having charge of the trust estates, contracted debts for necessaries for his family, & for supplies to the plantations, and died insolvent: *Held*, that neither the life estate of the wife nor the remainder of the children, was liable for such debts; but if the husband acted as his wife's agent, in furnishing necessaries for herself and family, & in procuring supplies for her separate estate, & if such an account was necessary & proper, her separate estate will be charged with it.

[Ed. Note.—Cited in Rabb v. Flenniken, 32 S. C. 195, 10 S. E. 943.

For other cases, see Husband and Wife, Cent. Dig. § 596; Dec. Dig. ⟸162.]

[*Husband and Wife* ⟸110.]

[Cited in Reid v. Lamar, 1 Strob. Eq. 37; Reese v. Holmes, 5 Rich. Eq. 566; Brock v. O'Dell, 44 S. C. 34, 21 S. E. 976, to the point that a wife's control of her separate property is strictly limited by the instrument creating it.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 396–407; Dec. Dig. ⟸110.]

[*Husband and Wife* ⟸144.]

[Cited in Waterman v. Kennerly, 3 Strob. Eq. 77, to the point that a married woman has absolute control of the income of her separate estate.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 35, 545–553; Dec. Dig. ⟸144.]

[*Husband and Wife* ⟸179.]

[Cited in Robinson v. Dart's Ex'rs, Dud. Eq. 131, 31 Am. Dec. 569; Clark v. Makenna, Cheves, Eq. 165; Terry v. Brunson, 1 Rich. Eq. 89; Fraser v. Fishburne, 4 S. C. 319, to the point that a feme covert cannot dispose of or charge her separate estate, even with the consent of her husband or trustee.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 711, 939; Dec. Dig. ⟸179.]

By a marriage contract, bearing date the 8th of April, 1807, between Archibald Simpson Johnston, of the first part; Agnes Ewing of the second part; and James Ewing, John Ewing, Robert William Ewing and David Lamb, trustees, of the third part; it was agreed, that all the estate to which Miss Ewing was entitled, and nearly all Mr. Johnston's, should be settled as follows, to wit: the fortune of the lady, to her sole and separate use during her life, and after her decease, to the issue of the marriage: and the estate of A. S. Johnston, to his use during life and after his decease, in trust to raise an annuity of £200 per annum, payable to the said Agnes in case she survived him, during her life, and subject thereto, and then to the issue of the marriage.

After the marriage, negroes were bought with Mrs. Johnston's money, and placed with Mr. Johnston, on his plantation, nor did the trustees interfere; but the whole estate was under one management, in the hands of Mr. Johnston. No deed was executed, to carry the contract into execution. From untoward circumstances, Mr. Johnston was compelled to live on credit. In January, 1818, he bor-

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*rowed from a friend $2,000, and immediately laid it out in paying off pressing demands, and by the end of the month was again in distress. He applied to Magwood & Patterson, and they agreed to indorse his note for $3,000, upon his giving them the bond of himself and Mrs. Johnston, and a mortgage of three negroes, as security. The bond was executed on the 3d February 1818.

The application of the money by Mr. Johnston was as follows:

For carriage and horses	$726 00
Medical attendance on plantation	106 68
Educating children	77 00
Plantation expenses	8 19
House expenses	159 62
Grocer's bill	117 78
Upholsterer's do	109 04
Druggist's do	46 43
Physician's do	114 00
Ship chandler's do	92 12
Negro cloth	234 62
Overseer	124 00
Tailor's bill	20 00
Tinman's do	21 93
Jeweller's do	42 00
Grocer's do	350 00
Corn for plantation	188 10
Plantation account	42 75
Trust estate	10 00
Medical account	37 87
House	10 87
Education	77 00
Horses	138 00
Plantation	8 00
House	159 62

The crop of 1818 failed. They made about half a cotton crop, which was applied to the loan made in January; the rest was not enough for the subsistence of the negroes for three months. Magwood & Patterson continued their assistance—they renewed the note,

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paying the inter*est from time to time, and furnished the plantation and family with necessaries. On the 15th of September, 1819, Mr. Johnston died, insolvent. Mrs. Johnston administered on his estate. At the time of his death, he was indebted to Magwood & Pat-

terson $1,124.84, for such advances, besides the note which they afterwards paid off. Mrs. Johnston sent the crop of 1819 to Magwood and Patterson, who retained the same for their debt. Of the negroes mortgaged, one was subject to a prior incumbrance, the remaining two were sold, and the proceeds placed to the credit of the note.

The plaintiffs continued the factors of Mrs. Johnston, and advanced money to her use from time to time, which she refused to pay, because they retained the crop of 1819, or passed it to the account of A. S. Johnston, while she contended it should be passed to her account.

The bill was filed on the 4th December 1823, against Mrs. Johnston and the trustees, to charge the trust estate with the plaintiff's demands; and afterwards Mrs. Johnston and the trustees, by permission of the Court of Chancery, sold all the settled estate. The interest of the money arising from the sale gave the family an easy income. Mrs. Johnston did not receive or spend the amount of her interest and annuity, which continued in the hands of the trustees—she died on the 27th March, 1828; and the bill was revived against her administrator and the trustees. The matters involved in the case were referred to the Commissioner, who reports, among other things, that the whole of the trust property has been sold, as before stated, except the Rosalind plantation, and a few old and useless slaves; and he recommends that the plaintiffs should be satisfied their demands, first by a sale of the Rosalind estate, and the residne out of the interest which has accrued on Gen. Can's bond, who was the purchaser of the trust property.

The cause was heard at Charleston, January Term, 1829, and the following decree delivered by

Harper, Chancellor. The case of Ewing v. Smith, 3 Desaus. Eq. Rep. 147 [5 Am. Dec. 557], which is very much the present in many of its circumstances, has settled, that a feme

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covert cannot dispose of, or in any man*ner charge her separate estate—not even with the consent of her trustee. If issues or profits are to be paid to her separate use, she may do what she pleases with them when she receives them, but cannot dispose of them by anticipation.—The Court, however, as has been decided in several cases, will charge her separate estate, if the debt has been contracted for its benefit. In a late case, that of Street v. Theus, which I decided at Sumter, I had occasion to consider the doctrine of the liability of trust estates, for debts contracted for their benefit; and to refer to some of the rules which I supposed would govern the Court, in the application of that doctrine. In that case, I observed, "that although it was perfectly well settled that a trust estate was liable for debts contracted for its benefit, it has not been settled that one trust estate is liable for the debts of another; or that the remainder man is to pay the debts which were contracted for the exclusive benefit of the tenant for life." The word 'estate' has sometimes been used ambiguously. There may be various estates in the same property, and one of these is no more liable for the debts of another, than if they were estates of different property. True, where property is conveyed in trust, and particular estates are created, there may be debts chargeable on the whole estate—the particular estates as well as the remainder, and to which all shall contribute rateably. As where, at the creation of the trust, the estate is charged with a debt which falls due during the continuance of a particular estate: or, perhaps, during the continuance of a particular estate a debt may be created which shall properly be chargeable on the whole, being contracted for the benefit of the whole—such may be debts contracted for repairs and improvements. On the other hand, it cannot be doubted there may be debts of the particular estate, for which subsequent estates, or the remainder, will not be liable —such as the well known instance of interest accruing during the continuance of a life estate, which the tenant for life is bound to keep down. The accruing interest is continually due, and is a charge on the particular estate. So in the case of a trust estate, all

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the charges of manage*ment are the debts of the particular estate; taxes, current and necessary repairs, the support of slaves, if they form part of the estate; so all debts, chargeable on the estate, which were contracted for the individual benefit of the tenant for life. In the case of a legal estate no one would think of the remainder being liable for the debts of the tenant for life. These must be paid, not out of the corpus of the property, but out of the profits accruing during the continuance of the estate for life. The particular estate is liable to be sold, not any part of the capital. The equity on which a creditor comes into this Court to render a trust estate liable to the payment of his debt, is this, that he has advanced his money, or given credit to effect the objects of the trust, and having accomplished the objects of the trust at his own expense, he has a right to be put in the place of the cestuique trust, or to be reimbursed out of the trust fund. If there were a trust to keep a hospital in repair, he who has made the repairs at his own expense, might have his equity to be reimbursed out of the trust fund. So, if the trusts were to pay rents and profits for the separate maintenance of a femme covert, he who had advanced his money for her separate maintenance, might have such an Equity. But every estate must bear its own burthen, or instead of effecting the objects of the trust, they will be defeated. The case of Street v. Theus, to which I have alluded, was one in which the property was settled to the joint use of the husband and wife dur-

ing coverture—on the death of the husband, to the wife for life, remainder on her death to the children of the marriage. The bill was filed after the death of the husband, to obtain payment out of the trust estate, of an account for articles furnished, and advances made to the husband for the support of himself and family. Here the objects of the trust were, that during the continuance of the joint estate, the issues and profits should go to the joint issue. The advances were made by the creditor to the joint use, and I thought he could look only to the joint estate for satisfaction—that is to say, to the rents and profits which accrued during the coverture. The further objects were to secure the

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estate to the individual use *of the wife after the husband's death, and to her children after her death.

If by making advances to the husband for the use of himself and family, the wife's separate life estate or the capital of the property might be rendered liable, it is plain that it would be in the power of the husband and a creditor to defeat the ulterior objects of the trust altogether. It would be vain to say that the wife shall not anticipate the income of her separate property, if the husband may by exceeding his income thus anticipate it, even before it vests in possession. It is to be observed that in such cases of marriage settlement, the husband the wife and the children, are purchasers of their several estates for valuable consideration.

I do not think the cases decided in this State inconsistent with the view I have taken. In Cater v. Eveleigh, 4 Desaus. Eq. Rep. 19 [6 Am. Dec. 596,] a cotton saw gin was bought for the use of the wife's separate estate—it is not stated whether she was tenant for life, or in fee. If only tenant for life, the saw gin may have been considered a permanent improvement, properly chargeable on the whole estate.—The order is general for payment out of the estate. I suppose if it were an estate for life, the effect of the order was to make it payable out of the profits of the life estate. In James v. Mayrant, 4 Desaus. Eq. Rep. 591 [6 Am. Dec. 630,] the order was express, to pay out of the accruing profits during the continuance of the life estate. In Montgomery & Eveleigh, 1 M'C. Eq. 267, there was an estate for life, and the debt was contracted for the support of the slaves, constituting according to my view only a charge on the life estate. The order is general to pay out of the life estate. The point does not seem to have been brought before the Court, of a distinction between the liability of the particular estate and the remainder. But I suppose the effect of the order was to make the debt payable out of the rents and profits of the life estate.

The bill in the present case is filed, as it is said, to obtain payment out of the trust estate, on the ground that the debt was contracted for its benefit. But it is to be observed in the first place, that here are two general trust estates, though both are created by the same settlement and vested in the same trustees, out of each of which various particular estates have been carved for dif-

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ferent purposes, and subject *to distinct liabilities. It is true, that as I understand the report of the Commissioner, the whole of both estates has been sold (except one plantation) and the proceeds vested in a single fund. But the Court must dispose of the proceeds of each according to the trusts of the original settlement. There is first, the property which was Mrs. Johnston's before her marriage, her share of her father's estate. In this the settlement gives her a life estate, (to her separate use during coverture) with remainder to her children. Is this property, or her life estate in it which still subsists, liable to the complainants' demands, or any, and which of them? The complainants must claim on the ground that their debt was contracted for the purpose of effecting the objects of the trust. What were the objects of the trust? That she should receive the issues and profits to her separate use during the coverture—to her own use for life after the determination of the coverture by the death of the husband, and that the property should go to her children at her death. Have the complainants advanced their money for these purposes? It is on this part of the case that I feel the principal and only difficulty. The complainants' first demand is for the money raised on the note indorsed by them, which they charge was expended by Mr. Johnston for the convenience and in the support and education of his family. This is said to have been the expending of money for the benefit of the trust estate. To expend money for the benefit of a trust estate, would seem to mean, either adding value to the estate, or the defraying of charges to which the trust estate would be liable. But was the wife's separate trust estate liable for the expenses of herself and family? In general such an estate is not. A femme covert who has an estate to her own separate use, may do what she pleases with the income of it. She is not bound to support herself with it, still less her children—She may suffer it to accumulate, and still demand a support from her husband.—A husband if he be of ability, is bound to support his wife and family, though they may have property of their own. But there may be cases where the husband is not of ability. He may be embarrassed, or without property, and the wife may be compelled to support

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herself out of her se*parate estate. And she might be subjected to the greatest distress, if she could not obtain the means of support on the credit of her separate estate. The Court has ordered children to be maintained out of their own property, when the father was not able to support them. The idea

seems to be, that if articles are furnished, or money advanced to the husband, and employed by him in the support of his family, and he afterwards turns out insolvent, it is sufficient evidence that he was not of ability to support them, and the creditors have an equity to charge their account on the wife's or children's estate. It seems fair, that they who have received the benefit of the creditor's advances, should satisfy him out of their own property. There seem to be several difficulties in the way of establishing such a doctrine. The husband, the wife and the children, have all received their share of the benefit from money laid out in family expenses, and if they have distinct property, it should seem that they ought to contribute in proportion to the benefit received. But there would be great difficulty in apportioning the contribution among them. The wife and children are not bound to support the husband and father, though they may be obliged to support themselves. If all accounts raised by the husband for the support of his family, are to be charged on the separate property of the wife and children when he proves unable to pay, it would always be in his power to squander his own property and contrive to charge his family expenses on the estates of the wife and children, thus defeating the object for which the trust was created. The husband ought to support his family in a manner suited to his income. If the wife's separate fortune will afford a more expensive way of living, and she is minded so to apply it, there is nothing to forbid her doing so. But he should not incur expenses in reference to what her fortune will afford. He will however be continually tempted to do so, if we allow accounts raised by him to be charged on the wife's separate estate. But the principal difficulty in the way of the doctrine is, that there is not, so far as I can discover, any law or authority for it. There would be no difficulty in such a case in England. If the credit were given to the husband he alone

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would be an*swerable, though he might have applied the money to the support of his family. If the wife should afterwards think fit to charge the debt on her separate estate, she might do so. So the wife there may raise any amount, or contract any debt on the credit of her separate estate, and the estate will be liable for them.

How far have our Courts departed from the English doctrines? Thus far, that the wife should not by her own act merely, charge her separate estate. The Court will look into the necessity and propriety of the charge. If she is under the necessity of supporting herself and family on the credit of the separate estate, she may do so, as in England. But the Court, before making her estate liable, will look into the circumstances of the husband, and be satisfied that the necessity existed, and that the goods furnished or money advanced, was proper in her circumstances. But still it must appear that the credit was given to the wife, and not to the husband.

The decisions of our Courts which take away from the wife the power of charging her estate by her own mere act, do not give the husband the power of charging it, even for things the most necessary and proper. The wife must be trusted, and on the faith of her own separate property. In case of a trust to pay rents and profits to the separate use of a femme covert, they must be paid to her own order, or into her own hand. So with respect to such an account. I should say, the goods must be furnished, or the money paid, to her own order or into her own hand. The husband may perhaps be her agent in raising the account, (though I should doubt the propriety of his acting as such) but then it should distinctly appear that he acted in the character of agent. In short, the dealings should appear to have been bona fide with the wife, and not with the husband. I can perceive nothing in the case, but that the credit was given to the husband, though it was attempted afterwards to obtain the additional security of the wife's separate estate. The money, so far as appears, was not paid to him for the particular purpose of supporting his family, but for any purpose to

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which he might think pro*per to apply it. The proof is very imperfect of his having applied it to the support of his family—at most it applies to but a part of the money. The carriage and horses form the most considerable item. On this I may observe, that if the husband thought proper to buy a carriage and horses for the convenience of himself and family, I do not perceive on what principle the wife's separate estate can be charged with them. If, by her direction, he bought them for her separate use, and they are now her individual property, perhaps she may be chargeable. If he purchased for himself, they remained his property, and she is chargeable with them as administratrix. The parties may have this point referred if they think proper. I cannot think either the wife's life estate in this property, or the children's remainder, liable to satisfy the complainants for the amount paid by them on the indorsement.

The complainants' next demand is on an account raised against Mr. Johnston, in his lifetime, principally for corn and other plantation supplies; cash advanced for payment of taxes; cash on account, for renewal of note, &c. So far as the supplies were for the use of Mrs. Johnston's separate estate, corn for the support of her separate slaves, or taxes paid for her separate property, I think her life estate, (not the children's remainder) is liable to satisfy the account. The report does not distinguish what was furnished for the separate estate, and what for the hus-

band's.—This may be a subject of further reference.

The complainants' next demand is for an account against Mrs. Johnston, since her husband's death, to the amount of $2,139.12, on which is credited $1,191, for produce sold chiefly in 1821. Mrs. Johnston admits this account in her answer, to the amount of $1,364.64, but states that this only exceeded the amount of the crop of 1819, sent by her to the complainants, by about $163; and that she afterwards sent them produce more than enough to pay the balance. The report is not very specific as to the amount of this account proved, or the payment on it. I suppose the question of its being paid depends on that of the complainants' right to apply the proceeds of the crop of 1819 to the ac-

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*count of A. S. Johnston. It is clear that they had no such right. If the crop was entirely the property of the estate of A. S. Johnston, they had no right to retain it as preferred creditors. The administratrix was entitled to it, that she might distribute it in a course of administration.—She may be liable for the amount, as administratrix, to the creditors of her husband, but as between her and the complainants, her factors, it was a mere personal transaction. As to the claim set up by Mrs. Johnston, to a portion of this crop, it is perhaps not necessary now to decide.—That question will arise when she is called to account for her administration. I am inclined to think, that if she and her trustee permitted her husband to use the services of the slaves on his own plantation, (I understand the crops were made on the Rosalind plantation) without any agreement as to apportioning the crop, that the crop was his, and that she cannot, at all events, be considered as any thing more than a creditor, for the hire of the slaves.—On this point, however, I do not conclude any thing. In the account against Mrs. Johnston, there are charges for money, said to be advanced specifically for the maintenance and education of the children, and so applied by her. If that account is paid, it is not perhaps necessary to notice this charge particularly. I may observe, however, that Mrs. Johnston is personally liable, and all her property is liable for any debt contracted by her, or money advanced to her, since her husband's death. If money was advanced to her for the support and education of her children, and properly applied, and the creditor should be unable to obtain payment of her, there is an estate expressly charged with the maintenance and education of the children, from which the creditor may be reimbursed. I could not, however, it seems, to me, make the order in this case, to which the children are not parties. I think the creditor might apply by petition.

As to the property which was A. S. Johnston's before his marriage, he had a life estate in that which was subject to all his debts. His life estate has now passed away, and the remainder has vested in the children, subject to a life annuity to their mother.

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They are *all purchasers for valuable consideration. From the view which I have taken, it will appear, that I do not think this remainder chargeable with the personal debts of A. S. Johnston, or those contracted by him for the support of his family, or those contracted for the benefit and support of his life estate—in short, for any of the complainants' demands.

It is Ordered and decreed, that the case be again referred to the Commissioner, to report on the matters specified in the foregoing opinion, as matters of reference.—And that as to the residue of the complainants' charges, the bill be dismissed.

Mr. Gray, (the Commissioner) to whom the cause was referred, by his report in January 1833, found that the bond and note were given as herein before mentioned; and the money expended by Mr. Johnston as already mentioned, and disallowed the complainants' claim to be reimbursed, either for the amount paid on Mr. Johnston's note, or the sums advanced by them to Mr. Johnston for the maintenance of the plantation and family. The report finds further the assets of Mrs. Johnston in the hands of the trustee, amounting to $3,965.55.

At January Term, 1833, the cause came before his honor, Chancellor Johnston, upon the report exceptions and equity reserved, who ruled, that the decree precluded every question, except as to the fact whether the carriage was bought for Mrs. Johnston, and the supplies furnished on her credit; and overruled the exceptions, without making any further decree.

The plaintiffs appeal, and move to reverse the same, on the following grounds:

1. That the evidence taken in the case places it beyond doubt, that Magwood & Patterson indorsed the note of A. S. Johnston, on the credit of him and Mrs. Johnston jointly; that the money was applied to their joint use, and that Mrs. Johnston was consenting to the application of the money, as well as to the loan.—And therefore, that this case comes within the principle of a loan, obtained by a married woman, upon the credit of her separate estate, and applied by her to her own use.

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*2. That the loan was necessary and proper, in the circumstances in which Mr. Johnston was placed; that the plaintiffs are humane and meritorious creditors of the wife as well as of the husband, and are entitled to the benefit of Mrs. Johnston's engagement to them, because that engagement was such as, in conscience and in equity, should be complied with.

3. That as Mr. & Mrs. Johnston were equally interested in the loan, their joint liability

was a fair and equal arrangement of which the plaintiffs should have the benefit; but, at all events, if Mrs. Johnston's estate be not liable for the whole, it should be liable for a proportionable part.

4. That the advances made by Magwood & Patterson, after February 1818, should be borne by Mrs. Johnston's estate in like manner, as having been made upon the same understanding, that they were for the joint benefit of the husband and wife, and that they were jointly liable.

All which positions, as the plaintiffs contend, are consistent with Chancellor Harper's decree and with the law of this Court. But if the Court be of opinion that the said decree is opposed to the relief which the plaintiffs seek, they appeal from so much of the said decree.

Pettigru, for the appellants, cited Jacques v. The Methodist Church, 1 John. Ch. Rep. 150; 17 John. Rep. 458; Ewing v. Smith, 3 Eq. Rep. 417.

EARLE, J. The Chancellor in his Circuit decree has decided the general principles of this case, and had settled the most important questions which arose in the progress of it. In order to charge the separate estate of the wife, he had said, that the goods must be furnished, or the money paid, to her own order or into her own hands. "And although the husband might perhaps act as her agent, that it should distinctly appear that he acted in the character of agent; and that the dealings should appear to have been bona fide with the wife, and not with the husband."

Under this general principle, the Chancel-

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lor expressly de*creed, that neither the life estate of the wife, nor the remainder of the children, was liable to refund the amount which the complainants had paid on their indorsement, and directed it to be referred to the Commissioner to inquire whether the carriage and horses were bought by the direction of the wife for her separate use, and were retained by her as her individual property. The Commissioner reported that they were not so purchased, and that they were sold after Mr. Johnston's death as part of his estate. He reports expressly that the credit, in relation to the money raised on the note indorsed, was given to Mr. Johnston himself. In relation to the advances, made by complainants to Mr. Johnston of money and supplies, provisions &c. for the plantation, it was further referred on this subject, to enquire and report, whether the supplies were for the use of Mrs. Johnston's separate estate; the corn for the support of her separate slaves, or taxes paid for her separate property. The Commissioner reports, that no evidence has been furnished by which it was practicable to distinguish what was on account of the one estate, and what of the other.

Another question raised, related to the supplies furnished Mrs. Johnston by the complainants after the death of her husband, in September 1819, on which account they claimed a large balance. This question depended on the right of the complainants to apply the proceeds of the crop of 1819, to the extinguishment of their demands against Mr. Johnston. From the report of the Commissioner, it appears that they retained the whole of that crop amounting to $1,162.90, which they had no right to do, according to the decree. The Commissioner therefore reports that sum against them in favour of the estate.

On exceptions to the report it was confirmed, and the Chancellor was of opinion that by the previous decree the whole bill was dismissed, except the subject specially referred and reported on.

This Court is now of the same opinion, and the order of confirmation is now affirmed.

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The complainants have *appealed from the original decree, and this Court concurs fully in the views which the Chancellor has taken, in that decree; and the same is hereby also affirmed, for the reasons which he has given.

JOHNSON and O'NEALL, JJ., concurred.

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1 Hill, Eq. 242

The Ex'ors of JAS. S. HOPKINS v. MARY MAZYCK and Others.

(Charleston. April, 1833.)

[*Deeds* ⇐69.]

P. R. M. a young man of intemperate habits, was prevailed on to execute a deed of his property to his mother & brother and sisters, reserving a life estate to himself, with the understanding on his part and promises on their's that the object was to protect his property, and not to deprive him of the right to control and dispose of it by will; but the deed contained no power of revocation, nor was there any undue influence exercised; P. R. M. afterwards made a will by which he disposed of his property, and died: *Held*, that the deed was valid and irrevocable.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 156–164; Dec. Dig. ⇐69.]

[*Deeds* ⇐69.]

The decision in Lawrence v. [illegible]aubien, considered and adhered to. Distin[illegible]n taken between ignorance & mistake of the law; the first is not susceptible of proof, & cannot therefore be relieved; but mistake may be proved, and when proven relief will be afforded.

[Ed. Note.—Cited in Halls Kirkpatrick & Co. v. Bank of South Carolina, 2 Hill, 578; Thrower v. Cureton, 4 Strob. Eq. 158, 53 Am. Dec. 660; Brockington v. Camlin, 4 Strob Eq. 198; Brock v. O'Dell, 44 S. C. 39, 21 S. E. 976.

For other cases, see Deeds, Cent. Dig. §§ 156–164; Dec. Dig. ⇐69.]

The bill states that Paul Ravenal Mazyck, being possessed of considerable property, on

the 4th of October, 1816, executed a deed to certain trustees, whereby, for certain good causes and considerations, he conveyed his whole estate in trust for his own use, during life, and at his death to his mother, brothers and sisters, to be equally divided between them.—That on the 5th November, 1816, the said Paul R. Mazyck, by his last will and testament, devised and bequeathed his whole estate to his sister Jane, (now Mrs. Elfe) subject to a legacy of $200, to his brother Benjamin; and requests his mother and brothers and sisters to take nothing under the deed, which he declares was executed at their instance, and intended solely for his own protection; and should they claim under it, he enjoins it on his executor to institute proceedings to set it aside; and shortly afterwards died. The defendant, George Elfe, has lately proved the will, and undertaken the execution thereof; and claims to hold the property disposed of under it.—That, Margaret Mazyck (one of the sisters of Paul R. Mazyck) in contemplation of marriage with James S. Hopkins, the plaintiff's intestate, by marriage settlement of the 24th February, 1824, conveyed her whole estate, as set forth in a schedule annexed, to trustees, in trust,

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among other things, *that if the said Jas. F. Hopkins survived her, and there should be no child of the marriage, the said estate should become the absolute property of her said husband. The schedule contained the following words, "under the trust deed of Paul R. Mazyck, one-sixth of all his estate, real and personal, conveyed in trust to his mother, brothers and sisters, should the deed be adjudged irrevocable." The marriage took effect—Mrs. Hopkins died, never having had issue, her husband surviving became therefore entitled to her estate, under the marriage settlement.

The plaintiffs, on behalf of their testator, claim the benefit of the deed executed by Paul R. Mazyck, and aver, that although it was voluntary, he executed it in the exercise of his best judgment, and when he was fully competent to do so, in order to protect himself from want, and to secure the property after his death to his relations.

The bill prays for partition of the property, and an account of the rents and profits.

The only question at this time made in the case, was whether the deed of Paul R. Mazyck was absolute and irrevocable, or was executed under such persuasion and undue influence, and mistake of the law, as to render it void.

The answer of Mrs. Mary Mazyck (the mother) among other things, says, that the said deed was made without any consideration whatever; but she cannot say that it was not made by over-persuasion, and the exercise of the influence of his family, and of at least one of his best friends; for such was the fact, though she denies that it was an undue influence in any improper sense of that word. The only object of herself and that friend, (Dr. Gough, now deceased) was to save him from squandering his property, and to prevent its falling into the hands of unprincipled creditors who might, and as experience had shewn would, draw him in by his dissipated habits to waste it all. The plan originated with herself—to secure the property to the family of the said Paul, viz. his mother, sister, and brothers, was the principal part of the design. The said Paul, being then resident at Byrd's Hotel, was sent for to her house and was brought in a chair with considerable difficulty, and after much

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persuasion; that after he came, the *object of his being sent for was made known to him, and it was then distinctly declared to him that the sole motive was to save him and his property from the arts of unjust and unprincipled creditors; that she employed all the influence she had as a mother to induce him to sign the deed; that he signed it with manifest reluctance, but not without repeated and solemn promises from herself and others present, that the deed should never at all interfere with his controul of the property, nor with his disposition of the same by will, in any way that he might please, and she never did consider herself entitled at all to claim any benefit under the said deed, against any will he might have. That after the execution of the deed, he lived continually till his death at her plantation, except in summer, when he lived at her house in town, and became a much less dissipated, though not entirely a sober man. She was not aware of the existence, and still less of the contents, of the will of Paul Ravenel Mazyck, until after his death.

Solomon Legare, the surviving trustee under the deed, by his answers says, that he had been for several years the intimate friend of the family, and was often consulted by the said Mary Mazyck respecting the affairs of herself and her children; that he well knew the said Paul R. Mazyck from his childhood; that as he grew up he acquired habits of dissipation and intemperance which were the occasion of much concern and anxiety to his mother, and his family and friends generally. But however inconsiderate the said Paul R. Mazyck may have been at periods of indulgence in liquor, yet in the intervals when he abstained from it, his mind was clear and good, and he was as competent to the judicious management of his affairs as men in general. He further says, that some short time previous to the execution of the deed of trust, above spoken of, he was sent for to see the said Paul R. Mazyck, who was suffering under a severe illness produced by his habits of intemperance —That on his becoming convalescent, Dr. Gough the attending physician, a disinterested friend of the family, advised the said Paul R. Mazyck to make some conveyance of his property, by which it might be secured

from any future acts of improvidence he might be led into. That the said Paul R.

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Mazyck approved of such *arrangement, and Dr. Gough, by his request and in compliance with the general opinion and wishes of his mother and family, actually drew a paper of similar import with the said deed, which was signed by the said Paul Ravenel Mazyck; but that he, the said Solomon Legare, on examining the paper so prepared by Dr. Gough, thought it informal and insufficient for the purposes which it proposed, and advised the said P. R. M. to employ a professional gentleman to draw such an instrument of writing as would carry his objects fully into effect. And the said Solomon Legare saith that it was at the suggestion and under the advice so given by him, that the deed aforesaid was drawn and executed. That he was present and saw the deed executed, as well by the said P. R. M. as by Mr. Gadsden, (the other trustee, since dec'd) and at the same time executed it himself; that he well remembered that it was said at the time, and understood among the family, that if the said P. R. M. reformed and became a temperate man, none of them could claim under the deed; but he did not understand that this was a condition of the deed, or that it was said to persuade P. R. M. to execute it: for, in fact, the said Solomon Legare is not aware of any reluctance on the part of the said P. R. M. to execute the deed, and the whole understanding appeared to be, that P. R. M. was in the mind to make such a deed, and was more willing to trust his mother, brother and sisters, than to trust himself. And he further says, that Mrs. Mazyck, the mother of the said P. R. M., and the family generally, approved the execution of the deed in question. He felt assured they did so from considerations of regard toward the said P. R. M., aware of his proneness to drink, and his consequent liability to squander his property; and not with any view to benefit themselves; and he says, as far as the circumstances under which the deed was made, are known to him, he can confidently state that no undue influence or persuasion whatever was made use of, by any one, to secure its execution; but that it was the voluntary, free and deliberate act of the said P. R. M. at a period when he had

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for some weeks left off drinking, *and when his mind was as strong and unclouded as it ever had been. He further says, that he was in the habit of frequently visiting P. R. M. after the execution of the said deed, up to the time of his death, and that he never heard him express the slightest regret at having made it, or any wish to revoke it; nor did he ever have any intimation of the kind from the family, until very recently; but on the contrary, always regarded the said deed of full force, and unrevoked. That he, the said Solomon, never knew nor heard of the will which the said P. R. M. afterwards executed, till it was deposited in the Ordinary's office, by a gentleman now deceased, who, this defendant believes, had possession of it without even the knowledge of its existence by the family. That not many weeks after the executing of the deed, and, as well as he can recollect, about the period of the date of the said will, the said P. R. M. resumed his habits of intemperance, which became more inveterate, and eventually produced his death.

The answer of George Elfe and Jane his wife, sets forth, that the said deed was voluntary, so far as regards a consideration for the same; and denies that it was irrevocable, but, on the contrary avers, that it was revocable, and was so understood and intended to be, by all the parties concerned therein.

Jane Elfe, for herself, separately answering to the actual transactions preparatory to, accompanying, and subsequent to the execution of the said deed of the 4th October, 1816, says: that she well remembers how anxious and distressed her mother was, at the habits and conduct of the said Paul, and at the prospect of the whole of his property being squandered by him, as the Queen-street lot had been. That under these circumstances, the said Paul, being a resident and constant boarder and lodger at Byrd's Hotel, was sent for, to his said mother's house. That he was accordingly brought, after much persuasion and difficulty.—That the deed had been previously prepared; nor did he know any thing about it until he came to his mother's.—That he was then informed that he had been sent for in order to execute that instrument; on which he be-

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came evi*dently distressed and embarrassed, and walked about the room, much disturbed in mind.—That he expressed great unwillingness to sign the paper, as not understanding its contents—and he undertook to read the paper, when his mother and the said Jane Elfe, being both of them present, expressly assured him that the only object of the deed was to save the property for his own use and benefit, from the injustice and rapacity of fraudulent creditors taking advantage of him; and that it was not, in any manner, intended to deprive him; of the use of the property, or of a control over it.—That under these assurances he became calmer, and executed the deed—and having done so, asked emphatically whether he would be debarred of the privilege of making his will, and disposing of his property, thereby. Whereupon he was assured by his mother and the said Jane Elfe, that he would not; that they had already told him so, and that they never would claim any thing under the deed. That these declarations satisfied him, and he left the house. After the execution of the deed he lived entirely at the residence of his mother, on Goose Creek, became a reformed man,

lived such the rest of his life, and died at his mother's, on Goose Creek, between three and four years afterwards. Said Jane, and she believed, the whole family likewise, were totally ignorant of the kind intentions of her brother towards her, and of the preference he had given her as the sole object of his bounty, for she most certainly, and she believes no one else of the family suspected, much less knew, of the existence of any will of the said Paul, and still less had they any idea of its contents. These defendants therefore, from the foregoing facts, within the knowledge of one of them, the said Jane, expressly denying that the said Paul was not induced by over-persuasion and undue influence to execute the said deed, but that, on the contrary, he was induced to do so by the solicitations and influences already set forth at large; they accordingly insist on said will, by way of plea, in their answer, in bar to the account sought for by the plaintiff; but should the same be overruled, they will be ready to account.

The answers of the trustees under the mar-

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riage settle*ment, is immaterial, and the answers of the other defendants, the sisters of Paul R. Mazyck, and their husbands, insist on the validity of the deed—they were all under age at the time of its execution. Benjamin and Alexander, the brothers of Paul, are dead, and Mrs. Mazyck administered on the estate of the former.

In addition to the above, it was proved that the marriage settlement of Mrs. Hopkins was drawn by Arthur O'Harra, the former husband of Mrs. Elfe.

The examination of Mrs. Mary Mazyck was offered, on behalf of Mr. & Mrs. Elfe, but objected to, on the ground that she was interested, and could not impeach the deed to which she was a party. The objections were overruled.

The following extract from the schedule annexed to the marriage settlement of Mrs. O'Harra, now Mrs. Elfe, was proved. "Under the will of Paul R. Mazyck, all his estate, real and personal, (subject to a legacy of $200 to his brother Benjamin) devised and bequeathed by Paul to his sister Mary Jane Mazyck, should the same be adjudged a legal and valid will. If not, one sixth of his real and personal, conveyed in trust for his mother, brother and sisters, should the deed be adjudged irrevocable." Mrs. Mazyck testified that she did not know whether Mrs. Hopkins was present when the deed was executed; but she afterwards told her of what had passed, and more than once expressed her agreement to it. Paul, in summer, lived in town with the family. He often said, "Remember, mother, I depend on you, that it is mine and I will do as I please with it;" and she thinks Mrs. H. must have been present on some of these occasions. It was no secret in the family—all looked upon it as his, and so did Mrs. H. After Mrs. Desil grew up, she was acquainted with the particulars of the execution of the deed, and never objected; and witness had no reason to believe she was not present at the conversations of Paul, above mentioned.

On the above state of facts, Chancellor Johnston, at Charleston, January Term, 1833, decided that the deed of P. R. M. of 4th Oct. 1816, was irrevocable, as it declared the trust property was to be subject to none other, and

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it *reserved no power of revocation—without deciding whether parol evidence was admissible to establish stipulations not contained in the deed; the Chancellor held, that the evidence contained none such.—That no such stipulation was made by the trustees; and all of the cestuique trusts, except Mrs. Mazyck, being under age, there was not sufficient proof of ratification by them after they had attained twenty-one.—That Mr. Hopkins was a purchaser for valuable consideration, to wit, marriage; and the notice to him in the schedule was not sufficient.—That the executor, devisee and legatee of Paul, are bound, because he was, and they cannot, because he could not, aver any other trust not in the deed; and his will does not pretend any stipulation, but merely insists on the motives. The Chancellor also decided, that the deed had not been executed under any mistake of law, as contended by Mr. & Mrs. Elfe; for that P. R. M. had good ordinary understanding, and his will does not pretend to any mistake, nor did he take that ground in his lifetime; and he questioned the correctness of Lowndes v. Chisholm, & Lawrence v. Beaubien. The decree therefore established the deed.

An appeal was taken upon the grounds following:

1. That under language of the deed of P. R. M. stating it to have been made "for divers good causes and considerations," and also for one dollar, the evidence of his motives and expectations declared at the time, was admissible.

2. That the evidence was not offered to alter the trusts in the deed, but to establish a palpable mistake at the time of execution, as to the effect of the deed in controlling the power of disposing of the property by will—a power which the grantor meant to reserve, and believed he had reserved.

3. That the assent of the trustees and of the minor cestique trusts was unnecessary, because the deed was plainly voluntary, and all the grantees and cestuique trusts were volunteers; and as the grantor was led into a palpable mistake by the declarations of his mother, speaking for all concerned, and

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as it were, actually contracting with him *on behalf of all others, the silence of the trustees, and the minority of the other cestuique trusts, are immaterial.

4. That the mistake is sufficiently made out by the proofs in the cause, to entitle Mr. & Mrs. Elfe to relief against the deed.—That the mistake was such a mistake in Law as is relievable in a Court of Chancery; and that Lowndes & Chisholm, and Laurens & Beaubien, are unquestionable law, and cover the whole ground under controversy here.

5. That although Mr. Hopkins was a purchaser for valuable consideration, yet he had notice by the very terms of the schedule.—That the will of P. R. M. of record in the proper office, was notice to him—and, had he enquired of Mrs. Mazyck, or of Mr. O'Harra who drew his settlement, he would have found what was meant by the clause; and as he chose to marry with notice of the doubts unexplained, he must take the consequence thereof.

6. That the Chancellor has erred in saying that the executor, devisee and legatee of P. R. M. cannot set aside the deed, because he, himself, if alive, could not do it—whereas, it is insisted, that if P. R. M. were himself alive, he could, on the existing state of facts, be relieved, on a bill filed by himself, to establish the mistake in law, just as Beaubien & Chisholm were relieved.

7. That the deed, therefore, must be declared null and void, and the will established; and the decree for account and settlement modified accordingly.

Grimke & Dunkin, for the appellant.
King & Pettigru, contra.

JOHNSON, J. We concur with the Chancellor, that the trust deed executed by Paul Ravenel Mazyck is good and must stand, and therefore that the decree of the Circuit Court should be affirmed; and that would be sufficient for the case itself, but the observations of the Chancellor are calculated to shake the rule in Lawrence v. Beaubien, 2 Bail. 623, [23 Am. Dec. 155,] and Lowndes & Chisolm, 2 McC. Eq. 455, [16 Am. Dec. 667,] and the Court have thought it necessary to use the occasion to express their adherence to it.

Lawrence & Beaubien was decided upon much consideration, and the more I have reflected upon it since, the more I am confirmed in its correctness; and I feel 'per-

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suaded that *all doubts about it proceeded from misapprehension of the principle on which it is founded. There is, as I understand it, a very obvious distinction between ignorance and mistake of law. Ignorance cannot be proved—(who can enter into the heart of man, and ascertain how much knowledge dwells there?) and for that reason the Courts cannot relieve against it. But not so with regard to a mistake in law. That is sometimes susceptible of proof. In relation to the general rules of property and of common honesty, which every one of common understanding must necessarily be taught by their intercourse with society; as that we have no right to the property of another—and that when, as in this case, one has parted from his property either voluntarily or for good or valuable consideration, his dominion and power of disposition over it ceases; no one will obtain credit for the pretence of being mistaken. But who that has had any experience in the profession of the law, does not know that a whole life of intense application is insufficient to develope all its mysteries, and that the most untiring zeal and ardent pursuit must leave many of the secret recesses unexplored; and shall it be said that those whose pursuits in life are inconsistent with the study of the law, shall understand its most subtle and intricate distinctions by intuition, and that at the price of their fortunes? I trust not—mistakes as to matters of fact have always been regarded as relievable upon clear full and irrefragable proof, and mistakes in law ought to be upon the same footing, when the proof is equally certain. Suppose a party claiming the benefit of a contract founded upon a mistake of law, should, when put to answer it, admit the fact and be base enough to insist on it. Where is the conscience so seared against the claims of justice and common honesty, as not to revolt at it? Is not a mistake of this sort as susceptible of proof as a mistake in a matter of fact? Lawyers are the professional advisers of the community, they are looked up to as oracles in this department, and when, as in Lawrence & Beaubien, their client is misled by them and makes a contract against his interest, what higher evidence can be wanted of the fact of mistake? Is it not as satisfactory as the admission of the party benefited by

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the contract? *This is only one mode of proof, and I doubt not that there are others which would be equally satisfactory. But we regard the question as definitely settled, and have only thought it necessary to say this much, to vindicate it from the doubts in which the opinion of the Chancellor was calculated to involve it.

It is ordered and decreed, that the appeal be dismissed, and that the decree of the circuit Court be affirmed.

O'NEALE, J., concurred.

HARPER, J., absent.

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1 Hill, Eq. 252

THOMAS E. SCREVEN v. WILLIAM JOYNER, Executor of Benjamin S. SCREVEN, and Others.

(Charleston, April, 1833.)

[*Contribution* ⇐1.]

On what principles and under what circumstances contribution will be allowed.—To entitle a plaintiff to contribution, he must shew

that his payment has removed a common burthen from the defendant and himself; and that defendant has received benefit from such payment.

[Ed. Note.—Cited in Thompson v. Perry, 2 Hill, Eq. 213, 29 Am. Dec. 68.

For other cases, see Contribution, Cent. Dig. § 1; Dec. Dig. ⟸1.]

[*Executors and Administrators* ⟸453; *Wills* ⟸848.]

The testator devised a tract of land called "Jasper's Barony," to his sons, Benjamin & Thomas, and designated the portions of each: a large amount of the purchase money being unpaid, the vendor filed his bill against the executors, and obtained a decree, charging the land with its payment; and by a subsequent decree, it was ordered to be sold: these decrees remained open and were not enforced for many years; meanwhile the devisee, Benjamin, sold his portion of the Barony, & his purchaser took and held possession, until he acquired a title under the statute of limitation: afterwards the former decrees were revived, and by order of the Court of Equity, the remaining portion of the Barony, being the share of Thomas, was sold to pay the purchase money: on a bill filed by Thomas against Benjamin, for contribution, *Held*, that as the lien of the vendor under the decrees in Equity, was lost & ended by the stat. of lim. the payment of the decree by Thomas, conferred no benefit on Benjamin, and consequently he was not liable to contribution.

[Ed. Note.—Cited in Singleton v. Moore, Rice Eq. 129.

For other cases, see Executors and Administrators, Cent. Dig. § 1902; Dec. Dig. ⟸453; Wills, Cent. Dig. § 2145; Dec. Dig. ⟸848.]

[This case is also cited in Blake v. Heyward, Bailey, Eq. 208, and Williams v. Neel, 10 Rich. Eq. 339, 73 Am. Dec. 94, without specific application.]

John Screven, who died in the year 1801, by his last will and testament directed that a large body of land containing 8000 acres, and known by the name of "Jasper's Barony," which he had recently purchased from Joseph Blake, should be divided by a certain line, specified in the will, into two separate tracts; one of which, called the "Upper Plantation," containing 6000 acres, he devised to his son Thomas E. Screven, the present plaintiff, and the other, called the "Lower Plantation," containing 2000 acres, he devised to another son, Benjamin S. Screven, the testator of the present defendant William Joyner. The testator John Screven further directed, that, as there might be some parts of each of these plantations conveniently situated, which might be disposed of without injury to the residue, his executors should sell such parts, or as much thereof as might be necessary, and apply the moneys arising therefrom towards payment of the purchase money of the Barony, remaining due to Blake.

In pursuance of these directions, the execu-

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tors, within a *year or two after the death of the testator, sold portions of both the "Upper" and the "Lower Plantations," and applied the proceeds towards the payment of Blake's debt: and the devisees, Thomas E. Screven, (by his guardian, being himself at that time a minor,) and Benjamin S. Screven, went into possession of their respective portion of the residue.

At the death of the testator, John Screven, a large amount of the purchase money of the Barony remained due to Blake; and a bill being filed by him against the executors, the Court of Equity, by a decretal order made in 1802, directed that the land should stand mortgaged for the payment. A second bill was filed by Blake, to revive and enforce the decretal order of 1802, and the Court, by a decree made thereon in 1806, ordered the land to be sold for the satisfaction of the debt. This decree was not carried into effect, but various payments were made by the executors up to the year 1825, at which time there remained due the sum of $6,798.89, with interest thereon from 2d June, 1818, and Blake filed a third bill, to revive the decree of 1806, and to obtain a sale of the land for payment of the balance remaining due. To this bill the devisees of the Barony were made parties, and by a decree made in 1827, and confirmed by the Court of Appeals, the whole of the land remaining in their possession, or in the possession of the executors, was ordered to be sold in conformity to the prayer of the bill.

The only portions of the Barony then in possession of either the devisees or the executors, were, a plantation called "Good Hope," containing about 1,000 acres, part of the "Upper Plantation," which remained in possession of the devisee, Thomas E. Screven, and a plantation called "Pilgrim's Hope," containing about 725 acres, also part of the "Upper Plantation," which was then in the possession of Dr. Richard B. Screven. The Court of Appeals refused to order a sale of any other portions of the Barony; but as it appeared that certain persons, to whom portions of the Barony had been sold, were in possession claiming by adverse title, it was ordered that Blake should have leave to amend, or file a supplemental bill, making

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such persons *parties. This was accordingly done, by a fourth bill, filed in 1828, against several persons who had purchased parts of the "Upper Plantation" from the present plaintiff, Thomas E. Screven. In this last mentioned suit a decree was pronounced by Chancellor Harper, in 1830, confirming the titles of some of the purchasers, and directing other portions of the land held by them to be sold, in conformity to the original decree.

In the meantime, Thomas E. Screven, in 1827, filed the bill which involves the subject of the present appeal. This bill was filed against the executors, legatees and devisees of John Screven, to obtain an account of the administration of his estate, and to have the assets, if any, applied to the extin-

guishment of Blake's debt, in case of the plaintiff's land, and to compel the defendant, William Joyner, executor of Benjamin S. Screven, who was then deceased, and the other devisees and legatees of John Screven, to contribute for the relief of the plaintiff. The matters of account being referred to the Commissioner, that officer reported that a balance of $23,497.72 was due by Richard B. Screven, one of the executors, upon his administration of the assets which had come to his hands; that the said Richard B. Screven was also liable, in case the assets were insufficient, to refund a pecuniary legacy of £1,000, of which he had received payment in the year 1803; and that he had in his possession a bond of John Posey, the husband of one of the female legatees, the condition of which was to refund a legacy to his wife, of which he had received payment, and on which bond there remained due a balance of $———: all of which sums, the Commissioner reported, as applicable to the payment of the debt due to Blake, prior to, and in case of any and every part of the Barony. In January, 1830, the case came on for hearing before Chancellor Harper, upon the bill, answers and exceptions to the report; and a decree was rendered, in which, amongst other things, the report of the Commissioner was confirmed, and the executor, Richard B. Screven, ordered to pay over the balance due by him, or so much thereof as might be necessary, and to refund this legacy of £1,000, if requisite, for the purpose of extinguishing

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Blake's debt, *and exonerating the plaintiff's land; and Posey's bond was directed to be assigned and delivered to the plaintiff, for the same purpose.

In relation to the liability of the estate of Benjamin S. Screven to contribute for the relief of the plaintiff, the decree is as follows: "With respect to the claim against the estate of Benjamin S. Screven for contribution, the case was very imperfectly made out. The claim is only in respect of the portion of Jasper's Barony received by him. There is no claim against him as executor. Now, as I understand it, by the decree of 1827, in the case of Blake and Screven, to which Benjamin S. Screven was a party, the whole of the Barony, including as well that part devised to Benjamin S. Screven as that devised to the plaintiff, is directed to be sold. It would seem then, that the estate of Benjamin S. Screven is precisely in the same situation with the plaintiff, and has the same claim to relief against the executor and residuary legatees. If the plaintiff's portion of the land should be separately proceeded against, or sold, leaving untouched Benjamin S. Screven's part, I suppose the plaintiff would be entitled to contribution; not however, until all the rest of the estate were exhausted.—The bill states that Benjamin S. Screven parted with that part of the Barony which he received. There was no proof on this subject, however, nor any admission in the answer of the executor, Mr. Joyner. If he sold the land, it may still be liable in the hands of the vendees. If, as has occurred in the case of the plaintiff, he has sold to persons whose title has been perfected by the statute of limitations, a different question might arise. I can conclude nothing on this part of the case as it at present appears. The plaintiff may, if he thinks proper, have a further reference to enquire and report whether any, and what contribution ought to be made by the estate of Benjamin S. Screven. On such reference the case may be fully made out."

Subsequent to, and soon after this decree, the plantations called Good Hope and Pilgrim's Hope, heretofore mentioned, were sold by Blake under the decree of 1827; and an appeal having been made from the decree pronounced by Chancellor Harper in 1830,

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on Blake's supplemental bill, the Court *of Appeals, by a decree made in 1831, declared the whole of Jasper's Barony subject to the lien of Blake's several decrees, except as to such parts as had been held adversely by purchasers a sufficient length of time to be protected by the statute of limitations; and as no one of the purchasers from Thomas E. Screven, who were parties to that bill, were in that situation, the whole of the lands purchased by them from him, were declared liable to Blake's debt, and ordered to be sold accordingly. Whereupon the said lands were sold, or arrangements made for the payment of Blake in exoneration of said lands, by Thomas E. Screven, who was liable over to his vendees.

A reference having been taken to the Commissioner conformably to the decree of Chancellor Harper, he reported that Benjamin S. Screven sold the residue of the "Lower Plantation" not disposed of by the executors, consisting of 1100 acres, to Josias W. Allston, for the price of $17,000; that this sale was made in 1804, and that the purchaser, or those claiming under him, having ever since been in quiet and undisturbed possession, were, according to the decree on Blake's supplemental bill, as recognized by the Court of Appeals, protected against Blake's lien, by the statute of limitations. The Commissioner further reported, that every portion of the "Upper Plantation," which had been devised to Thomas E. Screven, had been sold either by the executors, or by Blake under his several decrees, or had in some manner been ultimately subjected to the payment of the debt due to Blake; and finally, that the executor, Richard B. Screven, had wasted the assets which came to his hands, and was either utterly insolvent, or nearly so; and that the plaintiffs could have no reasonable prospect of relief either from the balance due by his executor, or from the legacy of £1000, which he had been ordered to refund.

It appeared, however, by several of the papers, and particularly by Chancellor Harper's decree, that the plaintiff received from the executor, Richard B. Screven, eleven negroes, being the price of the plantation called "Pilgrim's Hope," which was purchased by that executor; of which negroes the plaintiff

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has never been deprived, nor have *they ever been subjected in his hands, to the payment of Blake's debt. And although "Pilgrim's Hope" has since been sold by Blake, and Richard B. Screven may consequently have a claim upon the plaintiff for the value of these negroes; yet such claim can only be a set-off pro tanto, to the large sums due by Richard B. Screven; and the plaintiff can never, therefore, be deprived of his portion, saved to him out of the devise of Jasper's Barony.

Upon the coming in of the Commissioner's report, the cause came on for hearing upon the equity reserved, before Chancellor Johnston, who, after argument, ordered and decreed, that the estate of Benjamin S. Screven should contribute for the relief of the plaintiff, and directed a reference to the Commissioner to ascertain and report the amount of such contribution.

No reasons were assigned in the order for this decision. The defendant, William Joyner, appealed therefrom; and moved that the said order may be reversed for the following reasons.

1. That the devises to the plaintiff and defendant's testator, are distinct specific devises, and neither of the devisees is entitled to call upon the other to contribute for the removal of incumbrances specifically affecting the land devised to himself.

2. That the land devised to the defendant's testator, being protected against Blake, is equally protected against all persons claiming under him, and cannot be subjected to a new liability to the plaintiff, by reason of his payment of his debt due to Blake.

3. That the land devised to the defendant's testator not being directly subject to Blake's lien, cannot be made indirectly liable by reason of the liability of the plaintiff's land.

4. That if the land devised to the defendant's testator is liable to the plaintiff, the remedy of the plaintiff is against the land, or the persons in possession, and not against the estate of the defendant's testator.

5. That the defendant's testator having sold the land devised to him, and received the

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proceeds so long ago as *1804, more than twenty years previous to the filing of the plaintiff's bill, is protected by lapse of time and the statute of limitations, from all liability to refund, either for the benefit of the devisees or legatees, or for the benefit of creditors.

6. That the assets of the estate being originally sufficient for the payment of debts, and the deficiency of assets which forms the foundation of the plaintiff's claim for contribution, being occasioned by a devastavit of the executor, committed long subsequent to the period at which the defendant's testator sold and received the proceeds of the lands devised to him, the estate of the latter is not bound to refund, independently of the protection afforded by the statute of limitations.

7. That the plaintiff has not made out a case which entitles him to call upon the estate of the defendant's testator for contribution.

Bailey, for the appellant, contended, that the defendant's testator, if liable at all, must be so as terre-tenant and devisee; his only liability is in regard to his land. The ground of contribution is equality of benefits and burthens; Harris v. Ferguson, 2 Bailey, 397; and that the payment or loss by the party asking relief, has conferred a benefit, or relieved the other party from some burthen; 1 Cox's Ch. Cases 318; 1 Eq. Ca. Ab. contribution (a) 13; Show. P. C. 18, 19. Unless therefore the plaintiff, in satisfying Blake's debt, has conferred a benefit on the defendant's testator, or relieved his estate from some burthen, there is no ground for contribution. No benefit has been conferred—the land was not liable to Blake's debt, when the payments were made; for, having been sold and in the occupation of a bona fide purchaser, he acquired a title under the statute of limitations—McRa v. Smith, 2 Bay, 338; and in reference to this land, this doctrine was settled in Blake v. Heyward, February, 1831. B' ke could not pursue the money recovered by Benjamin S. Screven for the lands sold—his only remedy was against the land; however that may be, he could not follow the money, after the land became exempted by the statute of limitations, 3 Coke Rep.

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(a) 14. *The plaintiff might have been protected against Blake's decree, so far as regards Benjamin's proportion of the purchase money, by reason of his laches and neglect to enforce it; and this may, even yet, afford him ground for relief against Blake, but furnishes none against the defendant. The deficiency here is not for want of asset, but caused by a devastavit of the executor; the whole estate was liable for Blake's debt, and if contribution is to be made, are not all the devisees liable? But the plaintiff has received part payment, by the negroes received from the executor, on a sale of "Pilgrim's Hope." And where a legatee has received part of his legacy, and the executor wastes the balance of the estate, there can be no contribution; 1 P. W. 494; Lupton v. Lupton, 2 John. Ch. Rep. 626.

R. B. Smith, Attorney General, for the plaintiff. The decree of 1802, fixing the liability of the lands, and that of 1806, ordering them to be sold, established the right of contribution. By the decree of 1806, the whole

estate of John Screven was subjected to Blake's debt: 1st. the Barony lands—2d. the funds appointed by the will; and 3dly, the residue of the real and personal estate. Benj. S. Screven was executor, and a party to these decrees, and could he now deny his liability for this debt, or that he is bound by these decrees? Benjamin being liable for the debt, and a party to the decree which ordered Thomas' land to be sold for its payment, becomes liable for contribution. Where land subject to an incumbrance is sold to several, and the debt is exacted of one of them, he is entitled to contribution from the others; Carthew, 3. And where the lands of the ancestor is bound for his debts, which are paid by one of his devisees, the others must contribute: Clowes v. Dickerson, 5 John. Ch. Rep. 240; Select cases in Chancery, 24; 4 John. Ch. Rep. 531. If all the land had been alienated, could not Blake have compelled them to refund and pay his debt? The property of the devisees stands as surety for the executor—Benjamin and Thomas may be considered such, and may be subrogated to the rights of the creditor: 11 Ves. 22; 2 Vernon, 608; 2 John. Ch. Rep. 555; 4 Ib. 123.

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The de*vastavit of the executor must prejudice both devisees alike; and where one legatee has received his legacy in full, it is not clear that he may not be compelled to refund. 2 Ves. 193.—An executor who has voluntarily paid a legacy cannot compel the legatee to refund, but if the executor prove insolvent, the other legatees may have contribution, 1 Ch. Ca. 133, 136, 248; 2 Ib. 132.

Pettigru, in reply. The bill of 1802 was against the executors of John Screven; Benjamin and Thomas were infants, and their answers not sworn to, consequently are not answers, and they not parties. That part of the decree which relates to contribution, is not therefore obligatory. But can a creditor have such a decree as this hanging over an estate? He is entitled to a decree to be paid in due course of administration. Blake could have extended only one half of Thomas' land. Francis' Maxims, 15, sustains Lord Coke's doctrine. If one legatee refund, then the other must; but the decree of 1827 imposes a lien only on the lands in possession of the devisees; no liability exists against the lands of Benjamin—the payment of the decree confers no benefit, and there is, therefore, no ground for contribution. Lands devised are liable for the payment of debts, after the personal estate is exhausted; but if a creditor stands by, as Blake has done, and permits the personalty to be wasted, has he any right to pursue the land?

O'NEALL, J. In the view which we have taken of this case, it will only be necessary to enquire whether the defendant's testator is liable to contribution on account of Blake's decree.

The liability to contribute is the result of a general equity, founded on the equality of "burthens and benefits;" Harris v. Ferguson, 2 Bail. 397. To establish the right of contribution, the plaintiff must shew that his payment has removed a common burthen from the shoulders of himself and the defendant, and that they are each benefited by it. This occurs in all cases of payments made by one surety, on the debt for which several

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are bound—a common bur*then is removed and a common benefit received. But the doctrine of contribution is not at all founded on contract; it applies to cases where the liability, it is true, arises out of a contract, to which the plaintiff and defendant were parties; it is not, however, necessary that they should be bound by one contract: it may arise out of several, if they have thereby incurred a common liability. So, too, it applies to cases where the liability does not, in any shape, arise out of a contract, as when a common property, held by purchase, descent or devise, is liable to the payment of a sum of money, and one is compelled to pay the whole, he shall have contribution from his co-tenant. In cases where a benefit is derived from the destruction of the property of one for the preservation of another; when there is a community of risk, there may be contribution. But to make out such a claim, the benefit must be shewn to have been the necessary and proper consequence of the loss. For if the benefit is uncertain, or the loss was not the means of preservation, there can be no contribution. 1 Eq. Ca. Ab. Tit. Con. & Aver. (A) 13.

The right of the complainant to call on the defendant for contribution, depends not upon any act or personal liability of his testator. If he is liable at all, it must be that the land devised to him was liable, as well as that of the complainant, to the lien of Blake's decree at the time it was enforced and the complainant's land sold under it. To make out either the community of burthen or benefit, the decree must have had an equal lien on both, and both must have had the benefit of the removal of the lien.—The decree, as a subsisting lien, constitutes the only liability to which the land of either was subject. If that was ended as to one, and not as to the other, there was no liability on the former, to be removed by the latter. Originally both were affected alike by the general lien. A lapse of near twenty years, and a conveyance of his land by the defendant's testator, may have changed the operation of that lien, and may have ended the defendant's liability, while that of the complainant remained unimpaired. It is necessary, therefore, to en-

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quire whether the land de*vised to the defendant's testator, was liable to sale under Blake's decree, at the time the complainant was compelled to pay it? In 1804, the defendant's testator sold to Josias W. Alston:

his title accompanied by an actual adverse possession, was complete and legal, against the lien of Blake's decree, after the expiration of five years. M'Ra v. Smith, 2 Bay, 339. In 1809 or 1810, the land was protected from the lien of Blake's decree, and therefore, as to it, it was and must be considered as then ended. The payment by the complainant was between 1827 and 1832, a period of at least seventeen years after the land devised to the defendant's testator was exonerated by the operation of the statute of limitations, from the lien of Blake's decree.

I agree with the complainant's counsel that the liability of the defendant to contribute, depends upon the question whether Blake could have recovered against him, at the time he did against the complainant. We have seen that the lien of the decree was gone in 1810; in 1823, Blake filed his bill to make the complainant's land liable; Blake could not therefore then have made the land devised to the defendant's testator liable under the decree. Could he have had any recovery on account of his sale? If he could ever have recovered any thing on that account, it must have been on the ground that the money received by the defendant's testator, was to be regarded as received to the use of the creditor under the decree. This in equity might have made the defendant a constructive trustee for the creditor. But this constructive trust would not prevent the operation of the statute of limitations; the defendant in such a case holds in his own right and adversely to that of all others. From the time, therefore, that the creditor knew of his sale, the statute commenced to run, and as the claim for the account in Equity is analogous to the action for money had and received at Law, it would run out in four years from that time. In 1806 this fact was not only known to Blake, but is made the ground of exempting that part of the Barony from sale, under the decree then made. In 1810, then, the defendant's testator would have been protected by the statute of limitations, from any recovery on the part of Blake.

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*Neither the land nor the defendant's testator being liable at the time the complainant was compelled to pay the decree, it follows that the complainant has no right to claim a contribution from the defendant, on account of a payment which did not, and could not benefit it.

It may be, and I think it probable, that if the complainant had resisted payment of Blake's decree, on the ground that by his laches the land of the defendant's testator was exonerated from its lien, that the complainant would only have been held liable for his aliquot proportion of the debt. For In 3 Coke's Rep. 14, it is said, "Note reader, when it is said before and often in our own books, that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended, that the others shall give or allow him any thing by way of contribution; but it ought to be intended, that the party who is only extended for the whole, may, by audita querela or scire facias, as the case requires, defeat the execution, and thereby he shall be restored to all the mesne profits, and compel the conusee to sue execution of the whole land.—So, in this manner, every one shall be contributory, hoc est, the land of every terre-tenant shall be equally extended." In this State, the creditor would, at law, have the right to make his money by a fi. fa. out of any of the land subject to the lien of his judgment. And if the land of one purchaser, heir or devisee was sold, he would have a clear right in Equity, to contribution from the others whose land was equally subject to the lien. If the act or laches of the creditor defeats that equity, it would seem that equity ought to prevent him from enforcing his legal advantage, by holding the party only liable to him for so much of the debt as would be properly charged on his land as its proportionate share. In other words, he ought to be protected against the judgment, on paying so much towards it as he would have been in equity liable to contribute, if the land which is exempted by the act or laches of the creditor, had been sold for the payment of the whole debt. Be this however as it may, the complainant, by paying a debt which the defendant's testator was not in any event liable to pay, cannot acquire any rights against him.

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*It was contended that the fact that B. S. Screven was the executor as well as the devisee of John Screven, (dec'd.) and that he was a party to the decrees, made him liable. It appears that in 1807 he terminated his relation of executor to his testator's estate, by fully accounting for the funds in his hands and removing from the State. Since that time he has not acted as executor, and there is no pretence that he is liable for any thing in that character. If he is not liable to account as executor, the fact that he was the executor, cannot have any effect upon him in any other character in which he may be called on for an account.

He was a party to the decree obtained by Blake, and if upon it any action could be sustained against him, it might make him liable. But there is no recovery against him for a debt or demand, nor is there any sum ascertained by the decree, to be in his hands, applicable to its payment. The decrees of 1802 and 1806, merely establish the debt against his testator's estate; and in consequence of their legal effect, make the whole of the estate of the testator liable for their payment; no personal liability is thereby cast on the defendant's testator, and of course, the fact that he was a party, will not deprive him of the defence now relied on.

It is therefore Ordered and decreed, that so much of Chancellor Harper's decree as directs a reference to ascertain whether any, and what contribution, ought to be made by the estate of Benjamin S. Screven; and the decree of Chancellor Johnston, upon the report of the Commissioner, directing contribution to be made by the estate of Benjamin S. Screven, dec'd, for the relief of the complainant, be reversed.

JOHNSON and HARPER, JJ., concurred.

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1 Hill, Eq. *265

*BENJAMIN ADAMS and Others, Heirs at Law of Ann Adams, v. BENJAMIN S. CHAPLIN and Others, Heirs at Law of Benj. Chaplin.

(Charleston. April, 1833.)

[*Wills* ⇐123.]

A witness may attest the execution of a will, by signing the initials of his or her name.

[Ed. Note.—Cited in Ray v. Hill, 3 Strob. 303, 49 Am. Dec. 647; Ex parte Leonard, 39 S. C. 524, 18 S. E. 216, 22 L. R. A. 302; In re Crawford's Will, 46 S. C. 313, 24 S. E. 69, 32 L. R. A. 77, 57 Am. St. Rep. 684.

For other cases, see Wills, Cent. Dig. § 321; Dec. Dig. ⇐123.]

[*Wills* ⇐594.]

Where the testator devised a tract of land to his son "John, and to him and his heirs and assigns forever; but if he should die without lawful heir, or before he is twenty-one years old," then the land to go to another son; the word "or" was construed "and," and it was held, that John took an absolute estate, in fee, defeasible on his dying without issue under 21 years of age; that the limitation over, was not after an indefinite failure of issue, but restricted to the event of the devisee's dying without issue under twenty-one, and was therefore good as an executory devise.(*a*)

[Ed. Note.—Cited in Duncan v. Harper, 4 S. C. 84; Graham v. Moore, 13 S. C. 119.

For other cases, see Wills, Cent. Dig. § 1311; Dec. Dig. ⇐594.]

[*Deeds* ⇐126; *Estates* ⇐7.]

Where a fee simple conditional is granted, the whole estate is in the tenant in fee—there is no estate left in the grantor. The possibility of reverter, on the determination of the fee by the death of the tenant without heirs of his body, is not an estate, it is neither the subject of inheritance nor devise; and therefore the fee conditional in the heir at law, cannot merge in the possibility of reverter, if they should both meet in the same person.

[Ed. Note.—Cited in Deas v. Horry, 2 Hill, Eq. 246, 247; Pearse v. Killian, McMul. Eq. 233; Edwards v. Edwards, 2 Strob. Eq. 104; Hull v. Hull, 1d. 192; Buist v. Dawes, 4 Rich. Eq. 499, 500; Ex parte Yown, 17 S. C. 537; Carr v. Hanckel, 28 S. C. 339, 5 S. E. 818; Blount v. Walker, 31 S. C. 27, 9 S. E. 804; Powers v. Bullwinkle, 33 S. C. 302, 11 S. E. 971; Selman v. Robertson, 46 S. C. 270, 24 S. E. 187; DuPont v. DuBos, 52 S. C. 262, 29 S. E. 665; DuPont v. DuBos, 52 S. C. Append. 608; Vaughan v. Langford, 81 S. C. 285, 62 S. E. 316, 128 Am. St. Rep. 912.

For other cases, see Deeds, Cent. Dig. § 449; Dec. Dig. ⇐126; Estates, Cent. Dig. § 7; Dec. Dig. ⇐7.]

[*Perpetuities* ⇐4; *Wills* ⇐603.]

Devise in '76, to J. C. without words of perpetuity or inheritance, "but if he should die without an heir lawfully begotten by him," then a limitation over—the limitation being too remote and therefore void, it was held, that under the act of 1824, and the adjudged cases since, the devisee J. C. took an estate in fee.

[Ed. Note.—Cited in Edwards v. Barksdale, 2 Hill, Eq. 199; Buist v. Dawes, 4 Strob. Eq. 49; Buist v. Dawes, 4 Rich. Eq. 424, 501; Matthis v. Hammond, 6 Rich. Eq. 403; Glenn v. Jamison, 48 S. C. 319, 26 S. E. 677; Egan v. Touchberry, 93 S. C. 572, 77 S. E. 706.

For other cases, see Perpetuities, Cent. Dig. § 25; Dec. Dig. ⇐4; Wills, Cent. Dig. § 1353; Dec. Dig. ⇐603.]

[*Deeds* ⇐123.]

[Cited in Williams v. Caston, 1 Strob. 133, to the point that "issue" and "heirs of the body," when construed as words of limitation, are synonymous.]

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345–374, 413–435; Dec. Dig. ⇐123.]

[*Statutes* ⇐269.]

[Act 1824, declaring that no words of inheritance shall be necessary to convey a fee by devise, operates retrospectively, as it was declaratory of what the law was, and therefore operated retrospectively as well as prospectively.]

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 362; Dec. Dig. ⇐269.]

[*Wills* ⇐603.]

[Cited in Buist v. Dawes, 4 Rich. Eq. 423, to the point that a fee conditional cannot be raised by implication.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351–1359; Dec. Dig. ⇐603.]

This case came to a hearing before Chancellor Harper, at Coosawhatchie, January, 1830. The decree so fully recites the facts, and developes the merits of the case, as to supersede the necessity of any other report.

Harper, Chancellor. Benjamin Chaplin, the elder, of St. Helena Parish, by his will, dated in 1766, devised the tract of land which is in question in this suit, in manner following: "I give and bequeath to my son John all the rest of my tract of land where I now live, be it more or less, to him and his heirs, forever: but if he should die without lawful heir, or before he is twenty-one years old then 'tis my will the said land should go to and descend to my son William, and to his heirs forever." John Chaplin, the devisee, by his will, dated in 1776, devised the same land as follows—"I give and bequeath to my dear and loving son, John Chaplin, my tract of land on Port Royal Island, lying on Jericho Creek; but if he should die without an heir lawfully begotten by him, then I will and desire that the said tract of land be given to my brother, William Chaplin." John Chaplin, the testator, died soon after the execution of his will, leaving John Chaplin, his

(*a*) Seanlan v. Porter, 1 Bail. 427; Bedon v. Bedon, 2 Ib. 231.

son and only child, who entered on the land, and died in 1826, leaving no issue and never having been married. William Chaplin, to whom the land is devised over by the will of the testator, John, died many years ago intestate and without issue, before the act of 1791 abolishing the right of primogeniture, leaving, at his death, an elder brother, Benjamin, and a sister, Ann Adams. The complainants are the descendants of Ann Adams, and claim a moiety of the land, either as heirs and next of kin of William Chaplin, the devisee over, by the will of John Chaplin, if that limitation shall be held to have been good; or, as heirs and next of kin of the testator John Chaplin, if the reversion or possibility of reverter, was in him; charging that John

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Chap*lin, the younger, either took a mere life estate, or a fee simple conditional, which was determined by his death, without issue, in 1826, and that those must take who answer the character of heirs, at the time of the determination of the estate, or the happening of the contingency on which the limitation over was to take effect. In 1806 the land was sold under judgment and execution, as the property of John Chaplin, the younger, and purchased by Benjamin Chaplin, the brother of William and the testator John, to whom the sheriff executed titles. In 1815, the said Benjamin Chaplin conveyed the land in trust, for his daughters, who are defendants to the suit.—The defendant, Benjamin S. Chaplin, son of the said Benjamin Chaplin disclaims all interest in the land.

The first question which arises in the case, is, what estate in the land, John Chaplin, the elder, took under the will of his father Benjamin Chaplin, and consequently, whether his son, John Chaplin the younger, took as a purchaser under his will, or by virtue of the limitation of his grandfather's will. A preliminary objection was made, that the will of Benjamin Chaplin appears to have been attested but by two subscribing witnesses, and consequently was not duly executed to pass real estate. The name of Martha Barnwell first appears subscribed as a witness; then follow the letters E. E., and then the name of John Barnwell. The certified copy of the will was admitted in evidence, I suppose, on the proof which appears to have been made of it before a commissioner, to whom a dedimus for that purpose was issued by the Governor. The witness, John Barnwell, declares that he subscribed as a witness, together with Martha Barnwell and Elizabeth Ellis. If Elizabeth Ellis subscribed by merely making her initials, I suppose that this was sufficient, under the authorities of Harrison v. Harrison, 8 Ves. 185, and Addy v. Grix, 8 Ib. 504, which determine that the making of a mark is sufficient signing by a witness.

Then, as to the estate devised by the will. It was argued, that though the devise to John is to him and his heirs, forever, yet being limited over on the event of his *dying without lawful heir, to his brother, who might be his heir, this is equivalent to a limitation over on the event of his dying without issue, and restricts the preceding words, so that it would make it an estate tail in England, or a fee simple conditional in this country. That being a fee simple conditional, John Chaplin, the younger, took nothing from his father's will, but per formam doni, as heir of limitation, under the will of his grand-father, and the condition being once performed, by John, the elder's, having issue, the heir to whom the estate descended might alienate and bar the reverter, without any necessity for his having issue, and that the levy and sale by the sheriff, being the act of law, was equivalent to an alienation by the heir himself. There is no doubt but if lands be given to a man and his heirs, and limited over on the event of his dying without issue, or heirs of his body generally, that will restrict the effect of the preceding words, and make it an estate tail, or fee simple conditional. The limitation over after an indefinite failure of issue, sufficiently indicates the intention to give an estate tail, with a remainder expectant on its determination. But the devise over, in this case, is, "If he should die without lawful issue, or before he is twenty-one years old." I am satisfied, that here "or" is to be construed "and," and consequently, that the limitation over is not after an indefinite failure of issue, but restricted to the event of the devisee's dying without issue under the age of twenty-one, and is, therefore, a good executory devise, after the gift of the estate in fee simple.—There are several cases precisely in point, and they seem to me founded on good reason, to effect the testator's intention. They go upon this, that it cannot be supposed to have been the testator's intention, in the event of the devisee's dying under twenty-one, but leaving issue to give the estate away from the issue; yet this would be the effect of construing the words disjunctively, making an executory devise dependent solely on the event of the first devisee's dying under twenty-one, and a limitation over after an estate tail. Lord Hardwicke, in Brownsword v. Edwards, 1 Ves. 249, refers to cases in Croke, deciding

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the *precise point; and to the same effect are the cases of Fairfield v. Morgan, 2 Bos. & Pull. New Rep. 38, and Eastman v. Baker, 1 Taunt. 174. There are other cases to the same effect. I am satisfied that under the will of his father, John Chaplin, the elder, took an absolute estate in fee simple, subject only to be divested on an event which never happened.

We are next to consider the devise by the will of John Chaplin, the elder. The devise, in the first instance is to John Chaplin, the younger, without words of inheritance or

perpetuity, which, in England, would give but an estate for life. The estate is limited over, however, to the brother of the testator, if the devisee should die "without an heir lawfully begotten by him." This is equivalent to dying without heirs of his body, and according to the decision in Forth v. Chapman, 1 Pr. Wms. 663, which has been followed ever since, this is sufficient to enlarge by implication, the preceding estate for life, into an estate tail. The same implication, will, I think, in this country make it a fee simple conditional. It is clear, that the limitation over to the testator's brother, William Chaplin, was too remote, and void as an executory devise. In the case of Bailey v. Seabrook, [Rich. Eq. Cas. 419,] decided by me at Charleston, I considered the question whether a remainder could be limited after a fee conditional and determined that it could not. I refer to that case for the reasons of my opinion. The condition not having been performed, the devisee never having had issue, the estate is therefore supposed, on the death of John Chaplin, the younger, in 1826, to have reverted to the right heirs of John Chaplin the elder. The question is, who are those heirs? At the death of John Chaplin the elder, his son, John, was his heir at law, and the right of possibility of reverter, which his father had in the land, is supposed to have descended to him. On the part of the complainants, it was argued that those must take who answered the character of heirs of John Chaplin, the elder, at the time the estate of John Chaplin the younger determined: according to the rule laid down by Cruise, in his Treatise on Real Property, 3 Vol. 412, Tit. xxix: Chap. iv. 2,

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"that where a person entitled to *an estate in remainder or reversion, expectant on a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir: because he never had a seisin to render him the stock or root of an inheritance: but it will descend to the person who is heir to the first purchaser of such remainder or reversion, at the time when it comes into possession." "Thus it was laid down by the Court of King's Bench, in 34 Eliz. that of a reversion or remainder expectant on an estate for life, or in tail, there, he who claims the reversion as heir, ought to make himself heir to him who made the gift or lease, if the reversion or remainder descend from him; or, if a man purchase such reversion or remainder, he who claims as heir, ought to make himself heir to the first purchaser." The doctrine is very fully illustrated by Cruise, in the chapter referred to, and I have little doubt is applicable to the present case. Our act of distributions has so far altered the English law, that actual seisin is no longer necessary to enable one who has a present title to an estate, to become the stock or root of inheritance. It provides for distribution, "when any person possessed of, interested in, or entitled to a real estate, in his own right in fee simple," shall die intestate. This, I suppose, would be held to apply to a reversion or remainder, after an estate for life, or an estate tail, if such were allowed in this country, because such a remainder or reversion is an estate of fee simple. But the authorities are, that the right of reverter after a fee simple conditional, is no estate in the land, but a mere possibility, and therefore it is, no remainder can be limited after the preceding fee. This right then, I suppose, is not affected by the act, but must go as at common law, to the person who can make himself heir to the grantor of the fee conditional, when that estate determines.—The complainants and defendants, together, were such heirs, by virtue of our statute abolishing the right of primogeniture, being nephews or nieces, and next of kin of John Chaplin the elder. An heir is the creature of the law, and there can be but one rule of succession.

This view of the case would seem to en-

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title the complain*ants equally with the defendants, to a moiety of the land. But it was further argued, on the part of the defendants, that although by the words of the will of John Chaplin, the elder, only a fee simple conditional was given, yet by his death the right of reverter, which would have remained in him if he had conveyed in his life time, descended or accrued to his son, who was his heir at law. That having thus the conditional fee, and the ulterior right to the fee absolute, the lesser estate merged in the greator, and his estate was a fee simple absolute. This is a subject of considerable difficulty, and I have not found the authorities so clear as could be wished. I have come to the conclusion, however, that this is a correct view of the case, and that John Chaplin, the younger, had an absolute fee simple. The doctrine is expressly laid down by Cruise, 1st Vol. 92: "It has been stated that whenever a particular estate in land vests in the person who has the fee simple of the same land, such particular estate is immediately drowned or merged in it. In consequence of this principle, if an estate had been given before the statute de donis, to A. and the heirs of his body, it would have merged, if the fee simple was limited to A. by the same conveyance, or come to him afterwards." So, in Preston's conveyancing, 3d Vol. 258, it is said, that "determinable fees, qualified fees, and conditional fees, will merge in the fee simple, or in any fee of the same or a larger extent." Neither of these authors refer to any express authority in support of their positions; they are their own inferences from acknowledged principles. There is no doubt of the general principle, that a person having a particular es-

tate, and afterwards acquiring a greater estate, or the fee, the lesser estate is merged in the greater. The difficulty arises from what is said concerning the nature of the right which remains in the donor of a conditional fee simple—that it is no estate or interest, but a mere possibility, which cannot be granted or assigned. Co. Lit. 18 a. Lord Coke says, that "he who hath a fee conditional or qualified, hath as ample and great an estate, as he that hath a fee simple absolute," and there cannot be two fees simple in the same land. Yet, perhaps, the difficulty is rather verbal than substantial. Lord

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Coke says, in the same *page, there cannot be two fees simple absolute in the same land. He adds, "and yet in several persons, by act in law, a reversion may be in fee simple in one, and a fee simple determinable in another, by matter ex post facto: as if a gift in tail be made to a villein, and the lord enter, the lord hath a fee simple qualified, and the donor, a reversion in fee. But if the lord enfeoff the donor, now both fee simples are united, and he hath but one fee simple in him." This seems a plain instance of merger. He explains further, that one fee simple cannot be made to depend upon another, by the grant of the party. Here, it was the act of the law casting the right of reverter on John Chaplin, the younger, which merged the estate given by the will. Or, rather, I think John Chaplin, the younger, must be regarded as in by descent, and taking nothing by the will.

Justice Blackstone, 2 Com. 178, puts the doctrine of merger on the footing of a virtual or implied surrender or release of the inferior estate: "In the common cases of merger of estates for life or years, by uniting with the inheritance, the particular tenant hath the sole interest in him, and hath full power to defeat, destroy or surrender them to him that hath the reversion: therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate." If the superior estate be released or conveyed to the tenant of the particular estate, the same effect takes place: The party is presumed to surrender to himself. Now the possibility which remains in the donor, after the grant of a fee simple conditional, is, certainly, in its nature, capable of being surrendered or released, though not of being granted or assigned. As is said by Lord Hardwicke, in Wright v. Wright, 1 Ves. 411, in reference to the case before him, "This is still, in notion of law, a possibility: which, though the law will not permit to be granted or devised, still it may be released, as all sorts of contingencies may, to the owner of the land." If a party grant a fee conditional, and by the same deed limit the remainder to the donor, I suppose this is in effect a grant of the absolute fee simple, though the limitation of the remainder to another would have been void. It is a grant of the fee con-

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ditional, *and a release of the possibility of reverter. I suppose it cannot be doubted, but that if John Chaplin, the elder, had conveyed a fee simple conditional in this land, to his son, by deed, in his life time, and the son had re-conveyed to his father, the father would have had an absolute fee simple, according to the authority cited from Coke. This would have been a merger. So, if after conveying to his son by deed, the father had released to him his possibility of reverter, I suppose it can be as little doubted that the son would have had an absolute fee simple. But I do not perceive that it can make any difference, that, instead of taking by the release of his father, the same right of reverter was cast upon him by operation of law.

I said the same right was cast upon him by operation of law; for such, I think, must be the conclusion. When Cruise, in a passage before cited, says, that "where a person entitled to an estate, in remainder or reversion, expectant on a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir," it is plain, from the sequel of the chapter, that his words must be taken in a qualified sense. He means that it does not descend to and vest in the heir, so as to make him a new stock of inheritance, and capable of transmitting to his heir; but that the person who takes after the determination of the particular estate, must take as the heir of the first purchaser. The latter part of the chapter is employed in shewing, that when the heir of the first purchaser of the remainder or reversion, exercises an act of ownership over it, he thereby constitutes himself a new stock of inheritance, and capable of transmitting. He cites particularly the case of Stringer v. New, 9 Mod. 363, where a person, who was tenant for life, with remainder in fee, after estates tail to the right heirs of his father, whose heir he was, conveyed the estate to trustees for payment of his debts; this was held to be such an act of ownership as made him a new stock of inheritance. Lord Hardwicke says, speaking of the lease and release, "It likewise passed the reversion in fee; for, as he was right heir of his father, he had a reversion to grant; though it would descend to the right heirs of his father, without any such

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*alteration." It was never doubted, I imagine, if a person grants an estate tail, with reversion to himself, and dies, his heir at law may grant or release the reversion; and so any intermediate heir, if there should be any before the termination of the estate tail. Preston says expressly, after speaking of fees determinable, "On these instances, and indeed, on all limitations which can be ranked under this class, it is observable that the

reversion or remainder expectant on these estates, or the possibility of reversion, must remain in some person; and that a release or other proper assurance from that person, will give to this estate the quality of a simple and absolute fee."—1 Preston on Estates, 440, 441. If this fee conditional had been given to another person, by the will of John Chaplin, the elder, it would hardly have been doubted but that his son and heir at law might have released the possibility of reversion. He could not release to himself, however, and therefore it is that the law operates a merger of his estate. It adds some strength to these views, that it is only by construction from the words of the statute de donis, that estates tail are exempted from being liable to merge in the fee when the tenant in tail in possession is also entitled to the reversion. 1 Cruise, 92; 2 Blac. Com. 177, 178; 3 Preston's Conveyancing, 342. It is in favor of the issue, that an estate tail is privileged from merger, and therefore its exemption continues only so long as the privileges of the statute in favor of the issue are annexed to that estate. If, therefore, the right of the issue be barred, as by a fine, the estate tail will merge in the reversion. 3 Prest. Con. 344, 345, et seq.

John Chaplin the younger, according to the views taken of the case, having had a fee simple absolute, the sale and conveyance of his estate transferred all his right to Benjamin Chaplin, the father of the defendants. It follows that the complainants have no right in the land.

It is therefore Ordered and decreed, that the bill be dismissed.

From this decree the plaintiffs appealed, and moved that it be reversed, and that partition of the lands in dispute, and an account of the rents and profits, be awarded to them,

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*conformably to the prayer of their bill, on the following grounds:

1. That an estate is never implied by construction of the words of a will, when such construction would defeat the intention of the testator, and lead to the entire destruction of his will: That to imply a fee simple conditional in John Chaplin, the younger, would, if the character and incidents of that estate be such as are assumed by the decree, not only defeat the limitation over to William Chaplin, but render the will, even as to John Chaplin, the younger, a mere nullity; and, therefore, either such estate ought not to have been implied, but the interest of John Chaplin, the younger, should have been confined to an estate for life, and the limitation over to William Chaplin adjudged good by way of remainder; or, if the English rule relative to the implying of estates tail, be adopted and applied to fees simple conditional, then the foundation of that rule ought also to be adopted, and the fee simple conditional of John Chaplin the younger, have been adjudged a particular estate, and capable of supporting the limitation over to William Chaplin, as a contingent remainder.

2. That if the limitation over to William Chaplin be considered an executory devise, or conditional limitation, it is not too remote, being by direct implication from the words of the will, restricted to take effect upon the contingency of John Chaplin, the younger, dying "without an heir lawfully begotten by him," living at the period of his own decease.

3. That all possibilities accompanied with an interest which are descendible, are also devisable; and, therefore, the possibility of reverter in John Chaplin, being accompanied with an interest in the fee, was capable of being devised to his brother, William Chaplin.

4. That if the limitation over to William Chaplin be void on every ground, yet John Chaplin, the younger, had never any alienable estate; because he never, as tenant of a fee simple conditional, acquired the right of alienation by the birth of issue; and the reverter, or possibility of reverter, being a contingent interest, did not descend upon him, but vested in such persons as were heirs at

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law of John Chaplin the *testator, at the time when the contingency happened, and the estate sprung into existence.

5. That the complainants being heirs at law of the said testator to the extent of one moiety of his estate, at the time when the contingency did happen, by the death of John Chaplin, the younger, are entitled to partition and an account of the rents and profits.

6. That the same conclusion results, if the limitation over to William Chaplin be held good upon any ground; for in any case, the limitation was of a contingent interest, and no estate vested until the contingency happened; and the complainants were, at that time, heirs at law of William Chaplin, in like manner as they were heirs at law of John Chaplin, the elder.

7. That the decree is, in other respects, contrary to the rules of Law and Equity.

[For subsequent opinion, see Shands v. Rogers, 7 Rich. Eq. 422.]

These grounds were elaborately argued by Bailey & Pettigru, for the appellants, who cited and commented on the following authorities: Bedon v. Bedon, 2 Bailey, 231; 6 Cruise, tit. 38, chap. 12; Porter v. Bradley, 3 Term Rep. 143; Forth v. Chapman, 1 Pr. Wms. 663; Reed v. Snell, 2 Atk. 646; Fearne (Butler's Ed.) 471; 7 T. R. 720; 1 H. Black. 30; 1 Cruise, 70; Fearne, 561; 7 Cranch, 469; 3 Ves. & Beames, 69; Co. Lit. n. 338 (a); 2 Black. Com. 177; Fearne, 366; 3 T. R. 88; Bracton, 19; 1 Coke's Rep. 66; Plunket v. Holmes, Lev. 11; 9 Mod. 147; 3 Saunders, 382 (a) note 1; 2 Wilson, 29.

Grimke, contra, referred to and commented on the following authorities; Plow. 242; 3

Preston, 492; 5 Jacob Law Dic. 444; 2 Con. Rep. 94; 3 Black. Com. 30; 2 Prest. 472; 11 Vin. 466, 6 case; Cruger v. Heyward, 2 Eq. Rep. 112.

O'NEALL, J. I agree with the Chancellor, that the will of Benjamin Chaplin, the elder, of St. Helena Parish, was sufficiently attested to pass real estate, and that under it John Chaplin, the elder, took an estate in fee simple, determinable on his dying under the age of twenty-one years without issue. This position was settled in the case of Scaulan v. Porter, 1 Bail. 427.

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*Upon the other parts of the case, I propose to consider, discuss and decide, First, the doctrine upon which the decree is based, that a fee conditional in the testator's heir is merged in the possibility of reverter, which it presumes to be cast by descent upon him; Secondly, the estate which John Chaplin the younger took under the will of his father, John Chaplin the elder.

1. Merger is defined to be, whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately annihilated, or is said to be merged, that is, sunk, or drowned in the greater. 3 Co. Lit. (by Thomas Am. Ed.) 655, 338 (a) note K. Taking this definition, it will be necessary to ascertain, 1st, the nature and extent of an estate of fee conditional; 2nd, of the possibility of reverter. It seems to be agreed by all the books that a fee conditional is a fee simple. Some of them say it becomes so for certain purposes, upon the birth of issue, and others, that it is so before issue born. The latter is I think the better opinion: the estate is defeated if the tenant dies wihout heirs capable of taking per formam doni; but as long as he lives, the possibility of issue prevents his estate from being cut down from a fee simple to a less estate. If he alienes after issue is born, they cannot defeat his alienation; for they must take as his heirs or not at all, and hence they cannot dispute his feofment. Littleton says, "a man cannot have a more large or greater estate of inheritance than a fee simple." Upon which Lord Coke remarks, "this doth extend as well to fees simple conditional and qualified, as to fee simples pure and absolute. For our author speaketh of the ampleness and greatness of the estate and not of the perdureableness of the same; and he that hath a fee simple conditional or qualified, hath as ample and great an estate as he that hath a fee simple absolute; so as the diversity appeareth between the quantity and quality of the estate." 1 Co. Lit. (by Thomas Am. Ed. 583, 18 (a)) From this it would seem, that the only difference between the two estates, is as to the possibility of duration, but that as to quantity they are the same. The fee is in the tenant in fee conditional, subject to be divested

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on his death without heirs *of his body; but it is an estate which descends from him to the heirs of his body. The same doctrine is repeated in Plowden: in the argument of the Sergeants, it is said and not denied, "And as to the common law before the statute, there was but then one estate of inheritance, and that was a fee simple, but these fee simple estates were in two manners, the one a fee simple absolute, the other conditional. The fee simple absolute was, when land was given to a man and to his heirs; the other, to the heirs of his body, which was also a fee simple, but in this last estate there was a condition annexed to it, that if he died without heirs the land should revert to the donor." Plow. 235. Dyer J., speaking of the fee conditional, says, "But (as I take it) it was a fee simple presently before issue; but the having of issue made it more full and perfect than it was before." Plowd. 250. From these authorities, it seems to be clear, that the whole estate is in the tenant in fee conditional, and that no estate is left in the grantor. In other words, the tenant has a fee determinable upon his dying without leaving heirs of his body; and dying—leaving heirs of his body—descendible per formam doni, and not generally. This view is sustained by 1 Co. Litt. 527, 22 a., and 2 Co. Litt. 22. 14Ib. note M. This brings us to enquire, what is the possibility of reverter? Is it an estate? I think not. For it has nothing like an estate about it.—It is neither a present nor future right. It is a mere possibility.—Upon the happening of a condition the right may arise; but until then it is nothing but the mere remembrance of a condition upon which a present estate may be defeated, and a future one arise in any one who may be in esse and claim as heir to the donor. In the argument of Anthony Brown, one of the judges in C. B. in the case of Willion v. Berkley, speaking of the reversion under the stat. de donis conditionalibus, it is said, "For although the land should revert to the donor, before the act, this is no proof that he had a reversion, for an absolute fee simple shall escheat to the lord at this day, and yet the lord has no reversion. So the reverter of the land to the donor upon condition in law, does not prove that the donor

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had a reversion; for indeed *he had no reversion, but the donee had the fee simple and consequently the whole estate." Plowd. 247. This opinion of Brown, (who is described by Plowden, at page 356, to have been a judge of profound learning and great eloquence,) contains the substance of all the learning on the subject, and shews most clearly that the possibility of reverter is not an estate. It is, as he intimates, more like an escheat in possibility than any thing else. Land may escheat for the want of heirs in the tenant in fee; but this possibility is no estate. So

land may revert to the donor, on the failure of heirs of the body of the tenant in fee conditional; but until it occurs, there is neither right nor possession, to be holden or inherited. It however is said, it can be released. This is true, and yet it does not follow that it is an estate. A condition, as was very properly said in the argument, may be released, and this is exactly what is done when the possibility of reverter is released. The condition upon which the land is to revert to the donor, is destroyed.

If these views be correct as to the nature of the estate of the fee conditional and of the possibility of reverter, there can be no such thing as the merger of the one in the other. For the fee conditional during its continuance is the entire fee simple estate, and the possibility of reverter is nothing but a mere possibility, which may or may not become an estate in the donor. But the doctrine of merger is put upon the footing of an implied surrender, and can therefore exist in no case in which the actual surrender would not be lawful. Now, I take upon me to say in opposition to the opinion of the Chancellor, for which I entertain the highest respect, that there could be no surrender by the tenant of the fee conditional, to him who has the possibility of reverter. He might after issue born convey it to him, and his conveyance would carry the fee, because he has the whole estate, and may grant it. Surrender is defined to be, "a yielding up an estate for life, or years, to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years, may drown by mutual agreement between them." 2 Co. Litt. (Am. Ed.) 648. Upon this the editor remarks in

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note (B.) "To make a sur*render good, the person who surrenders must be in possession and the person to whom the surrender is made, must have a greater estate immediately in reversion or remainder, in which the estate surrendered may merge." The objections arising out of this law of surrender, as applied to a surrender by tenant of the fee conditional to him who has the possibility of reverter, are—1st. The estate to be surrendered is the whole fee, and that to which it is to be surrendered is no estate at all—2nd. The person to whom the fee conditional is to be surrendered, has no immediate estate either in reversion or remainder. For whatever may be his interest, it is only to take effect and commence after the death of the tenant in fee conditional without issue. These objections it appears to me conclude the question, so as not to admit of a doubt. But in 2 Co. Litt. 651, it is said "Littleton putteth his case of surrender of an estate in possession, for a right cannot be surrendered." The possibility of reverter is a mere right, at most, and if it could not be the subject of surrender, it cannot be of grant, devise or inheritance. For nothing can be surrendered, which cannot be conveyed. The possibility of reverter is this mere floating right of possibility.—It cannot be any thing with which an estate can unite. But the doctrine of merger cannot exist, so as to merge the fee conditional in the heir at law, in the possibility of reverter, which, it is said, the law also casts on him. To examine this as it should be, it is necessary to be satisfied, first, whether there is any such thing as a descent cast of the possibility of reverter. We have seen that it is no estate, and unless it is, it cannot be inherited. The possibility of escheat to the lord paramount, in England, never was supposed to be inheritable. It is an incident of the estate granted, and upon failure of heirs, the land re-vests in the lord upon office found. In the fee conditional, this land reverts and re-vests in the donor or his heirs, the moment there is a failure of heirs of his body, by operation of law. Until this occurs, there is nothing to inherit. If it is inheritable, then it may be devised; for, whatever is the subject of inheritance, is the subject of devise. If that is so, the de-

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vise over to William is a devise *of the possibility of reverter, and it would not have descended to John, the heir and tenant in fee conditional.—But it cannot be devised. For an executory devise over, after a fee conditional, is too remote and cannot take effect, unless it be accompanied with such words as will restrict the failure of the heirs of the body, to a dying without leaving issue, at the death of the first taker. Mazyck v. Vanderhorst, [Bailey, Eq. 48] decided February Term, 1828, at this place. If it cannot be devised, it cannot be inherited, seems to be the necessary consequence.

Admit the doctrine of merger, as contended for in this case, and it destroys the estate of fee conditional, whenever it is devised to the testator's heir at law. Such could not have been the understanding of Bracton, Fleta and all the early sages of the law, when they give instances of fees conditional in the eldest son. If the doctrine of merger is correct, they must have known that this made the estate a fee simple absolute, by the union of the conditional fee and the possibility of reverter. Their silence upon such a doctrine, is the strongest evidence that no such union could take place. The case of Goodright v. ———, 2 Wils. 29, is a strong and direct authority against the doctrine of merger. The testator, George Paynter, devised to his son, George Paynter, in the following words, "I give and devise the same copyhold and freehold, hereditaments and premises, unto my said son George Paynter, his heirs and assigns forever; but if he, my said son George Paynter, shall happen to die before he shall attain his said age of twenty-one years, leaving no issue living at the time of his death, then I give and devise the said premises unto my said mother, Catharine Paynter, and

to her heirs and assigns forever." George Paynter, the son and devisee, survived his grand-mother, who was entitled to the estate in remainder by way of executory devise; he was her heir at law—he died before attaining the age of twenty one years, and without leaving issue. It was held by Willis, Clive and Birch, that his estate did not merge in the executory devise to his grandmother on her death and the descent cast on him as her heir at law, but that the estates

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were distinct—his *determinable upon a contingency not yet happened, and her's purely contingent and depending upon the contingency on which his estate was to be defeated, and that upon his death without heirs, it descended to her heirs then living, and not his. If merger of an estate depending upon a condition as to its duration, in the descent of another estate, which depended on the determination of that estate as its commencement, ever could apply, it would have been allowed in that case. It was however there overruled, as it must be here.

2. This brings me to the consideration of the second part of the case. What estate did John Chaplin, the younger, take under the will of his father, John Chaplin the elder? The words of the devise, are, "I give and bequeath to my dear and loving son, John Chaplin, my tract of land on Port Royal Island lying on Jericho Creek, but if he should die without an heir lawfully begotten by him, then I will and devise, that the said tract of land be given to my brother, William Chaplin."

The first thing necessary to be disposed of, is the limitation over, by way of executory devise, in favor of William. If that be good, then it might have a material effect on the decision of the main question. But if it be too remote, as I think it is, then we shall disembarrass at once the case of a question which might otherwise interpose great difficulties to a right conclusion on the nature of the estate to John Chaplin. On this part of the case, I am spared a great deal of labor, by the case of Mazyck v. Vanderhorst, not reported, [Bailey, Eq. 48.] The words of the limitation over there, were, "provided nevertheless, that should my said daughter, Elizabeth Collins, depart this life leaving no lawful heir or heirs of her body, then my will is that the above mentioned remainder of my estate, both real and personal, I give unto my daughter Mary Woodbury's eldest son, that shall be named Josiah Collins." This Court held, "that this must be regarded as a limitation over after an indefinite failure of issue, and therefore too remote and void." That decision concludes

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the question now made, and on *its authority, the limitation over here must be also adjudged to be too remote, and void.

Is the estate devised to John Chaplin, a fee conditional at the common law? It is admitted, that on the face of the devise it is not to him and the heirs of his body.—But it is said, that the words, "but if he should die without an heir lawfully begotten by him, then over to William," authorizes us to imply a fee conditional. I admit, as I did in the case of Bedon v. Bedon, 2 Bail. 246, that these words would, in England, have raised an estate tail by implication. But I deny that the same words will imply an estate in fee conditional. Shew me a case, if it is to be found, in which such an implication has been made. None can be found. The estate in fee conditional, stands at common law, upon the words "heirs of the body." We are then unfettered by precedents on the subject, and we are free to adopt or reject the implication, as may best correspond with the analogies of the law of this State.—The cases under the statute de donis conditionalibus, in which the judges have, from such words, implied an estate tail, do not ex vi termini compel us to adopt them as authorities for the implication of a fee conditional. There the implication has been resorted to, to favor the intention of the testator—here, nine times out of ten, it would be resorted to, to defeat it. The case of Bedon v. Bedon has settled the rule, that the same words which, in England, will imply a fee tail, will not necessarily imply a fee conditional here; and I am prepared now to go one step further, and to say, that in no case shall a fee conditional be raised by implication. I regard the whole doctrine of implied estates, where no words are used giving directly to the issue, as an interpolation of the will of the Court, for the will of the testator.

The question, of what estate does the devisee take under a will, is always, what estate do the words legally inform us the testator intended he should take? If we ascertain this, there is nothing generally to prevent us from giving it effect. When the testator uses words which shew an intention to contravene the law, his intention cannot so

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*far prevail. This is the reason why devises, intended to create a perpetuity, cannot take effect. The rule, that a limitation over must take effect within a life or lives in being and twenty-one years and nine months after, was intended to prevent perpetuities, and all devises are compelled to bend to it.

The devise over in this case being too remote and void, can have no effect to enlarge or restrict the estate, unless it be to aid us in giving construction to the will, as to the estate of John Chaplin. A devise to A. without words of inheritance or perpetuity, or words clearly indicating an intention that he should take more than a life estate, was held formerly to give only a life estate. Take this to be the rule applicable to the

will before us, and what estate does John Chaplin take? I answer he takes a fee simple absolute. For the testator has used words which, in legal contemplation, mean that the land should not go over to the remainder man, only upon an indefinite failure of issue, and then that it should not revert to him. These words are equivalent to a grant of the fee to him, and as much import a fee simple, as if he had used the word, "forever," which is a word of perpetuity, and so are the words employed.

But strike all the words out after the words "Jericho Creek," for they are void as a devise, and the devise then stands simply as a devise to John Chaplin without words of inheritance or perpetuity. What estate does he then take? The act of 1824 enacts, "that no words of limitation shall hereafter be necessary to convey an estate in fee simple by devise, but every gift of land by devise shall be considered as a gift in fee simple, unless such a construction be inconsistent with the will of the testator, express or implied." This act settled a rule of construction which had been a vexed question in our Courts; and wills made long anterior to its passage, were subjected to the rule established by it, as will be seen by referring to the cases of Dunlap v. Crawford, 2 M'C. Eq. 171, Hall v. Goodwyn 4 M'C. 442, Peyton v. Smith, Ib. 476, [17 Am. Dec. 758,] and Bedon v. Bedon, 2 Bail. 231. The will, in the case of Hall v. Goodwyn, was executed, I think,

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during or before the revolu*tionary war. The rule is now regarded as a settled rule of construction—settled by the Legislature and the Courts, and is applicable to all wills, no matter when executed.

The case of Skimon v. M'Roberts, 1 Wash. Rep. 125, shews that the Court of Appeals of Virginia felt themselves bound to enforce the common law in the construction of a devise without words of inheritance or perpetuity contained in a will made before 1787. They seem to think that the Revolution, and the abolition of the feudal system and the rights of primogeniture, might for the future relieve them from this necessity and enable them to give effect to the intention of testators. That decision cannot affect this case or the rule which has been adopted under and since the act of 1824. The common law rule was adopted in Hall v. Goodwyn, 2 N. & M'C. 383, without any reference to the effect of the act abolishing the rights of primogeniture, and the same case, 4 M'C. 442, and Peyton v. Smith, when the common law rule was reversed and the rule of the act of 1824 was adopted, put the decision on the ground, that the act was declaratory of what the law was, and that it therefore operated retrospectively as well as prospectively.

There is nothing in the will, either express or implied, which is inconsistent with the construction that John Chaplin took a fee simple, and this was, I think the nature and extent of his estate under the will of his father. The purchaser at the sheriff's sale purchased therefore the fee simple, and the defendants claiming under him are entitled to the land. The complainants' bill was properly dismissed, and the Chancellor's decree is affirmed.

JOHNSON and EARLE, JJ., concurred.

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA, MAY & JUNE, 1833.

JUDGES PRESENT.

HON. DAVID JOHNSON, Presiding Judge.
" J. B. O'NEALL.
" WM. HARPER.

1 Hill, Eq. *285

*JAMES POAG, Executor of John Muldoon, Dec'd, v. WILLIAM POAG.

(Columbia. May, 1833.)

[*Principal and Agent* ⟸81.]

A private agent or assignee is not entitled to commissions, unless they are stipulated for in the contract creating the agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 197; Dec. Dig. ⟸81.]

[*Evidence* ⟸354.]

On a bill against an agent for an account, his books are not admissible to prove the sale and delivery of provisions and necessaries to the principal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1470; Dec. Dig. ⟸354.]

[*Principal and Agent* ⟸69.]

Although the agent in such case may be considered a trustee, and his transactions regarded with jealousy, yet he will be entitled to credit for notes on his principal, payable to himself during his agency, without shewing their consideration unless there be some evidence to impugn them.

[Ed. Note.—Cited in Jeter v. Tucker, 1 S. C. 253.

For other cases, see Principal and Agent, Cent. Dig. § 134; Dec. Dig. ⟸69.]

John Muldoon, the plaintiff's testator, being a man of weak understanding, and incapable of transacting his own business, gave the defendant a general power of attorney to act for him. Under this power the defendant made a settlement with a former agent, took possession of Muldoon's estate, and for several years managed all his affairs, and during this time occasionally supplied

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him with provisions and *other necessaries. On Muldoon's death, his executor filed this bill for an account.

On reference before the Commissioner, the defendant claimed commissions on the settlement with the former agent, which the Commissioner refused to allow. He also produced and proved the execution of sundry notes with the testator's mark to them, payable to himself, for which he claimed credit, but he refused to prove their consideration. The Commissioner refused to credit him with these notes, on the ground, that it was incumbent on him under the circumstances to shew the consideration for which they were given. The defendant then offered in evidence an account book, in order to prove the delivery of certain necessaries, which, as he alleged, were there charged. This evidence was rejected.

The Commissioner having made his report on the accounts, the defendant filed exceptions to it, charging error in the above particulars.

Chancellor Johnston, before whom the exceptions were argued, at York, sustained the report, and the defendant appealed on the grounds taken below.

Williams, for the appellant, in support of the grounds taken, cited and relied on Sinclair v. Kiddle, decided at the last Term, and 1 Mad. 110.

Hill, contra, insisted, that commissions could not be allowed on the whole amount which had been settled between the two agents, when but a small sum fell due thereon, and was in fact received by the defendant.—That, as regards the notes, the defendand was a trustee, and not permitted to contract with his cestui que trust; and all contracts between them should be avoided, unless the trustee shows that he has dealt

fairly; and the circumstances well justified the Commissioner in rejecting the notes. 1 M'C. Ch. 389; 4 Eq. Rep. 103; 1 Ves. 478; 2 John. Ch. Rep. 252; 6 Ves. 631; 2 Sch. & Lef. 492. The account book was properly rejected, according to the common rules of evidence.

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*HARPER, J. The first claim on the part of defendant is, to be allowed commissions on the amount received from a former agent on settlement. This cannot be allowed. Guardians and trustees having the charge and custody of the estate of infants and minors, are allowed commissions by the act of 1745; 1 Br. Dig. 392. Executors are allowed them by the executor's act, and factors and some other commercial agents have them by the usages of trade. But a private agent or assignee is not entitled to them unless they are stipulated for in the act or contract by which the agency is created. To this effect was the decision in the case of ———— decided by this Court in Charleston, and that of Muckenfuss v. Heath, ante, 182, decided at the same place during the last sitting of this Court.

The next question relates to the admissibility of defendant's book, to establish an account for articles sold and delivered to his principal, Muldoon. This certainly does not come under the general rule allowing merchants', shop-keepers' and tradesmen's books to be evidence. It is supposed to be admissible under the decision in the case of Sinclair & Kiddell v. The Administrators of Price, [2 Hill, Eq. 160], decided at this place in December, 1832. That was a peculiar case depending on its own circumstances. There was a mercantile agency for the purpose of selling goods, remitting the proceeds, &c.—stress was laid on the circumstance, that the books would have been evidence for the principal against third persons, (which cannot be said here) and the books were offered after the death of the agent, who might have been able to produce other proof if he had been alive. As to this ground also the motion must be dismissed.

We are of a different opinion with respect to the notes which were offered in evidence. It is certainly true that a trustee cannot purchase of his cestui que trust, without being prepared to shew that he gave a full consideration and did not unfairly avail himself of the advantages afforded by his character of trustee. The same rule is applied to other persons, not being strictly trustees but standing in relations of confidence, as to agents. But these persons are certainly at liberty to account with their principals, and to take

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acknowledge*ments or vouchers in relation to the transactions between them. A note given is evidence of an account settled and a balance acknowledged. In such a case as the present, where the principal is shewn to have been a weak man, hardly capable of transacting his own business, such transactions are regarded with jealousy, as in the instance of a guardian settling with his ward just after he comes of age, and slight evidence will be sufficient to throw the burden of proof on the agent. But I see no evidence to impugn the notes in this case. On the contrary they are supported by the testimony of the witness Jos. S. Poag, who proves the delivery of various articles by the defendant to Muldoon, without being able to specify quantities. What conclusion so obvious, as that on account of these the notes were given. And this is an additional reason against admitting the book to prove the account. Notes were given to the number of five, during the continuance of defendant's agency, at various times, and the presumption is that defendant's charges against his principal were included in these notes. The motion as to this ground of appeal is granted, and defendant's third exception sustained.

JOHNSON and O'NEALL, JJ., concurred.

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1 Hill, Eq. 288

THOMAS M'MEEKIN v. J. L. EDMONDS and Wife, ROB'T L. NANCE and CLOUGH S. MENG.

(Columbia. May, 1833.)

[*Fraudulent Conveyances* ⟸110.]

A sheriff's sale of a tract of land to one who purchased at the instance of the debtor in the execution, and conveyed to a trustee for the benefit of the debtor's family, under the circumstances set aside; but the mother of the debtor's wife having advanced money towards the purchase, & which went to the payment of his debts, & the trustee having afterwards paid out money in discharge of a mortgage, to which the land was subject when sold, and neither of them having been accessary to the fraud, the Court held that the money thus advanced should be refunded, and that the land should stand as security for the payment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 352–359; Dec. Dig. ⟸110.]

[*Fraudulent Conveyances* ⟸186.]

The fraud of a third person may sometimes vitiate a conveyance—a party to the conveyance shall not be allowed to derive any advantage from such fraud; but in setting aside such a conveyance, the Court will take care that innocent persons shall not suffer.

[Ed. Note.—Cited in Du Pont v. Du Bos, 52 S. C. Append. 601.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 594; Dec. Dig. ⟸186.]

[*Fraudulent Conveyances* ⟸237.]

Equity will entertain jurisdiction to set aside a fraudulent deed.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 674–680, 684–686; Dec. Dig. ⟸237.]

[*Husband and Wife* ⟸30.]

Where the Court of Equity by a decretal order directed the legacy of the wife for which a decree had been obtained, to be settled to her separate use &c. according to the trusts of the will, this is not a marriage settlement which

need be recorded; & a deed afterwards executed to the wife's trustee, is not void because not recorded as a marriage settlement.

[Ed. Note.—Cited in Bank of United States v. Brown, 2 Hill, Eq. 564, 565, 30 Am. Dec. 380.

For other cases, see Husband and Wife, Cent. Dig. § 176; Dec. Dig. ⟸30.]

[*Fraudulent Conveyances* ⟸317.]

[Cited in Anderson v. Fuller, McMul. Eq. 33, 36 Am. Dec. 290; Gracey v. Davis, 3 Strob. Eq. 58, 51 Am. Dec. 663; Werts v. Spearman, 22 S. C. 219; Wagener & Co. v. Mars, 27 S. C. 106, 2 S. E. 844; Curlee v. Rembert, 37 S. C. 222, 15 S. E. 954, to the point that a court of equity has power to order a sale upon vacating deed, and determine priorities.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 979, 980; Dec. Dig. ⟸317.]

The bill in this case was filed to set aside, as fraudulent, a sale and conveyance by the sheriff, of a tract of land of the defendant, J. L. Edmonds, to the defendant, C. S. Meng; and also a conveyance from Meng to the defendant, R. L. Nance, in trust for the use of Mrs. Edmonds and her children, under the following circumstances, as proved on the trial:

Mrs. Edmonds being entitled to a legacy, under the will of her grand-father, she and

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her husband instituted pro*ceedings in Equity, and obtained a decree therefor; but Edmonds being largely indebted and likely to prove insolvent, the Court of Equity, by a decretal order, in June 1826, directed the amount of Mrs. Edmonds' legacy to be paid to R. L. Nance, in trust, to be laid out in the purchase of property for the use of Mrs. Edmonds and her issue, and for such other uses and under such limitations as the will directs. Shortly after, the greater part of Edmonds' estate was sold under executions, at Newberry. Besides the property then sold, he owned a tract of land in Union District, which he had contracted to one Thomas Clarke for $2,400, $400 of which he had received, and taken notes for the balance, and given his bond for titles. On the sale day in September, 1826, this land being exposed for sale by the sheriff under executions in his office, Edmonds applied to the defendant, C. S. Meng, who had been recommended to him as a man of probity, to purchase the land as an agent, saying that he had money to satisfy all the executions in the sheriff's office against him, and that his object in getting him (Meng) to purchase the land, was to enable him to perform the contract with Clarke, by tendering him through the purchaser, sheriff's titles. On this representation Meng consented to act, and accordingly bid off the land at $920. He then paid the sheriff $128.-73¼ in satisfaction of the executions against Edmonds, from money which Edmonds gave him; and Edmonds then gave him a receipt for $791.26¾, the balance of the bid after satisfying the executions, and which would be coming to Edmonds, but no money was paid; and the sheriff executed titles to Meng, for which Edmonds paid. After the titles were delivered, Meng, who felt no interest in the matter, at the instance of Edmonds gave a bond to execute titles for the land, to R. L. Nance, the trustee of Mrs. Edmonds; and shortly afterwards executed a formal conveyance. This deed has since been approved of by the Commissioner in Equity for Newberry District, and accepted in execution of the previous order of the Court. At the time of the sheriff's sale the land was under mortgage to one Darby

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from *whom Edmonds purchased it, for the purchase money, the balance of which then due was $604.91. Mr. Nance, the trustee, has since paid this sum, and disencumbered the land of the mortgage lien.

Edmonds, in his answer, states that he received no money from Meng, and that he was of the opinion that the mortgage was to be satisfied out of the proceeds of the sale. Mrs. Wadlington, the mother of Mrs. Edmonds, it appeared, had advanced $200 to Edmonds, to aid in this purchase, of which, however, only $128.73¼ were applied to that purpose.

Some months after the sale of the land, judgment was obtained and execution lodged against Edmonds in favor of Nancy Hamilton, who assigned the same to the present plaintiff for a valuable consideration. On this judgment the land was again sold by the sheriff in June, 1827, and purchased by the plaintiff; and in July following Edmonds was arrested on a ca sa, and having rendered in a schedule, was discharged under the Prison Bounds Act, leaving the plaintiff's judgment wholly unsatisfied.

The case came to a hearing before Chancellor De Saussure, at Union, June Term, 1832.

For the plaintiff, it was argued, that the sale was intended to defraud creditors, and should be declared void; and it was further contended, on the authority of Price v. White, Law Journal 296—that the order of the Court, appointing Nance a trustee, and settling the property on Mrs. Edmonds, was a post nuptial settlement, and not being recorded in due time, nor in the proper office, was void as to creditors.

The Chancellor held, that the evidence did not establish fraud in the sheriff's sale and the subsequent conveyance to the trustee; that this was not a case to which the registry acts applied, the property not being derived in such way as to be liable for the husband's debts unless protected by a settlement; but the decretal order of the Court settling the property on Mrs. Edmonds, is merely ancillary to the will which creates the trusts, and intended to give it effect. He therefore dismissed the bill with costs.

From this decree the plaintiff appealed, and moved to reverse it, for error in the decision of the Chancellor.

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*B. M. Pearson, for the appellant, commented on the facts, which he insisted shewed a fraudulent intent on the part of Edmonds to screen his property from his creditors by procuring the sheriff's sale: Miller v. Tolleson, Harp. Eq. Rep. 145. That if Mrs. Wadlington advanced money, she did so without any contract with the trustee, and even without his knowledge—she could not recover from him, and was not entitled to have it refunded out of the land, but stood in the relation of any other creditor of Edmonds, to whom she had loaned it: 2 N. & M'C. 75. Nance, the trustee, was not a purchaser at the sheriff's sale. He knew nothing of it until some time afterwards, when he accepted the title. Meng was not his agent, but Edmonds'; and if Edmonds had authority to act for the trustee (which does not appear) he could not delegate his authority to Meng: 16 Ves. 45; Newland, 145. The purchase at sheriff's sale, cannot therefore be regarded as the act of the trustee in execution of his trust.—That the land was sold subject to the mortgage, he referred to 4 M'C. Rep. 336; the overplus, after satisfying the executions, was Edmonds'. And that the settlement by the Court was void, for want of being recorded, he relied on Price v. White, Law Journal, 296. A. A. 1823.

Irby, for the defendant, also commented on the facts, and contended that the evidence did not make out such a case of fraud as to justify the interference of this Court; and that if the Court did set aside the sale, it would direct that the land should stand charged with the money advanced by Mrs. Wadlington expressly for this purpose, which went to satisfy the executions against Edmonds, and with the amount paid by the trustee in discharge of the mortgage; 1 Eq. Rep. 117, 419.

J. J. Caldwell, in reply, insisted that nothing but the equity of redemption was sold at the sheriff's sale; or more properly according to our law, the land was sold subject to the mortgage, and the purchaser took it with that incumbrance. According to this view there remained of the purchase money, after satisfying the executions against Ed-

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*monds, $791.26 of an overplus, which belonged to Edmonds and was applicable to his debts. To this extent, at least, the Court should grant relief, and a resort to the land is the only means of obtaining it.

HARPER, J. I think the sale by the sheriff to the defendant Meng, must be regarded as fraudulent so far as the defendant Jefferson L. Edmonds was concerned. The land was sold subject to a mortgage on which $604 were due. It was bid off at $920. The price then bid for it was, in effect, $1,524. Edmonds however gave his receipt for $791.26¾, and I think must be regarded as having paid so much of the price out of his own funds, and that it was to this extent a voluntary conveyance for the benefit of his family. It is true that Edmonds states in his answer, that he and the bidders at the sale were under the impression that the mortgage was to be paid off out of the proceeds of the sale, and that though he gave his receipt, the amount was in fact paid by the trustee Nance; but the answer of Edmonds is no evidence for this purpose; there is no charge on the subject in the bill. He himself knew of the mortgage; Meng was his agent for making the purchase, and must be regarded as having had notice, and the conclusion of law is, that he purchased only the equity of redemption, as we term it—in fact, the legal estate remaining in the mortgagor, taking the land still subject to the mortgage. But if we were to take the statement of Edmonds for granted, there still remains a portion of the price which he must be regarded as having paid. His receipt to Meng was for $791.26¾; the amount due on the mortgage was $604; there was then $184.26 for which he voluntarily gave his receipt. If he had actually received the $791.26, it might have been applied to the benefit of creditors, and it was a fraud on them that so much of his property should be applied to benefit his family, and in effect himself. Other circumstances seem to indicate that he wished his family to obtain an undue advantage at the expence of creditors. If he could have enforced his contract with Clarke, (and there is no clear evidence to shew that he could not) it would have been a much more advantageous sale than that

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which was ef*fected, and he seems to have misrepresented to Meng the purpose for which he wished him to bid off the land. It is possible he may have intended fairly; but the law draws a different conclusion from the circumstances; and though neither the trustee nor his cestui que trust, Mrs. Edmonds, may have had any accession to the fraud, they are not allowed to keep an advantage gained by the fraud of another. Huguenin v. Basely, 14 Ves. 273.

It is not alleged on any hand, that either Nance or his cestui que trust have any accession to the fraud. The trustee purchased bona fide, and for valuable consideration, for he paid off the mortgage. He may have supposed that the land had been bid off for a nominal price, and that the amount of the mortgage was the only consideration to be paid. In general, the title of a bona fide purchaser for valuable consideration without notice of fraud, is good both in law and equity; but in this case I am of opinion that though the title of the trustee was good at law, and therefore the complainant took nothing by his purchase at sheriff's sale, yet it must be set aside in equity, though al-

lowed to stand as a security for what has actually been paid. In the case of Smith v. Henry, 1 Hill, 26, decided at the last sitting in this place, we recognized the general principle, that the fraud of the grantor alone is sufficient to vitiate a conveyance; and, as I have said, the fraud of a third person in procuring a conveyance, may vitiate; but in neither of these instances, is such construction to be made, as will render innocent third persons sufferers. In general, if a purchase be made bona fide, and for valuable consideration, the Court will not look to the adequacy of the consideration. But here, as I have said, the whole of the consideration was not paid by the trustee; part of it was paid by Edmonds; though, for aught that appears, without the trustee's knowledge. If an insolvent having saved a thousand dollars in money from the wreck of his fortune, should go to a third person and say "if you will sell to my wife's trustee a tract of land worth $2,000 for $1,000, I will privately make up the difference," it is plain the transaction could not stand. Otherwise there would be no restraint on fraud. But the gran-

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*tees being themselves innocent, are not to be made sufferers. The ends of justice can only be answered by setting aside the sale, allowing the property to stand as a security for what was actually paid. But the sale was good at law. The purchaser having paid a valuable consideration, bona fide, could not be affected at law; the jury must find the deed good or bad, and could not decree that it should be avoided, on the repayment of what had been advanced. This is an answer to the question of jurisdiction, which has been raised in the case. The complainant would have had no relief at law.

In several English cases, even where the defendant appears to have been a partaker of the fraud, but the proof was not entirely clear, the Court has set aside the conveyance, decreeing it to stand as a security for the money actually paid. Herne v. Meeres, 1 Vern. 465, was a case of this sort. The Chancellor says "and so at law, where a case is found to be fraudulent, the creditor comes in and avoids it all, without repayment of any consideration money; and in Equity, therefore, where the Court can decree back the principal and interest, there is no hurt done; and a lesser matter in such case, will serve to set a conveyance aside." Addison v. Dawson, 2 Vern. 678, and Clarkson v. Hanway, 2 Pr. Wms. 203, were cases in which upon setting aside the conveyance, the Court decreed the defendants to be refunded what they had actually paid. In Boyd v. Dunlap, 1 Johns. Ch. Ca. 478, where the consideration was very inadequate, but the proof of actual fraud in the defendant doubtful, the Court set aside the conveyance, allowing it to stand as a security for the money actually paid. Chancellor Kent, says "Courts of law can hold no middle course. The entire claim of each party must rest and be determined at law, on the single point of the validity of the deed; but it is an ordinary case in this Court, that a deed though not absolutely void, yet if obtained under inequitable circumstances, should stand as a security for the sum really due." In How v. Weldon, 2 Ves. 516, though there was actual fraud, dolus in re ipsa, as the master of the rolls expresses it, the deed was allowed to stand as a security for the money paid. I

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*think however that our Court of Equity was right in determining, in the case of Miller v. Tolleson, Harp. State Eq. Rep. 145, [14 Am. Dec. 712,] that where the defendant was a partaker of the fraud, he should not be allowed to derive any advantage from the conveyance; and therefore, where it was made to secure a previous debt, it should be set aside absolutely.

The conveyance being good at law, the complainant took nothing by his purchase at sheriff's sale. Creditors had an equity to set the conveyance aside; but if it had been the defendant's equity, it was not a subject of levy and sale by the sheriff. He can only sustain his bill as a creditor, and we understand there are other creditors who have a legal priority over him, of which we are not authorized to deprive them.

In addition to what I have said on the subject of jurisdiction, it may be observed, that although the rule be that the title to freehold shall not be tried in this Court, yet the Court has jurisdiction of fraud; and nothing is more common than that parties should come into this Court to set aside a fraudulent deed, preparatory to a trial at law.—This is an application to set aside a fraudulent deed. If that deed were out of the way, there is no dispute about title—both parties concur in the title of Edmonds and claim under him.

In addition to the money paid on the mortgage, I think the land must stand as a security for the money advanced by Mrs. Wadlington towards the purchase. She states positively that she did advance this money, intending it as a gratuity to her daughter, and I see nothing in the evidence to contradict her. She states indeed that she advanced $200; but it does not appear that Edmonds applied more than $128.73¼ towards the purchase. These sums however must be reimbursed without interest; Mrs. Edmonds having received the rents and profits of the land.

With respect to the question, whether the conveyance to Nance is not a marriage settlement, and therefore void for want of recording, I cannot see how it can be regarded as such a settlement. The former decree of the Court was intended to carry the will into

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effect, and, as observ*ed by the Chancellor,

a will is not a marriage settlement. The deed is not supported by the marriage consideration, nor by the wife's equity which results from the marriage, as in the case of Price v. White, [Bailey, Eq. 244.] If we should regard every conveyance of a husband to the use of his wife, as a marriage settlement, this would not come under that description. In legal contemplation, it was a purchase from a third person by a trustee, for the use of his cestui que trust. The conveyauce to Meng was certainly not a marriage settlement. The same transactiou might have happened though Mrs. Edmonds had been unmarried, and Jefferson L. Edmonds a stranger to her.

As there are older judgments against Edmonds than that of complainant, and as it may be that he has been prosecuting for the benefit of others and will derive no advantage from the decree, it would in that event be inequitable, if other creditors should obtain benefit from the decree, that he should be charged with costs.

It is therefore Ordered and decreed, that the decree of the Chancellor be reversed; that the land in question be sold by the Commissioner, and that out of the proceeds he pay in the first instance, the sum of seven hundred and thirty two dollars, 73 cents, to the defendant Robert L. Nance as trustee, and the surplus to the creditors of the defendant, Jefferson L. Edmonds, according to their legal priorities; and that he advertise for creditors to come in and establish their demands. Parties to pay their own costs: provided, that if there be a surplus received by creditors, the complainant's costs shall be paid by the creditors so receiving, in proportion to the sums received by them respectively.

JOHNSON, J., concurred.

O'NEALL, J., having been of counsel in this case, gave no opinion.

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1 Hill, Eq. *297

*JOHN BROWN and Others v. WM. K. M'DONALD.

(Columbia. May, 1833.)

[*Executors and Administrators* ⇐426.

If an executor or administrator find the affairs of the estate so complicated as to render the administration difficult and unsafe, he may institute proceedings in Equity against all the creditors to have their claims adjusted by the Court, and to obtain its judgment for his guide. There is no difference in this respect between an executor and administrator.

[Ed. Note.—Cited in Eno v. Calder, 14 Rich. Eq. 156.

For other cases, see Executors and Administrators, Cent. Dig. § 1663; Dec. Dig. ⇐426.]

[*Fraudulent Conveyances* ⇐241.]

The general rule is that a creditor must first obtain a judgment at law before he can ask relief in Equity; but this rule applies only where the Court is called on to aid a creditor in furtherance of his legal remedy; it has no application when the Court is asked to give effect to its own judgment. And therefore, where on a bill by an administrator against creditors to marshall the assets &c. an injunction was obtained restraining proceedings at law & creditors came in & established their demands; this is a judgment of the Court of Equity: and if the creditors afterwards file their bill to set aside certain conveyances by the intestate as fraudulent, and it appears from the bill that they have no remedy at law, they will be entitled to relief in Equity.

[Ed. Note.—Cited in Perry v. Nixon, 1 Hill, Eq. 336.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 702, 713; Dec. Dig. ⇐241.]

[*Equity* ⇐427.]

A general prayer in the bill for relief, will authorize a decree for the specific relief appropriate to the case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1009; Dec. Dig. ⇐427.]

[*Fraudulent Conveyances* ⇐74.]

It is not indispensably necessary to establish fraud in a deed, that the grantor was indebted at the time of its execution, or that it was executed with a view to future indebtedness; it may be avoided by shewing that the sale was merely colourible.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186–190; Dec. Dig. ⇐74.]

[*Fraudulent Conveyances* ⇐110.]

Where the grantor, being indebted, conveyed his land to his mother, for a valuable consideration, which was paid and applied to his debts, and it was agreed at the time, that he should retain possession of the land during his life, and it should go to his children on his death, and he did hold possession, and the grantee afterwards devised the land to the grantor's children: the conveyance was held to be fraudulent as to creditors, and set aside.

[Ed. Note.—Cited in Beattie v. Pool, 13 S. C. 384; Ex parte Kenmore Shoe Co., 50 S. C. 148, 27 S. E. 682.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 359; Dec. Dig. ⇐110.]

[*Fraudulent Conveyances* ⇐183.]

Conveyance of land set aside as fraudulent against creditors, but the grantee intending no actual fraud, having paid the consideration & applied it to the payment of the grantor's debts, and afterwards devised the land, the Court ordered the money actually paid to be refunded to the devisee, and the deed to stand as a security for it.(*a*)

[Ed. Note.—Cited in Ex parte Kenmore Shoe Co., 50 S. C. 148, 27 S. E. 682.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 578; Dec. Dig. ⇐183.]

[*Fraudulent Conveyances* ⇐96.]

Quere, whether a promise by a parent indebted at the time, to pay an infant for his services, will support a deed against the other creditors?

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 289–322; Dec. Dig. ⇐96.]

[*Fraudulent Conveyances* ⇐96.]

Where negroes were purchased and paid for by a debtor, & the title made to his sons, under the circumstances it was held, that a trust resulted to the debtor in favor of cred-

(*a*) See also M'Meekin v. Edmonds, ante, 288, [26 Am. Dec. 203.]

itors, and the negroes were held liable for his debts.

[Ed. Note.—Cited in Richardson v. Monnee, 19 S. C. 482.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 298; Dec. Dig. ⟸96.]

[*Equity* ⟸208.]

[New substantive matter of defense set up in the answer must be supported by proof, and a replication is not necessary to put such matter in issue.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 479; Dec. Dig. ⟸208.]

[*Fraudulent Conveyances* ⟸54.]

[The fact that the grantor, in a deed fraudulent as against creditors, has since paid off the debts due when the deed was executed, will not confirm the deed, if he has been constantly indebted in the meantime.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 136; Dec. Dig. ⟸54.]

[*Fraudulent Conveyances* ⟸316.]

[Cited in Bath South Carolina Paper Co. v. Langley, 23 S. C. 145, and Jenkins v. Jenkins, 83 S. E. 544, 65 S. E. 736, to the point that a court of equity has authority to order an accounting of rent and profits after vacating sale of realty.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 976–978; Dec. Dig. ⟸316.]

The bill in this case was filed by the plaintiffs, as creditors of Thomas M'Donald, dec'd., to set aside certain conveyances of land and slaves, and to subject them to the payment of their demands; and also for an account of the rents and profits, to be applied to the same purpose.

The late Thomas M'Donald, the father of the defendant, being embarrassed in his circumstances, in September, 1811, executed a deed for a tract of 700 acres of land, in Lancaster District, whereon he resided, to his mother, Mrs. Charlotte M'Donald, purporting to be in consideration of one thousand dollars. The deed was delivered to Mr. Massey, for safe-keeping—was recorded in 1814, and not given up to the party until after the death of Thomas M'Donald. When the deed was executed Thomas M'Donald was indebted to his father's estate $300. Mrs. M'Donald took this debt on Thomas, in part of her share of her husband's estate, to go in part payment of the land, and paid the remaining seven hundred dollars to him and his creditors.—It appeared also to be the understanding at the time, that Thomas M'Donald should retain possession during his life, and that the land would then go to his children. Thomas M'Donald did remain in possession of the land, and enjoy it as before, without paying rent, and in all respects acted as the owner, until his death, in 1828. The value of the land, with the ferry, was estimated by the witnesses, at from three to five thousand dollars.

Mrs. Charlotte M'Donald died in August 1812, leaving a will by which she devised and bequeathed the land in question and five slaves, to her son Thomas M'Donald, for twenty years, and then to be equally divided among his children, of whom the defendant is the only survivor. The land was subsequently sold by the sheriff for fifty dollars as the property of Thomas M'Donald; the titles were executed to the defendant and his deceased brother, but the consideration paid by Thomas M'Donald. The defendant Wm. K. M'Donald generally resided with his father

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until the death of the latter, *and acted for some time on his own account, and a part of the time as an overseer for his father; he claimed four horses as his own, but it was admitted that he had no other means of obtaining property than by his own industry. On his father's death in 1828 he took possession of the premises, received the crop of that year, and has had possession ever since. He was not of age until the year following.

As regards the negroes, Rachel and her children, which the plaintiffs seek to make liable to their debts, it appears that they were purchased and paid for by Thomas M'Donald in 1827, but the bill of sale was executed to the defendant and his brother (since deceased.) These negroes remained on the plantation in Thomas M'Donald's possession until his death, when they went into the defendant's possession. For the purpose of shewing the fraudulent intent of Thomas M'Donald, the plaintiffs proved that in 1819 he executed a deed to the defendant and his brother for nine slaves, who continued afterwards in his possession. They are not now in dispute.

Since 1811, Thomas M'Donald was generally embarrassed, and finally died insolvent. After his death his administrator filed a bill in Equity to marshall the assets, and to enjoin creditors from proceeding at law and compel them to come in and establish their debts against the estate. An injunction was obtained, and the plaintiffs, among other creditors, established their demands before the Commissioner, but they have not obtained judgments at law.

The case was heard by Chancellor De Saussure, at Lancaster, July, 1832.

The Chancellor held that the conveyances of the land were fraudulent; that Thomas M'Donald having paid for the negroes, Rachel and her children, a resulting trust was created to him, to which his creditors were entitled. His Honor therefore set aside the conveyances, and decreed the land and negroes liable to the claims of the creditors, and that the defendant should account for the rent profits, from which any sum he might appear entitled to by the report of the Commissioner, for his services as an overseer, should be deducted. From this decree the defendant appealed on the following grounds:

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*1. That the deed from Thomas M'Donald to his mother was not fraudulent, in as much

as Thomas M'Donald at that time possessed property more than sufficient to pay all his debts besides the land—that the sale of the land nearly paid all his debts at that time, nor was there proof of his indebtedness for several years after. And the consideration of the deed having been fully paid, and there being no intention to defraud creditors, the deed should have been sustained.

2. That although Rachel and her children were paid for by Thomas M'Donald—it was also proved, that he was indebted to the defendant for his services, and for that reason the Court should have decreed in favor of the defendant's title.

3. That the defendant, not being a party to the bill filed by the administrator of Thomas M'Donald, against the creditors, should not be bound by the proceedings in that case; nor should the plaintiffs derive any advantage from them, as against the defendant.

4. That the plaintiffs should have established their demands by judgments at law, before asking this Court for relief, and without which this Court has no jurisdiction.

5. That the plaintiffs' bill does not pray to set aside the deed from Thomas M'Donald to his mother, and no such relief should therefore have been granted.

Williams, for the appellant, contended, that a creditor cannot ask the aid of this Court without having first obtained a judgment at law, Screven v. Bostick, 2 M'C. Ch. 410-16. Establishing the debts in the Court of Equity, would not be a compliance with the rule, and it might be questioned whether an administrator could file a bill to marshall the assets, and to compel creditors to come in and establish their debts, whatever an executor might do. And on the facts, he insisted, that the transactions on the part of Thomas M'Donald were not fraudulent, the sale of the land being for a valuable consideration which was fully paid, when there was but slight indebtedness—and that the title of the negroes

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was vested in the defendant, in con*sideration of his services, which were proved to have been rendered; and the answer of the defendant is conclusive in this respect.

Blanding, contra, argued, that the case of Screven v. Bostick, 2 M'C. Ch. 410, only decides that a creditor shall not ask the aid of the Court of Equity, until he has exhausted all the means at law; but the bill by the administrator prevents the plaintiff from proceeding at law. He commented on the facts, to shew that the transactions were fraudulent as to creditors, and cited and relied on Smith v. Henry, 2 Bailey 118, and S. C. 1 Hill, 16.

Clarke, in reply. As to the right of an administrator to file a bill against creditors to establish their demands, and to marshall assets, cited Toller ex'ors, 456. As to the fraud, he contended that the transactions were bona fide, and that the circumstances of the case could not warrant the conclusion in either a legal or moral point of view; and cited and commented on 1 M'C. Ch. 251; 4 M'C. 294; 1 M'C. 227; 1 Eq. Rep. 348. And whatever might be the conclusion of the Court in this respect, the court should allow the defendant for the money actually advanced by Mrs. M'Donald to the payment of Thomas' debts. Newland on Con. 352.

O'NEALL, J. Preliminary to the discussion of this case on the merits, it was contended. 1st. That the proceedings in the case of the administrator of Thomas M'Donald against his creditors were irregular, and that therefore the decree establishing the debts of the plaintiffs could not be regarded as a judgement. 2nd. That the plaintiffs could not maintain this bill, inasmuch as they had not recovered judgments at law, sued out executions and pursued the estate of their debtor to insolvency. It will be necessary to dispose of these objections before proceeding to consider the case on the merits.

1. I had supposed that an administrator or executor had an unquestionable right, when they found any difficulty in the administration of the estate, to bring the whole matter with all the parties interested therein,

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to the view of the Court of Equi*ty, and obtain its judgment for his guide. But it seems that doubts are entertained by counsel as to the correctness of this practice. Toller in his law of executors, 455, relied on as authority in the argument of defendant's counsel, says, "if the executor find the affairs of the testator so complicated as to render the administering of the estate unsafe, he may institute a suit against the creditors for the purpose of having their several claims adjusted by the decree of the Court." This was not denied to be law, but a distinction was attempted to be made between executors and administrators; the rule was conceded in the case of the former, but denied in the latter. There is however no such distinction, both have the same remedies, and both are properly accountable in Equity. I think therefore that the first objection cannot avail the defendant.

2. The general rule in Equity seems to be, that a creditor, to entitle himself to relief, must not only have recovered a judgment at law, but also must "shew that he has proceeded at law to the extent necessary to give him a complete title." Brinkerhoff v. Brown, 4 J. Ch. Rep. 671; Screven v. Bostick, 2 M'C. Ch. Eq. 410 [16 Am. Dec. 664]. But this general rule applies solely to cases where the Court is called on to aid a creditor in furtherance of his legal remedy. It has no application where the Court is called on to aid

a creditor in giving effect to its own judgment. There the only questions are, has the Court jurisdiction on the matters charged? and without some further decree is the creditor without an effectual remedy? In the language of Judge Nott, in the case of Bostick ads. Screven, the plaintiffs must shew that their decree "cannot be enforced without the aid of the Court of Equity" against this defendant. They have undertaken to do this, and have I think succeeded. It appears from the proceedings had in the case of the administrator of Thomas M'Daniel, against the present complainants and others, creditors of the said Thomas, that their debts were established, as simple contracts, and that the administrator had in his hands assets to the amount of $446.35 applicable to specialties. This is a judgment of the Court of Equity entitling the plaintiffs to payment, but at the same time declaring that there

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were no as*sets in the administrator's hands for payment. It is analogous to a judgment at law, of assets quando acciderint on a plea of plene administravit. In such a case it would not be pretended that an execution would be necessary to complete the plaintiff's title to relief in Equity. It is true there may be real estate, and if the bill was silent in that respect it might constitute a reason why Equity should not interfere. But it is expressly alledged by the complainants and admitted by the defendant, that the whole real estate of Thomas M'Donald, before his death was sold at sheriff's sale under execution, and titles executed to the defendant and his brother now deceased, and that the purchase money was paid by the said Thomas. According to this allegation and admission, there was no real estate of the said Thomas which could be made available by execution without the aid of this Court. The legal title was in the defendant, and the equitable title in the said Thomas. This, as well as the fraud in the title which the defendant derived from Charlotte M'Donald in the same land, and the fraud and resulting trust in the slave Rachel and her children, not only shewed most satisfactorily that the plaintiffs could have no remedy by execution, but also that the Court of Equity had jurisdiction of the case, and was bound to relieve the plaintiffs if the fraud and resulting trusts were established.

This brings us to consider the right of the plaintiffs to have a decree made, declaring liable to the payment of their debts, 1st, the land, and 2ndly, the slaves, Rachel and her children. As to the land, it is objected that the complainant has not prayed that the deed from Thomas M'Donald to Charlotte M'Donald, should be set aside. The fact that a party does not pray for the specific relief appropriate to his case, is no ground of objection to a decree in his favor, provided his bill contains a general prayer for relief, and the relief decreed arises out of the case made by the pleading. The bill sets out the sale and conveyance of the land in dispute, by the sheriff of Lancaster District, for $50, to the defendant and his brother now deceased, and alledges the said consideration was paid by Thomas M'Donald, who was then deeply

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Indebted; and prays that the said sale *and conveyance may be set aside, and the land be decreed to be sold for the payment of the debts of the said Thomas. The defendant admits this case of the complainants, and to avoid it sets up an antecedent conveyance of the land, by Thomas M'Donald, to his mother, Charlotte M'Donald—her will devising it to him for twenty years, and after that time to his children, of whom the defendant is the only surviving one. This defence of the defendant put the deed in issue, and it was necessary that its validity should be established, before he could derive any benefit from it. A formal reply on the record to the defendant, has long been out of use in this State—the proof of the complainants must be regarded as in reply to the defence in the answer, and the charge of fraud, thus made out, the same as if it had been formally replied, by a replication on file. In this view, it was perfectly competent to the Chancellor to make the decree which he did. But, in addition, it may, be remarked, that the validity of the sheriff's sale was very intimately connected with the legality of the defendant's title, under the deed to his grandmother. If that had been good, it would have interposed a serious obstacle to any relief against the sheriff's sale. The prayer of the bill, for a sale of the land in satisfaction of the debts of Thomas M'Donald, covers every thing which may be necessary to be decreed to disencumber his title, and to subject the land to sale. In order to make such a decree, it was necessary that the defendant's title, under his grand-mother, should be vacated.

As to the alleged fraud in that deed, I concur fully in the conclusion of the Chancellor. It is not indispensably necessary to establish fraud in a deed, as against the creditors, that it should be shewn that the party was in debt at the time of its execution, or that it was executed with a view to future indebtedness. A deed is frequently avoided by proof of facts subsequent to its execution, shewing that the sale was merely colourable. For if, not withstanding an absolute sale, possession remain in the vendor, it is generally destructive of the conveyance. The retention of possession creates the inference that the sale was made upon a secret trust,

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for the use of the vendor. The fraud *consists in this, that the vendee permits him to hold himself out to the world as the owner of the property, and upon the faith of it, to obtain credit. The case before us, however, is accompanied by sufficient facts, at the exe-

cution of the deed, to render it void. The proof is, that the grantor was then in debt beyond the consideration paid, which was applied to the payment of his debts; that from that time to his death, he continued in debt; and that at the sale it was agreed that he should retain possession during his own life, and that it should then go to his own children. If the defendant could put his finger on any point of time from the execution of the deed to his father's death, when he was clear of debt, he might well say that the old debts, which were paid off, ought not to affect the deed, and they would not. But he is unable to do this—and the subsequent debts, contracted in exoneration of preceding ones, are nothing more than a continuation of the antecedent indebtedness. Like a stone descending a mountain covered with snow, its bulk is increased every time it rolls over; but still every added particle is referrible to the stone originally put in motion, as the cause of its adhesion to the aggregate mass. But if the grantor did not owe a single debt at the time of the execution of the deed, the agreement then made, that he should hold for life, and that his children should succeed him, shews that the sale was colourable merely, and upon an express parol trust for the grantor's use. This (although I have no doubt the mother, to whom the deed was made, intended no moral fraud) was yet covin in law, and made the deed, as an absolute conveyance, void as against the subsequent creditors without actual notice of it.—The deed, too, was left with Mr. Massey for safekeeping, and he did not deliver it over to the devisee of Mrs. M'Donald, until after the death of Thomas M'Donald.—This is, in itself, another strong circumstance, indicating fraud. The deed deposited in the hands of a third person, might have been, and probably was, intended to be produced or suppressed, accordingly as exigencies might demand. It is, however, unnecessary to pursue the evidence farther in detail; it is abundant to

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shew, that according to familiar *principles, this deed cannot be sustained as an absolute conveyance, and that the land is liable to the payment of the complainants' debts. But I think that the consideration actually paid by Mrs. M'Donald, and applied to the debts of her son, ought to be refunded to her devisee, the defendant; and that in this point of view, the deed may be regarded as a security for it. The proof is clear that she paid for the land a debt due by the son to her husband's estate, of $300, and that the remaining $700 of the consideration were also paid, appears to be pretty clearly made out. Although the conveyance is contaminated by legal fraud, it does not appear that the grantee intended any actual fraud. In Equity the parties are entitled when they have acted without any intention to commit a fraud, to be put in statu quo. This is done by setting the deed aside, and refunding the money paid. No one can complain of this. The money paid was applied to the payment of debts, which were entitled to be paid out of the land and might have sold it. Boyd v. Dunlap and others, 1 John. Ch. Rep. 478. But the money must be refunded without interest until the time at which the title is divested, and the defendant is ordered to account for rents and profits. For up to that time, the land is used in the manner and by the person in which and by whom the grantee directed and consented it should be used. The rents of the land, although received by her grantor, was, in point of law, received by her, as an equivalent for interest.

There can be no question about the negro woman Rachel and her children. Thomas M'Donald purchased and paid for them and took a title to them in the name of his two sons. A trust resulted to him in favor of his creditors, and the property as against them was as much his, as if he had taken the bill of sale in his own name. The defendant contends however, that his father was indebted to him, and that the purchase was made in extinguishment of that debt. The nature of the indebtedness might seriously affect the conveyance, were it necessary to go into that question. For I am not prepared to say that

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a promise to pay an infant son *for his labor, by his father who is indebted, would constitute such a valuable consideration as would prevent a deed founded on it from being declared fraudulent. For at law the father is entitled to his services, and if he give up this right and promise to pay him for them, this although it might be binding on him, would as against his creditors be purely voluntary, and would hardly be enough to support the deed. But as I have already said it is not necessary to pursue that inquiry any further. There is no evidence that the father bought and paid for the negroes in consideration and in extinguishment of his indebtedness to his son. The defendant says so in his answer, but this is in avoidance of the title which the law would imply in his father from the admission contained in the answer. Thomas M'Donald bought and paid for the negroes and took a title in the name of the defendant and his brother, as his answer admits. A trust resulted from these facts, to the said Thomas, in favor of his creditors, and the answer to avoid it alledges that he bought and paid for them in satisfaction of a debt due to the defendant. To sustain this allegation of his answer, the defendant was bound to prove an agreement that they should be so bought, or that they were accepted in satisfaction of the debt. In this he has failed. He has only proved that he overseed for his father some time previous to this purchase. How long he has so served him, or how much was really due, is uncertain. It is perfectly clear however that his father did

not, and could not, owe a sum equal to the price of the negroes. The fact that they were conveyed to himself and his brother, shews that his father's indebtedness to him could not have constituted any part of the consideration. I am satisfied therefore, that the negroes must also be declared liable to the payment of the complainants' debts.

The defendant must also account for the rents and profits of the land and ferry, and the hire of the slave Rachel from the first of January 1828; for the proof is that he received the crop of that year in which his father died, and that he has had possession ever since. Upon the death of his father the crop, land, and slaves, were assets applicable to the payment of his debts; and a receiver

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would in such a case have *been appointed by the Court of Equity, until the decision of this case. It follows, that rents and profits and hire must be accounted for. In such account the defendant must be allowed credit for the sum of $1000 paid by his grandmother Charlotte M'Donald for the land, with interest thereon from the first day of January 1828: and also for whatever sum was due to him by Thomas M'Donald at the time of his death for his services as an overseer. From this last item must however be deducted any sum which the defendant received from Thos. M'Donald in either money or horses. If a balance on the whole account should be struck in favor of the defendant, then he must be paid such balance out of the sale of the land and negroes.

It is ordered and decreed, that so much of Chancellor De Saussure's decree as conflicts with this opinion, be modified according to the principles herein before stated, and in all other respects be affirmed.

JOHNSON and HARPER, JJ., concurred.

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1 Hill, Eq. 307

WM. PINCHBACK v. The Adm'rs of J. McCRAVEN, Dec'd.

(Columbia. May, 1833.)

[*Evidence* ⟸408.]

[A receipt, being a mere acknowledgment of payment, is subject to parol explanation or contradiction.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1829; Dec. Dig. ⟸408.]

A receipt is only prima facie evidence that all matters were then accounted for, and finally settled; it is not conclusive, and if fraud or mistake can be shewn, relief will be granted against it: and therefore, where, on a bill to account, the defendant produced a receipt in full, if the plaintiff can shew that there were other monies not embraced in the receipt, and not then accounted for, he may do so, and will be entitled to relief.—See Benjamin v. Sinclair, 1 Bailey, 175; McDowall & Black v. Lemaitre, 2 McC. 320.

1 Hill, Eq. *308

*WM. STUCKEY and Others v. HARDY STUCKEY and Others.

(Columbia. June, 1833.)

[*Wills* ⟸587.]

Where the residuary clause of a will contains the following words—"I do hereby leave all the rest of my property that is not above-mentioned, such as horses, cattle, hogs, sheep, geese, beds, crop and other articles, too tedious to mention," &c. *Held*, that money on hand at the testator's death, passed under it.(*a*)

[Ed. Note.—Cited in Pell v. Ball, Speers, Eq. 86; Gambrell v. Gambrell, 82 S. C. 212, 64 S. E. 1135.

For other cases, see Wills, Cent. Dig. § 1287; Dec. Dig. ⟸587.]

This bill was filed by the plaintiffs as next of kin and heirs at law of Edmund Stuckey, dec'd., charging that he died intestate as to the money on hand at his death, and claiming distribution thereof. The only question was, whether the sum of two thousand dollars, found on hand at the death of Edmund Stuckey, passed under the residuary clause of his will, which is in the words following: "I do hereby leave all the rest of my property that is not above-mentioned, such as horses, cattle, hogs, sheep, geese, beds, crop and other articles, too tedious to mention, to be equally divided between Hardy Stuckey, Edmund Stuckey, Howell Stuckey, and Wm. Peebles," who were also appointed his executors.

The case was heard on the bill and answers, by Chancellor Johnston, at Sumter, February 1833, who held that the money passed under the will, and dismissed the bill; and from his decree the plaintiffs appealed.

Preston & Mayrant, for the appellants. This is a question as to the intention of the testator. The general rule certainly is, that the residuary clause carries every thing not before enumerated; but it will not apply where there are words of qualification, restricting the generality of the meaning. The words, "the rest of my property, such as," followed by an enumeration of articles, shew that the testator intended to confine the bequest to property of that class. The words, "other articles too tedious to mention," could not be intended to mean the money. It amounted to one-fifth of the testator's whole estate; and can it be supposed that he regarded it of such small value, as to be "too tedious to mention?"

McCord, contra. The preamble to the will shews the testator's intention to dispose of his whole estate; and the words here used are general enough to cover the money. The words, "all the rest of my property," "and

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other articles," *include the whole estate.

(*a*) See Peay & Picket v. Barber, ante, 95, where the words "all the rest of my property," in the residuary clause of a will, were restricted to a particular description of property. R.

Money is an article. This Court has held it to be a chattel, and the subject of levy.

O'NEALL, J. We agree with the Chancellor, that there were no words used in the clause of the will under consideration, which would restrict the general words "all the rest of my property that is not above mentioned," to property of the kinds specifically enumerated.

The money, the subject of this suit, was found on hand at the testator's death, and was probably acquired after the execution of his will. The words of the will in the case of Cambridge v. Rous, 8 Ves. 12, are very like the words of the will before us—"I then give and bequeath all the rest and residue of my property and effects, whether in money or in the public funds, or other securities of any sort or kind whatever, to be equally divided." A specific legacy, consisting of plate, diamonds, jewels, household furniture, linen, wearing apparel and old gold coins, lapsed by the death of the legatee, in the lifetime of the testatrix; the question was, whether the lapsed legacy fell into the residue and passed under the residuary clause. It was held that it did. The Master of the Rolls, Sir William Grant, remarking on the words, says, there "the words, 'whether in money or in public funds, or other securities of any sort or kind, whatsoever,' are adverted to as tending to shew that at least the specific articles were not included. But these are not words of restriction. They are rather words of enlargement. The object was to exclude nothing. Such an enumeration, under a videlicit, a much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles."

The words of the will in the case before us, are, "I do hereby leave all the rest of my property, that is not above mentioned, such as horses, cattle, hogs, sheep, geese, beds, crop, and other articles too tedious to mention, to be equally divided," &c. The general term "property," has, I am well satisfied, two meanings, one legal and the other popular. Its legal meaning is equivalent to estate, and may include every thing a man is

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worth:—Its popular mean*ing would exclude choses in action, and cash on hand.—If there was any thing which shewed that the testator used it in its restricted popular sense, it ought to be so restricted in the construction of his will. But it is manifest that he used it in its largest sense, and that he intended it to cover every thing which he had not disposed of. The specification made was intended to enlarge, and not to restrict, the words before used.

In the case of Bland v. Lamb, 2 Jac. & Walk. 406, Lord Chancellor Eldon states the rule to be, "that very special words are required to take a bequest of the residue out of the general rule." That was a case of property subsequently and very unexpectedly acquired, by the will and death of the testator's aunt, who was one of his legatees. At page 404, Lord Chancellor Eldon states the general doctrine applicable to residuary legacies, under such circumstances.—

"After the cases which have been referred to, there can be no doubt that a gift of the residue may have a limited operation, although the general doctrine of the Court is, that if a person give all the rest of his personal estate or property, such a gift will not only pass that which he then has, but that which may become his property; and it will operate in this singular way, that although a testator may probably have meant to pass nothing but what he had at the time of his will, (which alone, according to the common sense of the expression, can be called his property) yet if, at the time of his death, he has not a single particle of that property, and has afterwards acquired other property, this last property will pass under the words 'my property.' The Courts have held, whether on satisfactory grounds or not is another question, that where a person gives all his property, it shews that he did not mean to die intestate as to what he had at the time of making his will; they have inferred that he did not mean to die intestate as to what he should have at the time of his death. This rule has sometimes operated with great hardship, and directly contrary to

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the intention of the party, *but notwithstanding that, it has been allowed to prevail."

From these authorities, it is clear, that in any point of view, the Chancellor's decree is correct, and ought to be affirmed.

It is accordingly so Ordered.

JOHNSON and HARPER, JJ., concurred.

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1 Hill, Eq. 311

SARAH COLE and Others, Minors, by Their Guardian, v. ALEXANDER CREYON.

(Columbia. June, 1833.)

[*Wills* ⇐531.]

General rule that in a bequest to the children of A. and B, or to A and the children of B, they take per capita; but a bequest to an ascertained individual, and to a class of unascertained individuals to be ascertained at any future time, vests a present interest of one half in the individual ascertained & the other half vests in the class collectively, when they are ascertained.

[Ed. Note.—Cited in Barksdale v. Macbeth, 7 Rich. Eq. 132; Risher v. Adams, 9 Rich. Eq. 249; Dupont v. Hutchinson, 10 Rich. Eq. 2, 3; Archer v. Mundy, 17 S. C. 90; Gourdin v. Deas, 27 S. C. 487, 4 S. E. 64; Lott v. Thompson, 36 S. C. 45, 15 S. E. 278; Brown v. Mc-

Call, 44 S. C. 515, 22 S. E. 823; Tindal v. Neal, 59 S. C. 15, 36 S. E. 1004.

For other cases, see Wills, Cent. Dig. §§ 1143, 1144, 1148–1152; Dec. Dig. ⟸531.]

[*Wills* ⟸524.]

Where a bequest is to children at the death of a tenant for life, those who then answer the description of children will take.

[Ed. Note.—Cited in Holeman v. Fort, 3 Strob. Eq. 72, 51 Am. Dec. 665; Risher v. Adams, 9 Rich. Eq. 249; Dupont v. Hutchinson, 10 Rich. Eq. 3; Clark v. Clark, 19 S. C. 350; Gourdin v. Deas, 27 S. C. 487, 4 S. E. 64; Lott v. Thompson, 36 S. C. 45, 15 S. E. 278; Brown v. McCall, 44 S. C. 515, 22 S. E. 823; Tindal v. Neal, 59 S. C. 15, 19, 36 S. E. 1004.

For other cases, see Wills, Cent. Dig. § 1122; Dec. Dig. ⟸524.]

[*Wills* ⟸524.]

A bequest on the death of a tenant for life to A. and the children of Elizabeth, to be retained by the executors until the age of 21 or day of marriage which shall first happen—A takes a moiety and is entitled to possession at 21; & the other moiety must be distributed equally among the children of Elizabeth in esse when the eldest attains twenty-one.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1122; Dec. Dig. ⟸524.]

[*Partition* ⟸19.]

Application for partition being premature it was refused, but the bill retained with leave to apply by petition, when the parties respectively become entitled to receive their shares.

[Ed. Note.—Cited in Cannon v. Lomax, 29 S. C. 372, 7 S. E. 529, 1 L. R. A. 637, 13 Am. St. Rep. 739; Tindal v. Neal, 59 S. C. 15, 36 S. E. 1004.

For other cases, see Partition, Cent. Dig. § 60; Dec. Dig. ⟸19.]

[*Wills* ⟸636.]

[Cited in Gourdin v. Deas, 27 S. C. 485, 4 S. E. 64, to the point that as to opening vested remainders a different rule applies where child dying (before period of distribution) has left children than when he has left no issue.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1514–1518; Dec. Dig. ⟸636.]

[This case is also cited in Perdrian v. Wells, 5 Rich. Eq. 29, 30; Barksdale v. Macbeth, 7 Rich. Eq. 134; Brown v. McCall, 44 S. C. 515, 22 S. E. 823; Tindal v. Neal, 59 S. C. 16, 36 S. E. 1004, and distinguished therefrom.]

This case was heard at Lancaster, July 1830. The following decree of the Chancellor then pronounced, presents the facts and the questions made for the decision of the Court:

De Saussure, Chancellor. This is a bill for the partition of an estate devised to the complainants, and the defendant.

It appears that George Hicklin having a wife, but no children, made and duly executed his last will and testament, on ——— day December, 1823, by which he devised and bequeathed his whole estate to his wife for life, and at her death to the complainants and defendants, who were his nephews and nieces, subject to two small legacies amounting to two hundred dollars. The words of the will applicable to the question under consideration are as follows: "And all the balance of said estate real and personal, it is my will and desire, that it be equally divided between Henry and Elizabeth Cole's children, and Alexander Creyon, viz. the offspring of said Elizabeth Cole's body, and no other—to be retained in the hands of my executors and executrix until the age of 21 years, or days of marriage, which shall first happen; then to be made over to them lawfully, each legatee receiving their just quota of the same, which I will and bequeath to them and their heirs forever." The testator

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had two nieces—Eliza*beth, married to Henry Cole, and Sarah, the wife of ——— Creyon. The complainants are the children of Elizabeth Cole, and the defendant is the only son of Sarah Creyon.

George Hicklin died leaving his said last will and testament in full force, his wife, and said nieces, Elizabeth Cole and Sarah Creyon, him surviving—Henry Cole, the husband of Elizabeth, is also alive. The complainants are their children. The eldest of them is about twelve years of age; and the defendant Alexander Creyon of the age of seventeen years. The widow of the testator having lately died, this bill was filed for partition of the estate. The complainants claim that the estate should be divided equally between them and their cousin Alexander Creyon, so that each shall have an equal share thereof. The defendant claims a moiety of the estate. The question arises out of the wording of the will. It is contended for the defendant, Alexander Creyon, that he is entitled to a moiety of the estate by the terms of the will, taken in conjunction with the relative situation of the devisees and legatees. On examination of the disposing words of the will, without regarding technical rules, they would seem obviously to import, that the children of Elizabeth Cole and Alexander Creyon, are to take the estate in equal shares. But it is argued for the defendant that this could not be the meaning and intention of the testator, because by the provisions of the will, the situation of the defendant Alexander Creyon, is entirely different from that of the children of Elizabeth Cole, in these particulars. He is designated by name—the others are to take as the children of Elizabeth Cole; and the delivery of their share is postponed to a future day, the day of marriage or attaining 21 years of age, and Elizabeth Cole may have more children who will be entitled to shares, besides these born at the death of the testator; and that this involves difficulties in the tenure of the estates, which ought to lead to a different construction. I have considered the able argument furnished by the counsel on this point. But I am not satisfied by it. It does not appear to me that the plain and obvious import of the disposing words of the will should be changed by a consideration of the difficulties which may grow out of the de-

cision giving effect to that obvious import.

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*If the meaning of the disposing words of the will was doubtful or equivocal, then the argument ab convenienti would apply, and might lead to a contrary construction. It was further argued for the defendant, that the Court might be guided in the construction of the present will, by the provisions of a former will by which the testator devised a moiety of his estate to his niece Elizabeth Cole, and the other moiety to his niece Mrs. Creyon. It is very dangerous to travel out of the will under consideration, for lights to guide us in the construction of it. Those lights would often be delusive. The Courts have been so aware of this danger, that it is only in a few and most peculiar cases that they will receive parol evidence to assist or guide in the construction of wills. Such as to explain the person or thing intended. I do not think that this is one of the cases in which parol evidence is receivable—I permitted the parol evidence to be taken down for consideration. It consisted of two parts—first, that by a former will the testator gave half his estate to one of his nieces and half to the other, and that on Alexander Creyon's mother marrying contrary to his wishes, he made the new will. This, as far as it goes, would add nothing to defendant's claim, but rather the contrary.—One of the witnesses however, went on to say that he drew the will by the directions of the testator, and that he was directed to draw it so that one half of the estate should go to Alexander Creyon, and the other half to the children of Henry and Elizabeth Cole; and he believed in using the words he did, he was obeying the direction of testator, and that if they do not produce that effect it is owing to his mistake. This evidence certainly goes directly to the point, and if received and allowed to control the will, would establish the right of the defendant to a moiety of the estate. But I am not at liberty to receive and allow such testimony. It would put every will at the mercy of witnesses who might be purchased and perjured; and although there might be no danger in this case (and none has been suggested) the precedent would be most dangerous. I am obliged therefore to exclude this testimony. The will then must be interpreted by its own words, and it seems to me they carry the whole estate

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to be divided equally *among Alexander Creyon and the children of Elizabeth Cole born prior to the time fixed for the division—when the eldest of them attains 21 years of age, or day of marriage—under this view of the case it is obvious that no partition can now be made. The application is premature. The complainants are therefore out of Court, and the bill must be dismissed. The costs to be paid out of the estate.

From this decree the plaintiffs appealed, because the Chancellor refused partition; and the defendant also appealed, on the ground that the Chancellor erred in deciding that he was only entitled to take equally with the plaintiffs, whereas, he contended he was entitled to one half of the estate.

Williams, on the part of the plaintiffs, submitted the case on the brief, without argument.

Blanding, for the defendant. The only question in the case is—whether the offspring of Elizabeth Cole, as a class take collectively one half of their testator's estate, or individually each one-fifth.

This depends on the construction to be given to the words "children" and "offspring." The defendant contends that they mean a class of unascertained individuals; and that A. Creyon takes as an ascertained individual.

That there was a life estate to expire before it could be ascertained who were to take, as the children of Elizabeth Cole, is the important feature of the will, and on it the defendant rests his claim to one half of the estate.

Alexander Creyon was a person certain, and his remainder was to vest in possession, on a fixed and certain event.—He therefore took a present interest in a vested remainder. The children of Mrs. Cole were unascertained: who they would be at the termination of the life estate, was wholly uncertain and contingent.—Their estate was, therefore, a contingent remainder—2 Prest. 35.

The first position requires no proof. The second can be supported by authorities. Where a devise or bequest is to the children of a person, and no time is fixed for the division or distribution, only such children as are in being at the testator's death can take. But where the distribution is postponed to a definite period, as to the death of another person, then all take who are in being at that

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*period, or the death of that other person. In Myers v. Myers, 2 M'C. Ch. 257, Judge Nott has collected and reviewed all the cases on this point, and he says that, "where legacies are given to a class of individuals, as to the children of B. to be divided among them at the death of C., any child, who can entitle himself under the description at the time of distributing the fund, may claim a part of it—as well the children living at the period of distribution although not born till after the testator's death, as those born before, and living at the happening of the event." And the same learned Judge adopts the principle of the case of Stanley v. Baker, Moore's Rep. 220, that "a bequest to the children of a living person, vests in all the children in esse at the termination of the life estate on which it is limited."

It is then clear, that the estate could not vest in any child of Elizabeth Cole, until the death of the testator's widow. In Alexander

Creyon, the estate vested on the death of the testator, subject to the life estate of his widow.

This being established, it next will be attempted to prove, that where classes of persons are to take, and one can take presently, and the other must take on a future contingency, each class must, from necessity, be tenants in common with the other, and not joint tenants; and that each takes a moiety.

The fact that they cannot take at one and the same time, excludes one of the unities essential to a joint-tenancy.—This needs no authority to support it; but see 5 Co. 8; 1 T. R. 630; 2 Prest. 20. Creyon and Cole's children, therefore, could not take as joint-tenants, but as tenants in common. It then remains to be proved, that taking as classes and as tenants in common, they take moieties.

Mr. Preston, vol. 2, p. 21, says, "a gift to the right heirs of two persons who are dead, will be a gift to them as joint-tenants and per capita, and not per stirpes. But a gift to the right heirs of two persons who are living, creates a tenancy in common, and the heirs of each person must take a moiety. So by a gift to the heirs of three persons, of

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*whom two are dead and one is living—it seems, the heirs of the person who is living, would take one-third part separately to themselves, and the heirs of the two deceased persons would be joint-tenants of the two remaining third parts. But if the gift be to the right heirs of two persons who are living and of one who is dead, the heirs of the different persons collectively, would take third parts." From these principles, the conclusion is deduced, that a bequest to an ascertained individual, and to a class of unascertained individuals, vests one half in the said individual, and the other half in the individuals of the class collectively when they are ascertained.

Nemo est heres viventis, is the principle of the distinction in the cases put by Mr. Preston. So here, that no one can be ascertained to be the offspring of Mrs. Cole, according to the meaning of this will, till the death of the widow, should decide this case.

There are adjudged cases, which at first blush, would seem to settle the doctrine against the defendant; but a distinction can be shewn between them and this.

In Butler v. Stratton, 3 Br. Ch. Rep. 367, the bequest was "to divide equally between A. B. and the children of C." and it was held that the children of C. took as if named individually in the will. In that case, it is to be observed, that a present interest was given, and no children could take but such as were in esse at the testator's death.—They were a class of ascertained individuals, as much so as if they had been named in the will.

In Blackler v. Webb, 2 Pr. Wms. 383, there was a present bequest equally to the testator's son John, to his son Peter's children, and his daughter, Mrs. Webb's children.—Mrs. Webb was alive. Lord Chancellor King first inclined to the opinion, that the grand children would take per stirpes, but finally decided that they would take per capita, as if all the grand children's names had been inserted in the will. Now it is observable, that all their names could have been so inserted; because, being a gift to take effect at the testator's death, they were all ascertained.—That does not then come up to our case

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—and there the *Chancellor doubted. But a strange reason is given for the Chancellor's change of opinion. It was, that Mrs. Webb was alive, and therefore, that the children could not represent her, and could not take per stirpes. Had she been dead, they would not have represented her in that estate, and the Chancellor changed his opinion on a verbal distinction, without a difference.

In the case of Philips v. Garth, 3 Brown Ch. 64, Judge Buller for the Chancellor decided, that under a bequest "to next of kin, equally to be divided, share and share alike," a brother, a nephew, and the nieces of a deceased brother, took per capita, and not per stirpes. Buller said he was bound by the authority of Blackler v. Webb, although he thought they ought to have taken per stirpes. This case too, was one where a present interest passed, and all the legatees were in esse, and ascertained at the testator's death.

So, the same decision was made in Northey v. Strange, 1 Pr. Wms. 341; and Weld v. Bradberry, 2 Vern. 705, in which cases, under a bequest to children and grand-children equally, all took per capita.

In all these cases there was no legatee to come into being, or to be ascertained—they all might have been named in the will, and took as if they had been so named. But in our case, the children were not ascertained—they could not have been named in the will, without changing the entire construction, and they must therefore take among themselves collectively, a moiety.

If Lord King doubted, and Buller thought his decision wrong, in the case where ascertained individuals were included in nomen collectivum: there can be no reason for not rejecting the rule, in a case where the designation, from necessity, must mean a class, and not individuals.

This construction is one which will, in ninety-nine cases out of a hundred, accord with the testator's intention.—Wills are the result of natural affection or friendship.—The object is always a person in being; and the children unborn, are provided for only on account of the testator's affection or friendship for the parent. This would uniformly lead to an appropriation by classes;

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and exclude *the idea, that the amount of interest which each should take, should depend

on the fecundity of the different objects of the testator's bounty.

But suppose the construction to be a doubtful one. It is an ambiguity of intention, which may possibly be removed by parol, and if it can the evidence is full as to the real intention. Mr. Roberts, in his Treatise on Wills, 470, says, "It seems to be a settled practice of the Courts, that if they can, from the lights furnished in the instrument itself, gain some foundation of conjectural inference, they will look out of the instrument, to the situation of the parties concerned;" and again, "If matter can be collected from the general context of the instrument, the approach to an ambiguity patent, in a particular clause, will not exclude the admission of parol evidence, provided it tends to confirm the collective inference from the context." Now the conjectural inference which we collect from this will, is, that by offspring here, was meant a class of individuals, who were the issue of one niece, and intended collectively to take an equal share with A. Creyon, the son of another niece. Had the testator intended otherwise, he would have named the individuals he intended. But he could not name them—for he intended that her after-born children should take. But it could hardly be supposed that he would have intended, that while he left open for admission of all Mrs. Cole's children, born up to the time of distribution, yet that he intended that A. Creyon, whom he specially named, should have his share enhanced or diminished, by the deaths or births of the other family.—Such an intention will not be supposed unless it is expressed in unambiguous terms. But in this will, "children" do mean a class; and whether he intended that class should take an equal share with Creyon, or that each individual of that class should take an equal share with him, is doubtful. There may be a strong inference, that the equal share was only intended for the class; and to strengthen this inference, the parol testimony is offered.

In Ulrich v. Litchfield, 2 Atk. 372, the ambiguity was on the face of the instrument;

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but there was a bearing in *the will that assisted the sense, and parol evidence was received to decide the preponderance. Here the uncertainty is, whether Mrs. Cole's "offspring," were intended to take individually or as a class—and the parol evidence was given to decide which. It is here to be observed, that the real question is, do they take individually, or as a class? not, whether they take per capita or per stirpes. That doubt can only arise, when the question is, do they take sui juris, or in jure representationis? Under this will they take sui juris, and the mother is only named as the designation of the class, or of the individuals of which it is composed, and the word lends no light as to which was meant.

Where there are words used in a will, that are equally susceptible of two distinct meanings, shall both be rejected? or shall extrinsic evidence be admitted, to shew which was intended? Suppose the word "let," should be used in an instrument, so as, that if the clause is taken by itself, it is uncertain whether it mean to permit or to hinder. How is the difficulty to be solved? Look to the context—that furnishes some aid; but is not entirely conclusive. Shall not the preponderance be decided by parol? Is it not precisely the case, where a will is made in favor of J. A., and there are two J. A.s, and parol evidence is received to shew which?

Here the will, all taken together, shews that the word "offspring," means a class of persons, who will be in esse at the death of the testator's widow, and the inference is, that they are to take as a class, and we aid that inference by parol.

HARPER, J. I am inclined to think the defendant's counsel correct in his conclusion, that if there be a bequest to an ascertained individual and to a class of unascertained individuals, (to be ascertained at any future time after the death of the testator) it vests one half in the said individual, and the other half in the individuals of the class collectively when they are ascertained. The cases sufficiently settle that if there be a bequest to the children of A. and the children of B. or to A. and the children of B. they take per capita. This rule however is entirely arbitrary, and

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I am not sure that if a *different rule had been adopted, the intention of testators would not have been more frequently effected. In this particular case, Independently of the parol testimony, I think that we should be most likely to comply with the intention by a different construction. The rule being settled however, must be adhered to; but I think the authorities relied on in the argument of counsel, (to which I refer) go far to make out an exception, when the titles of the devisees are to accrue at different times. In addition to the authorities quoted, I may also refer to that from Samme's case, 13 Co. 57. "And therefore if a grant be made by deed to one man for term of life, the remainder to the right heirs of A. and B. in fee, and A. hath issue and dieth, and afterwards B. hath issue and dieth, and then the tenant for life dieth; in that case, the heirs of A. and B. are not joint tenants, nor shall join in a scire facias to execute the fine; (24 E. 3—Joinder in action, 10,) because, that although the remainder be limited by one fine and by joint words, yet because that by the death of A. the remainder as to the moiety vested in his heir, and by the death of B. the remainder vested in his heir, at several times, they cannot be joint tenants." With respect to this authority, it may be observed that it was the vesting in interest, and not the vesting in possession, which prevented the joint tenancy. At the

death of the tenant for life, when the property vested in possession, A. and B. being both dead, their heirs were ascertained, and there was nothing to prevent their taking jointly.

In the present case, I think it cannot be doubted that the remainder to the defendant Creyon was vested in interest immediately on the death of the testator. Fearne defines the fourth class of contingent remainders to be "where the person to whom the remainder is limited is not yet ascertained, or not yet in being." Certainly Alexander Creyon, named in the will, was a person ascertained and in being, and might have disposed of his remainder, or if he had died during the continuance of the life estate, must have transmitted his interest to his representatives. But who the children of Elizabeth Cole should be at the death of testator's widow, was uncertain and unascertained. It might have happened that all the children living at the time of the tes-

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tator's death had *died and others had been born before the termination of the life estate. It is certainly settled that if an estate be given to a class of persons, as to the children of A. and B. after a life estate; or if the division be postponed, as until the eldest shall arrive at the age of 21, all the children born before the event happens, will be entitled. It has been supposed that in such case the property should be considered vested in the children living at the time of testator's death, so that in case of their death, they should transmit it to their representatives, and only so far liable to be divested, as that the estate should open and let in children born before the vesting in possession; and accordingly in the case of Devisme and Mello, 1 Br. C. C. 537, where £4,000 were given to L. for life, remainder to the children of W., and one of the children of W. living at the death of the testator died during the continuance of the life estate, it was held that her representative was entitled. But the point seems not to have been particularly considered, and I think the decision is opposed to the current of authorities and to the reason and intention. In Gilmore v. Severn, 1 Br. C. C. 581, where a legacy was given to the children of a sister, to be paid them as they respectively attained the age of 21, it is said, that "as none were entitled to a vested interest, the Court ordered the money to be paid into bank." This however may have been merely an expression of the Reporter. In Viner v. Francis, 2 Br. C. C. 658, where a legacy was given to children of a sister, and one of them died in the testator's life time, it was contended that that child's portion of the legacy had lapsed; but it was held that the testator must have meant those who should be children at the time of his death. Now if a legacy be given expressly at a future period, subsequent to testator's death, there seems to be the same or a stronger reason for saying that he must have meant those who should be children at the time his gift is to take effect. In Godfrey v. Davis, 6 Ves. 49, the Master of the Rolls expresses himself thus, "Where the gift is to all the children of A. at 21, if there is no estate for life, it will vest in all the children coming into existence, till one attains the age of 21. Then that one has a right to claim a share; admitting into participation

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all the children then ex*isting: so if it is to a person for life, and after the death of that person, then to the children of A. the intention is marked, that until the death of the person entitled for life, no interest vests." In Hughes v. Hughes, 16. Ves. 256, where the devise was to trustees, to maintain the children of testator's three daughters, until the younger should attain the age of 21, and then to distribute among them; one of the children who was living at the death of the testator died before the period of distribution, and it was held that her representative was not entitled. In this case however, some stress was laid on the circumstance that the testator had provided expressly in his will, that if any of the children should die leaving children, the children should stand in the place of the parent. The cases are not so explicit as could be wished, and so far as I have been able to discover, I cannot say that there is any distinct rule on the subject. I think it however the more natural import of the words, when the bequest is to children at the death of the tenant for life, that those who then answer the description of children, should be meant. The intention too, will, I think, in general be best complied with by this construction. When property is thus given to children, and one dies before the period of distribution, it will commonly happen that his brothers and sisters will be his next of kin, and then it will be immaterial whether they take as legatees or as next of kin of the deceased. But it may happen that there will be a father or mother to take along with them; and when the testator has passed over the parent and given the whole to the children, it would seem to defeat his intention that the parent should at the period of distribution, take any portion as next of kin. When the devise is of real estate in England, one brother would, take the whole of the deceased's portion as heir at law; and this would seem to defeat the intention that all the children should take equally. There would be reason for making a different construction, and probably a different one ought to be made, when the child dying has left children; and this also to effectuate the intention: for it cannot be supposed that the testator intended the object of his bounty not to be capable of transmitting to his children so as to provide for them.

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*The testator by his will, after the bequest to complainants and defendant, directs

the property to be retained in the hands of his executor and executrix until they attain the age of twenty one years or day of marriage, which shall first happen. According to the construction we have made, one moiety is given to the defendant severally. To this he will be entitled when he attains the age of twenty one. The other moiety is given to the complainants as a class. This they will be entitled to distribute among the children then in esse, when the eldest shall attain the age of twenty one.

The application for partition was premature. The Chancellor states that at the time of the decree, the eldest of the complainants was about the age of twelve years and the defendant about seventeen. The bill is also informal, in that the surviving executor is only a party in the character of next friend of the complainants. Yet the parties were entitled to come into Court to have their rights ascertained. We are unwilling that the bill should be dismissed, giving occasion for further expense and litigation.

It is therefore Ordered and decreed, that the bill be retained; with liberty to the defendant, when he shall have attained the age of twenty one, to apply to the Court by petition stating that fact, and praying partition and distribution; giving proper notice to the complainants and the executor Henry Cole; and that upon such application one moiety of the estate real and personal be apportioned and allotted to him; and with like liberty to the complainants, when the eldest of them shall have attained the age of twenty one, to apply for partition and distribution among themselves, or such children of Henry and Elizabeth Cole as may then be in existence.

JOHNSON and O'NEALL, JJ., concurred.

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† Hill, Eq. *324

*WM. T. SPANN and ELIZABETH, His Wife, v. TYRE JENNINGS, CHS. G. SPANN, and Others.

(Columbia. June, 1833.)

[*Trusts* ⇐61.]

Conveyance in trust for the separate use of the grantee's daughter S. during her life, remainder to such child or children of S. "as may be then living, or who shall marry, or attain twenty one years," the trust was executed in the children of S. on her death, and the legal estate then vested in them.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83–87; Dec. Dig. ⇐61.]

[*Husband and Wife* ⇐8.]

Where the wife, being sole next of kin to deceased infants, and entitled to their whole estate, and there being no debts, before her marriage took possession of the estate without administration, and the husband, after marriage had alike possession: *Held*, that the marital rights of the husband attached on the personal estate of the deceased children, and it vested in him.

[Ed. Note.—Cited in Verdier v. Hyrne, 4 Strob. 168; Spann v. Stewart, 1 Hill, Eq. 333; Huson v. Wallace, 1 Rich. Eq. 23; Markley v. Singletary, 11 Rich. Eq. 403.

For other cases, see Husband and Wife, Cent. Dig. § 26; Dec. Dig. ⇐8.]

[This case is also cited and explained in Fripp v. Fripp, Rice, Eq. 84.]

This case came to a hearing before Chancellor Johnston, at Sumter, Feb. 1833, on the bill answers and exhibits, and the following statement of facts agreed to by the parties:

Ephraim Adams, the grandfather of the plaintiff Elizabeth, on the 2d of January 1817, conveyed certain slaves mentioned in the conveyance exhibited with the bill, to Daniel Wade, "in trust to and for the sole and separate use and benefit of his daughter Sarah O'Quin, during her natural life, and notwithstanding her coverture &c. that the same should not be liable to the debts of her then or any future husband, and from and after her death, to the use of such child or children of his said daughter as may then be living, or who shall marry, or attain the age of twenty one years, lawfully begotten by her then husband Daniel O'Quin, junior." Mrs. O'Quin died in 1818, leaving three children by O'Quin, of whom the plaintiff Elizabeth is one; the other two died shortly after their mother, minors unmarried, without issue and intestate, and no one has yet administered on their estates. The plaintiff Elizabeth went into the possession of these slaves before her marriage with James L. Spann, and retained possession until that marriage, which took place in 1824. He retained possession from the marriage until his death in 1827. The main question argued in the case, was whether the marital rights of James L. Spann attached on the slaves so as to pass them under his will.

The Chancellor decreed, that the trust in these slaves was executed in the children of Sarah O'Quin on her death, and Mrs. Spann's third part thereof vested in her husband, he having had them in possession during coverture: and that the other two-thirds vested in the children now deceased, and are subject to administration, and therefore did not vest in J. L. Spann, the husband.

From this decree the complainants appeal, because the Chancellor decreed one third of these slaves to the defendants; and the defendants appeal, because he did not decree them the whole.

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*HARPER, J. We concur with the Chancellor, on all the points involved in this case, except as to the marital rights of James L. Spann not having attached on the shares of the children of Sarah O'Quin, who died infants, leaving the plaintiff, Elizabeth, their sole next of kin, and entitled to their whole

estates. On that point we think the decree must be modified on the authority of the case of Marsh v. Nail, [Rich. Eq. Cas. 115] decided by this Court at Columbia, January, 1832. In that case the husband had taken possession, without administration, of the estate to which his wife was exclusively entitled, all the debts being paid, or there being no debts; and it was held that the marital rights had attached. In this case it was agreed that the children died at a very early age, and could have owed no debts. James L. Spann was entitled to the administration in the name of his wife. But to what purpose should he have administered? There were no debts to pay, and no distribution to be made. Was it simply that he might take possession in his own right? That would have been merely going through a nugatory ceremony.—Or if any other person had administered, could the property have been recovered from him? No—by going into Equity and shewing that there were no debts, and that his wife was exclusively entitled, a recovery at law would have been restrained.(a) In every point of view, then, administration would have been superfluous. He took possession of the two-thirds, derived from the deceased children, just as he did of the rest of his wife's property, and we think his marital rights must be held to have attached on them.

The decree of the Chancellor is modified accordingly.

JOHNSON & O'NEALL, JJ., concurred.

Blanding, for the plaintiffs.
Mayrant, contra.

(a) If another administering could recover the property at law from the husband, unless restrained by injunction, (which seems to be admitted) does it not prove that the legal estate had not vested in the husband, and consequently that the marital rights had not attached? See Elders v. Vauters, 4 Desaus. Eq. Rep. 155; Farley v. Farley, 1 McC. Eq. 514; Gregory v. Forrester, 1 McC. Eq. 324; Bradford v. Felder, 2 McC. Eq. 170.

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1 Hill, Eq. *326

*WM. SPANN v. WM. STEWART, SARAH G. WRIGHT, and Others.

(Columbia. June, 1833.)

[*Executors and Administrators* ⇐292; *Husband and Wife* ⇐59.]

Where administration was granted to husband and wife in right of the wife, and the administration bond was signed by both, the wife is not bound by the bond; and after the husband's death she is not liable for his devastavit during the administration; & so much of the estate as remains unchanged is subject to partition between the wife and the other distributees, the wife's interest therein surviving to her. But as regards such part of the estate as the husband had wasted, the wife is not entitled to a share thereof—and on a bill filed by the security to the administration bond, against whom a judgment at law had been obtained for the whole estate, relief was granted to this extent, and credit given him on the judgment for her share of so much of the estate as had been wasted.

[Ed. Note.—Cited in Durant v. Salley, 3 Strob. Eq. 160; Lewis v. Price, 3 Rich. Eq. 197; Renwick v. Smith, 11 S. C. 308.

For other cases, see Executors and Administrators, Cent. Dig. § 1167½; Dec. Dig. ⇐292; Husband and Wife, Cent. Dig. § 277; Dec. Dig. ⇐59.]

This case was heard before Chancellor Johnston, at Sumter, February, 1833. It presented the following facts.—Sarah E. Screven married Dr. Thomas W. Wright, prior to 1824. About that year her mother, A. Screven, died intestate, leaving Sarah E. Wright her only surviving child, but leaving grand children, and possessed of a considerable personal estate, consisting of Bank stock, slaves, furniture, &c., to one-third of which Sarah E. Wright was entitled, as distributee of her mother. On the 9th day of January, 1824, letters of administration were granted to her and her husband, and the administration bond was signed by her as well as her husband, with the plaintiff as security. —Wright, in February, 1824, sold the bank stock, furniture, &c., and received the money, which amounted to $3,800 including interest. Dr. Wright died about the year 1825, intestate, and on the 17th February, 1826, administration de bonis non was granted to the defendant, Stewart. He obtained a decree against J. Mayrant, jun., administrator of Wright, for the whole of A. Screven's estate, and after exhausting Wright's estate, a considerable balance remained unsatisfied. To recover this balance, suit was brought at law, against Spann, the security of the administration bond, and judgment obtained, on the plea of non est factum. —Before any writ of inquiry was executed, this bill was filed to restrain Stewart from proceeding at law, and to subject Sarah E. Wright to the demand, in exoneration of her security.

On the hearing, the plaintiff's counsel contended,

1. That Sarah E. Wright was bound for all acts done during coverture, respecting the administration, whether done by herself or her husband, and to indemnify the plaintiff to the whole extent, he being her security: or, in other words, that the plaintiff was entitled to credit, on the decree against the administrator of Wright, to the extent of Mrs. Wright's distributive share of Mrs. Screven's

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estate; *and that a decree should go against her for the balance due on the administration, after exhausting Dr. Wright's estate.

2. If not entitled to a decree for this, then, that the plaintiff should be indemnified by crediting or enjoining the administrator's judgment, to an amount equal to the entire distributive share of Mrs. Wright, whether reduced into possession by the husband, or remaining in action at his death.

3. Or, that he should be indemnified, by credit or injunction, for so much of her share as the husband had reduced under his marital rights; and that this extended to one-third of all the personal estate of the intestate, which he had converted into actual cash, or received in negro hire.

4. Or, failing in this, that his indemnity should extend to all the interest which had accrued on one-third of the cash received by Dr. Wright, and the hire of the slaves of the intestate during coverture.

The Chancellor decreed against all these claims, and dismissed the bill as to Sarah E. Wright, but retained it against Stewart administrator de bonis non, till an account.

The defendant appealed from this decision, and now moves this Court for a reversal of the decree, discharging Sarah E. Wright; and relies on the same grounds he took on the Circuit.

Blanding, for the appellant, insisted on the following positions. 1st. That Mrs. Wright is bound by the administration bond. 2d. That if she is not bound by the bond, she is liable for the devastavits of that administration. 3d. That if not so bound, her third part of the estate had been converted by her husband to his own use by her consent, and she has no equity to call it back. 4th. The husband having received the interest and hire of her estate while he supported her, she can not make his estate liable for the same.

1. Mrs. Wright as only daughter of the intestate was exclusively entitled to the administration. 31 Ed. 3 C. 11, 3 Bac. Ab. 54, tit. Ex'or. & Adm'or. F. Raym. 498; P. L. 492, Sec. 16; and this right is so perfect that if the Ordinary refuse to grant it, a Mandamus lies, 4 Bacon, Ab. tit. Mandamus,

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*D. Having the right she had the legal capacity with the consent of her husband to administer. 2 Roper Husb. and Wife, 97; and this consent being given, her right and legal capacity became perfect. It is admitted that the common law rule is that a femme covert cannot bind herself by bond; but the Act of 1789 P. L. 493, declares that every administrator shall enter into bond with security, and differs herein from the British statute, 22 and 23 Car. 2 C. 10, 3 Bac. Ab. 46, Exor. and Admr., which merely requires that the Ordinary "shall take sufficient bond with security," but does not direct from whom they shall be taken; and hence it has been decided that the husband shall take the letters in the name of his wife, but give the bond himself. The husband has no right but through her, and if she refuse to administer, he cannot, and the right passes to the next of kin. Under our Act which requires every administrator to enter into the bond, either there can be no administration by the wife, although by law entitled to it and legally competent to act, or she must join in the bond. The last clause of the 16th Section of the Act of 1789 proves that it was not intended to deprive a femme covert of administration, for it provides, that where a widow administratrix marries, her letters may be revoked and one of the next of kin joined with her. A femme covert then, since the Act of 1789, may administer, and it follows that she may give a bond. And such has been the practice throughout the State, but especially in Charleston, where the Ordinary's Office was first established, and filled by an eminent lawyer.

The Chancellor however, says, that the argument proves too much, that infants and idiots may administer. With deference be it said, there is a distinction in the cases—for an infant or idiot has not the legal capacity to administer, 3 Bacon Ab. 14, Ex'or and Adm'or, B. 3. Nor is there any thing unreasonable in requiring a married woman to join in the bond, for she is always entitled to a part of the estate, and the question had been agitated, whether she was not liable for the devastavit of her husband—whether the letters were granted before or after marriage. The act settled the question, and at the same time gave the devastavit, which was but a tort, before the

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character of a specialty. And a good *reason for requiring her to join in the bond, is, that thereby the security is protected from being called on by her, for her estate wasted by her husband, with her own consent: and the bond, so far as the security is concerned, becomes the act by which her interest in the estate is vested in her husband, and cuts up the enquiry where there was that legal reduction into possession by which the marital rights would attach.

2. But suppose the wife's bond void—is she bound for the devastavits of her husband, who administered in her right with her consent? In this view of the case, the Court must reform the bond by considering her name as stricken out of it, and the letters of administration, by striking out his. For if we are governed by the law of England, the letters should have been granted to her, and the bond given by him. The reason why she is liable for her husband's devastavits is obvious. On his death she is sole administratrix; persons having claims against the estate must sue her alone; and who would pretend that she could plead plene administravit, that her husband, as her agent in the administration, had consumed the whole estate? If the demands are legal ones, she must be charged at law for the waste of her husband; if they are equitable, she must be charged in Equity, as administratrix. Beyond this, it is admitted, the legal and equitable creditors have

a further claim: i. e. if she be insolvent, her husband's estate may be charged, in Equity, (not at law) with their demands, so far as his estate has been benefitted by the estate he has rendered insolvent. This is the clear legal reasoning, and it is supported by authority. See the whole doctrine stated in 1 Roper's Husband & Wife, 193.

No one can doubt as to her liability to creditors, whose claims are at law. But the complainant here represents the distributees of Mrs. Screven, and, it is said, must come into Equity, and that there a differeut rule may prevail.—She survived her husband—administration had been granted with her consent—it survived, and she could not renounce it. Had the distributees filed a bill against her alone, charging her with the whole estate, could

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she reply that *the husband, acting in her right, had destroyed the whole estate, and that they must look to his estate? Suppose to this it is answered, that his estate is insolvent, are the distributees without redress? This is the case before the Court. The security to the administration bond has the right to stand in the place of the distributees, and whomsoever they can charge he can charge. This doctrine is laid down in Adair v. Mann, 1 Sch. & Lef. 257; 1 Rop. Husb. & Wife, 194.

But it is said, that there is a distinction, and but three classes of cases must be regarded: 1st, where the wife administered dum sola. 2nd. Where the right accrued to her dum sola, and administration was granted during coverture. 3d. Where the right and administration both arose under coverture. In the first case, no one ever doubted she was bound by the bond, and consequently bound to relieve her securities. In the two last cases, the distinction is without a difference—see Roper's Husband & Wife, 193, 194. The case of Beynon v. Collins, 2 Brown C. C. 323, merely settled the question, whether Collins the trnstee in the settlement, having sold the settled estate and paid the money over to the husband, was liable to the wife on the husband's insolvency. So that all that Lord Thurlow said on this point is extra-judicial: or, as Lord Redesdale calls it, "a sort of dictum." But this dictum is in accordance with Lord Redesdale's opinion, and that laid down by Roper, who says that if her administration by the husband is without the consent of the wife, and she does intermeddle, on his death she may renounce. Bellew v. Scott, 1 Strange 440, a return that the husband and wife wasted as executor and executrix was held good, and the judgment was against both. All the cases shew that she is administratrix during her husband's lifetime, and may continue so, whether she can renounce or not. What would be the effect of a renunciation? Had a suit been brought in the husband's lifetime, the judgment would have been against both. Her renunciation, therefore, after his death, can have no other effect than to release her from the administration, not from acts already done.

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*3. Has Mrs. Wright's share of Mrs. Screven's estate passed into the hands of her husband, with her consent, so that she cannot call it back from his security?

Spann was no party to any of the suits in which Mrs. Wright established her rights against her husband's estate, and as against his security, the case is the same as if for the first time she was now making her claim; and the plaintiff is entitled to all the equities of the administration of her husband, and the case will be argued as if she was now plaintiff against that administrator. He administered with her consent, and before the act of 1824, which renders void a sale by an administrator unless by the order of the Ordinary, he converted all the estate by actual sale, into cash, except the slaves, and their hire he received, and there were no debts to be paid; and this constitutes her claim against his estate. Can she call back her share of his estate from his administration? If she can do it now, she could have demanded a settlement against him in his lifetime, and if it is an equity now, it was an equity then. Murray v. Elibank, 10 Ves. 90, the Lord Chancellor says, "the husband, when he can, is entitled to lay hold of the wife's property, and this Court will not interfere." And Mr. Clancy, (page 122) says "if he has once acquired the possession of the property, although it should be of an equitable nature, this Court will leave him in the full enjoyment of it." So that the wife's claim only attaches on that part of her personal estate which the husband can acquire in no other way than by suit in Equity. Now could not Wright have held his wife's third part of this money? No suit in Equity was necessary, and in such suit he must have been both plaintiff and defendant. But again.—If the husband and wife, being administrators, and he does an act which amounts to a devastavit, it vests the legal estate in him.— So that Mrs. Wright, as administratrix, could not now recover the property. See Jones v. M'Neil, 1 Hill, 96; 1 Bos. & Pul. 293. In Arnold v. Bidgood, Cro. Jac. 318, the husband was possessed of a lease in right of his wife, executrix, which he sold, and it was held, that it passed to the grantee. See also 2 Black. Rep. 801. And so if the husband alter the nature of the debt to the wife execu-

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*trix, he alone may bring an action to recover it. See the cases collected in 1 Roper, Husband & Wife, 186. The debt due in this case was Bank stock, which the husband converted into money.

4. The interest on Mrs. Wright's third part

of the estate, should be discounted. If she had filed a bill for a settlement, would the Court have ordered the interest to be settled? 1 Roper's Husband & Wife, 272.

C. & W. Mayrant, contra, as to the first ground, contended, that a femme covert cannot execute a deed, and that her contracts are void in Law and Equity; and cited and relied on the case of Edwards v. Spann, decided by this Court, in 1831; and 22 Car. 2, c. 10; 3 Bacon, Tit. Ex'ors. & Adm'rs. p. 9; John v. John, 11 Ves. 531; 3 Bl. Rep. 620. As regards the liability of the wife, for the devastavit of the husband, they argued, that the wife could not assent to the administration, and that she is not liable for a devastavit unless she continues the administration after her husband's death, 1 Sch. & Lef. 266. And on the question of reduction into possession, they insisted, that the decree against Wright's administrator fixing the liability of his estate, concludes this question. On this question, they cited and relied on 2 M'C. Ch. Rep. 433; 3 Eq. Rep. 160.

O'NEALL, J. We concur in opinion with the Chancellor, that the defendant Sarah E. Wright is not bound by the administration bond executed by her during coverture, and that she is not liable to account to the complainant for any devastavit committed by her husband Dr. Wright in administering the estate of Mrs. Screven. The case of Edwards v. Spann, not reported, decided by this Court May Term 1831, is an authority directly in support of the Chancellor's decision. We also agree with the Chancellor that the whole distributive share of Mrs. Wright in the estate of her mother, could not be considered as reduced into the possession of her husband during coverture. So much of the property of Mrs. Screven at the death of Dr.

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Wright as remained unchanged, (a) was *liable to be partitioned between Mrs. Wright and the other distributees; her share or interest in it, was therefore an equitable chose in action which survived to her. The cases referred to by the Chancellor, and the cases of Schuyler v. Hoyle, 5 John C. R. 196, Blount v. Bestland, 5 Ves. 515, Wildman v. Wildman, 9 Ves. 174, and Baker v. Hall, 12 Ves. 497, fully sustain this position and conclusion.

But we differ with the Chancellor, in his conclusion that the complainant, the security of the administrator, is liable for the share of Mrs. Wright of that portion of her mother's estate which was wasted and consumed by her husband. It seems to me that when the estate of an intestate is sold, and converted into money or notes and obligations to the administrator for the proceeds, that so far as his wife may have an interest in the property thus changed, it is to all interests and purposes a reduction into possession. The money, or notes or obligations into which it is converted, is at law his own: in equity, when they could be traced in specie, and the administrator was dead or insolvent, they might be followed at the instance of a creditor or a distributee who was a stranger to the administrator, as assets of the estate. But this is the utmost extent to which Equity could go in preserving the proceeds as the estate. The instant they cease to be capable of being traced, the administrator's liability to account for them is all which can be looked to by either creditors or distributees. Could the husband during coverture have been compelled to account for his wife's interest in the fund which he had wasted? I apprehend he could not. For he had the right to receive it as husband, or even release it. If he could not be compelled to account for it, and having the actual possession, it is plain that there was nothing to survive to the wife in this respect. Her right pro tanto had been consumed, and consequently reduced into possession by the husband.

But be this view correct or not, and I think it is, both on reason and on the authority of the cases of Hix v. Cox, Marsh & Nail, not reported [Rich. Eq. Cas. 115,] and Spann v. Jennings & Spann executors, ante, 324, decided by this Court, still the complain-

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ant is not liable *for Mrs. Wright's share of that part of the estate of her mother which was wasted by her husband Dr. Wright. No case can be found in which the wife was held to be entitled to have an account from her deceased husband's representatives for so much of her choses in action as were received by him and wasted: The utmost extent of her rights by survivorship is to the undisposed residuum. This was the case in Schuyler v. Hoyle and Baker v. Hall. The fact that the husband is the administrator and acting in a trust capacity, cannot alter the case. His devastavit arises, it is true, from his powers as administrator, but it is a personal wrong for which he is personally liable. It is the conversion of the testator's or intestate's goods and chattels rights and credits to his own use. This is wrongful as against the creditors and distributees, over whose rights he has no control. But over the rights of his wife, in action, he has the right to reduce them into possession, and as against her there can be no devastavit; for he has the right to receive her interest and apply it as his own. If Dr. Wright is not liable to account for the devastavit commit-

(a) The only property remaining unchanged was the negroes: and according to the doctrine of Spann v. Jennings (ante 324) the marital rights would have attached on them if the wife had been solely entitled to them—the grounds of distinction between that case and this being, that there the wife was solely entitled to the estate, and here jointly with others, and that here there was administration by the husband, whilst there there was none. R.

ted so far as his wife's interest in the same is concerned, it follows that the complainant is entitled so far to the relief which he seeks. For as security he is liable as far, and no farther than his principal.

It is Ordered and decreed, that the Chancellor's decree be so far modified as to allow the complainant credit on the judgment recovered against him in the name of the Ordinary on the administration bond, for Mrs. Wright's one third part of so much of the personal estate of Mrs. Screven as was consumed and wasted by her husband Dr. Wright, and in all other respects that his decree be affirmed.

JOHNSON and HARPER, JJ., concurred.

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1 Hill, Eq. *335

*STUART PERRY v. WM. NIXON and JAS. W. TATE.

(Columbia. June, 1833.)

[*Creditors' Suit* ⇐7.]

A creditor who has obtained judgment, sued out execution & levied it on property in which the debtor has the equitable but not the legal estate, is entitled to the aid of the Court of Equity, to make the property available in payment of his demand.

[Ed. Note.—Cited in Kennedy v. Simons, Dud. Eq. 144.

For other cases, see Creditors' Suit, Cent. Dig. § 10; Dec. Dig. ⇐7.]

The defendant, Tate, being entitled for life to the profits of an estate, held by the defendant Nixon as trustee, contracted a debt to the plaintiff for the support of his family, on which he confessed judgment. The plaintiff sued out execution, and levied on the trust property, when the defendants filed a bill and obtained an injunction. The plaintiff then filed this bill, to subject the property to the payment of his debt; and the injunction was dissolved, and the defendants' bill dismissed. In the meantime Tate left the State; and it was admitted that he had no other property.

The case was heard by Chancellor De Saussure, at Camden, July, 1832, who, by a decretal order, directed the trustee to pay the plaintiff's debt, out of the trust estate in his hands.

From this decree the defendants appealed on the grounds:

1. That it was neither alleged in the bill, nor proved, that the plaintiff could not enforce execution at law—and there was adequate remedy at law, by compelling Tate to assign under a ca. sa.; which could have been done before he left the State.

2. That the debt contracted to the plaintiff was not for the benefit of the trust estate, and only the life estate of Tate liable; and the trustee not liable.

Blanding, for the appellant, in support of these grounds, cited and relied on Screven v. Bostick, 2 M'C. Ch. 416; Edmonds v. Davis, 1 Hill, 279.

DeSaussure, contra, contended that the plaintiff had brought himself within the rules which justify the interference of Equity, by alledging and proving that judgment was obtained and execution levied on the trust property, and that there was no other property—and he could not enforce a ca. sa., for the defendant left the State. 4 John. Ch. Rep. 671–5.

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*O'NEALL, J. The only question argued in this case and on which it will be necessary to express an opinion, is whether the complainant has entitled himself to relief in this Court. It is understood from the brief and the admissions made in the argument, that Perry had recovered a judgment and sued out an execution at law, which was levied on the trust property, when an injunction was moved for and obtained by these defendants; this bill was then filed, and the injunction heretofore obtained by the defendants was dissolved and their bill dismissed. In the mean time the cestuique trust, Tate, went from and without the limits of the state. The defendants admit that the trust property is the only estate of the cestuique trust, Tate.

Before a creditor seeking relief touching the personal assets of his debtor can come into this Court, he must shew not only a judgment and execution, but that he has pursued his execution at law to every available extent. The rule as stated in the case of Brinkerhoff v. Brown, 4 John C. R. 677, seems to me the true one, "to procure relief in Equity by a bill brought to assist the execution of a judgment at law, the creditor must shew that he has proceeded at law to the extent necessary to give him a good title." Screven v. Bostick, 2 M'C. Eq. R. 416 [16 Am. Dec. 664.] Brown v. M'Donald [1 Hill Eq. 297.] decided at this Term. Following up the rule laid down in the case of Brinkerhoff v. Brown, Chancellor Kent, in the case of M'Dermutt v. Strong, 4 John C. R. 691, says, "I regard the law to be clearly settled, that before a judgment creditor can come here for aid against the goods and chattels of his debtor or against any equitable interest which he may have therein, he must first take out execution and cause it to be levied or returned, so as to shew thereby that his remedy at law fails, and that he has also acquired, by that act of diligence, a legal preference to the debtor's interest." In the case of Spader v. Davis, 5 John. C. R. 280, the plaintiffs had recovered judgments at law and sued out executions which were returned nulla bona. Chancellor Kent said that "the plaintiffs at the time of filing their bill had acquired, as execution creditors at law, a priority of right valid in Equity, to the trust monies belonging to the defendant D. and

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in the hands of the defendant H., *and that

payments of the same by H. to D. subsequent to the filing of the bill containing notice of that right and of their claim in pursuance of it, were made in his own wrong."

From these cases and authorities it is clear that the plaintiff is entitled to the relief which he seeks. He has recovered judgment, sued out execution and levied it on property in which his debtor has the equitable but not the legal estate. This entitles him to the aid of this Court, for he has shown a legal title to the relief sought.

But it is said the party ought to have gone one step farther, and compelled the debtor to assign his interest by ca. sa. This in this case could not have been resorted to, for the debtor had left the state before the injunction was dissolved. I do not think, however, that it is necessary in any case. The party must shew an execution returned nulla bona, or levied on the trust property, before he can claim the intervention of the Court of Equity to relieve him touching the personal assets of his debtor. This seems to furnish a better and higher guard against unnecessary applications to this Court, than an assignment under a ca. sa. would. For an assignment might be forced and obtained, when the debtor's other funds were amply sufficient to pay the debt. But there can be no necessity for an assignment to entitle a creditor to proceed in Equity; the fact that his debtor is in Equity regarded as the owner of property, which at Law he is not, entitles the creditor to its aid, to make it available in payment of his legal demand. It is not necessary that he should have either legal or equitable title to the property; his debt legally established, and pursued to every available extent at law, entitles him to have the equitable assets of his debtor applied to its payment. I am satisfied that the Chancellor's decree is correct in principle; but as it may have (unintentionally) charged the trustee personally with the debt of the cestuique trust, from the general words used in the decree, it will be necessary in this respect to modify it.

It is Ordered and decreed, that the Chancellor's decree be so far modified, that it be referred to the Commissioner to ascertain and

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report what part of the trust estate *in the bill mentioned, belonging to the defendant, J. W. Tate, remains in the hands of the defendant, Wm. Nixon, or was in his hands at any time since the filing of the bill; and that the said Wm. Nixon apply so much thereof, either income or capital, as may be necessary, to the plaintiff's debt, interest and costs at law; but if the capital should be broken in upon, it can only be for the life of James W. Tate, and if sold, it must be sold for his life only; the purchaser or purchasers to give bond or bonds with good security, for the delivery to the Commissioner of this Court of such of the slaves and their increase, as may be sold to pay the plaintiff's debts, and which may be alive at the death of James W. Tate. The costs to be paid out of the trust estate.

JOHNSON and HARPER, JJ., concurred.

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1 Hill, Eq. 338

BROCKMAN v. BOWMAN.

(Columbia. June, 1833.)

[*Fraudulent Conveyances* ⇐318.]

[Where a conveyance of a deceased debtor is set aside at suit of creditors, the court will order the property to be delivered to the executor or administrator, to be applied in the course of administration.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 981; Dec. Dig. ⇐ 318.]

[*Fraudulent Conveyances* ⇐321.]

[The proceeds of property a transfer of which has been declared void as to creditors are distributable among all the creditors of the grantor according to their legal priorities, without preference to the party first moving to set aside the transfer.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 985; Dec. Dig. ⇐ 321.]

[*Executors and Administrators* ⇐439.]

[Where a creditor files a bill to set aside the conveyance of a deceased debtor for fraud, the personal representative of the debtor is a necessary party.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1782; Dec. Dig. ⇐439; Fraudulent Conveyances, Cent. Dig. § 744.]

Where a bill is filed by creditors to avoid the alienation of a deceased person for fraud, his executor or administrator is a necessary party; and if the Court should set aside the conveyance, it will order the property to be delivered to the executor or administrator, to be applied in due course of administration. The suing creditors are not entitled to have their demands paid out of the property, in preference to others.

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1 Hill, Eq. *339

*SMITH & CUTTINO v. H. MACON, Adm'or of William Capers, Deceased.

(Columbia. June, 1833.)

[*Bonds* ⇐135; *Payment* ⇐42.]

The penalty of a bond conditioned for the payment of money, is to secure payment of the whole of the condition, and any part of it remaining unpaid is a forfeiture of the penalty—therefore the obligee may recover the balance of the condition with interest thereon, altho' that sum when added to the payments previously made would exceed the penalty.(*a*)

[Ed. Note.—Cited in Ellis v. Sanders, 34 S. C. 240, 241, 13 S. E. 417.

For other cases, see Bonds, Cent. Dig. § 243; Dec. Dig. ⇐135; Payment, Cent. Dig. § 121; Dec. Dig. ⇐42.]

(*a*) See contra, Bonsall v. Rives, 1 M'C. 503.

The bill in this case was brought by the plaintiffs' creditors, by bond of William Capers deceased, against the defendant as his administrator.

Of the numerous questions presented to the Court, it is only thought necessary to notice one, viz: Whether the plaintiffs were entitled to recover beyond the penalty of the bond.

O'NEALL, J. It is objected by the defendant, that he ought not to be liable to pay the complainants more than the balance of the penalty of the bond, after deducting from it a payment made by his intestate, in his lifetime; on the ground that, to apply the payment to the extinguishment of the debt and interest, on the condition of the bond, would be virtually allowing interest to be recovered beyond the penalty. He relied upon the case of M'Worth v. Thomas, 5 Ves. 329, as authority for this position. That was a bill filed by the creditors of Ilted Thomas, to obtain satisfaction out of the real estate. The executrix claimed to be allowed to retain £1,325, the arrears of an annuity of £100 per year, granted, by the dec'd to her father, secured by a bond in the penalty of £500. The Lord Chancellor refused to allow more than the penalty, saying—"This is in the administration of assets. Is it possible for the Court to let a creditor stand as a specialty creditor, for more than the debt at law? There is no doubt of the proposition in Collins v. Collins, but then it must be enforced as an agreement between the parties; but in the administration of assets, how can I possibly deviate from the law? I cannot put a larger sum in the bond than the parties have." To the same purpose and extent are the cases of Tew v. Winterton, and Knight v. M'Lean, 3 B. C. R. 489, 496. I am satisfied that the view taken by Lord Eldon, in the case of M'Worth v. Thomas, is perfectly correct; and if it is an authority at all applicable to the case, it is directly against the position assumed by

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the defend*ant. In the words of the Lord Chancellor, with the change of a single one, I would say, "I cannot put a" less "sum into the bond than the parties have." To accomplish the defendant's purposes, this must be done. The penalty is to secure the payment of the whole condition; any part of it remaining unpaid is a forfeiture of the penalty, which is the debt at law. The party to be relieved against it in Equity, must pay the amount really due on the condition. What is the amount due on it? The balance of the debt specified in the condition, after applying the payment at the time it was made to the extinguishment of the interest to that time, and the residue to the principal, with interest on the balance to the present time. If this is less than the penalty, (as it is admitted to be) the defendant can only claim to be relieved from the penalty, by paying such balance.

JOHNSON and HARPER, JJ., concurred.

De Saussure, for the appellants.
Mayrant, contra.

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1 Hill, Eq. 340

SMITH & CUTTINO, Administrators, v. SARAH OSBORNE and Others.

(Columbia. June, 1833.)

[*Limitation of Actions* ⟸10.]

Where a mortgage of land having been recorded, the land was sold by the mortgagor and the purchaser took possession, *Held*, that the recording was notice to the purchaser, and the statute of limitations will not bar the mortgage lien. The decision in Thayer v. Cramer, 1 M'C. Ch. 395, considered and adhered to.

[Ed. Note.—Cited in Thayer v. Davidson, Bailey, Eq. 412; Drayton v. Marshall, Rice, Eq. 374, 385, 33 Am. Dec. 84; Wright v. Eaves, 5 Rich. Eq. 82; Harper v. Barsh, 10 Rich. Eq. 152; Norton v. Lewis, 3 S. C. 34; Clark v. Smith, 13 S. C. 587.

For other cases, see Limitation of Actions, Cent. Dig. § 34; Dec. Dig. ⟸10.]

Heard before Chancellor Johnston, at Sumter, February Term 1833.

This bill was filed to foreclose a mortgage of a tract of land, executed 23d Nov. 1816, by Wm. R. Theus to George and Savage Smith, the plaintiffs' intestates, to secure the payment of a bond of the same date, the last instalment of which became due 1st January 1821. The mortgage was recorded in the Register's Office, February 10th, 1817. On the 1st May 1818, Theus sold and conveyed the mortgaged premises to Robert F. Wethers, who on the 28th of the same month

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sold *and conveyed to Charles L. Osborne. Osborne then went into possession and retained it until his death in 1826, since which the defendants, his distributees, have continued in possession. The bill was filed in August 1830.

The defendants in their answer set up the purchase from Wethers, which they alledge was bona fide and without notice of the mortgage, and rely on the statute of limitations.—The main question for the consideration of the Court was whether the recording of the mortgage was such notice as to prevent the operation of the statute; in relation to which the Chancellor in his decree says:

"With respect to the act of limitations, I am not at liberty to depart from the decisions of the Court of Appeals.

"Purchasers must be held to reasonable vigilance. When Osborne purchased from Wethers he was bound to look into his title. If he had looked into it, he would have discovered that it came from Theus; and then

the recording of the mortgage would have been notice to him.

"The time must come when the case of Thayer & Cramer, 1 M'C. Eq. 305, and the case of Bynum ads. Nixon, [1 Bailey, 148,] will be held to lay down propositions entirely too broad and unqualified. They cannot be reconciled with the case of M'Rae & Smith, 2 Bay, 339.

"It will not do, in principle, to except out of the general rule, that trustees by implication may rely on the statute—purchasers from mortgagors, which purchasers are in no respect trustees except as held so by the Court on account of their fraud in purchasing the entire interest knowing that it is burdened with a lien. If they purchase without notice, they stand on the ground of innocent purchasers, and besides are entitled, from their adverse holding, to the benefit of their possession from the time they take it. If they purchase with notice, they are entitled to the benefit of their possession from the time they give notice of its adverse character to the incumbrancer.

"But I am bound by the decisions which make no such distinctions."

His Honor therefore decreed foreclosure, and ordered a sale of the premises to satisfy the balance reported by the Commissioner to be due on the bond.

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*From this decree the defendants appealed, on the ground that the plea of the statute of limitations should have been sustained.

Haynesworth & Blanding, for the appellants.

C. & W. Mayrant, for the appellees.

JOHNSON, J. Both the grounds of this motion resolve themselves into the question whether the complainant is bound by the statute of limitations, and but for the doubts thrown out by the Chancellor, and the very learned argument of my brother Harper, in the judgment delivered by him in Thayer v. Davison when presiding in the Court of Chancery in Charleston, I should have regarded the cases of Thayer & Cramer, and Bynum & Nixon, referred to by the Chancellor, as decisive of it. I have been induced by these considerations to look again into the subject, and the result of further examination is, that it is not a case for the technical application of the statute. The statute does not operate to invest the party in possession and claiming under it with any right or title, but only as a bar to the plaintiff's right to recover. The words are that "if any person or persons to whom any right or title to lands, tenements, or hereditaments in this province, shall descend or come, do not prosecute the same within five (not ten) years after such right or title accrued, that he and they and all persons claiming under him and them, shall be for ever barred to recover the same" &c.; and the same statute points out an action at law as the only effectual mode of making or prosecuting the claim, so as to prevent the bar of the statute.

As mortgagees, the legal estate in the lands never has been, and is not now, in the complainants or their intestates—the act of 1791, 1 Faust, 65, expressly declares "that no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time for the payment of the money secured by the mortgage is elapsed; but the mortgagor shall be deemed owner of the lands, and the mortgagee as owner of the money lent or due, and shall be entitled to recover satisfaction for the same, out of the lands, in the manner above set forth." Neither the plaintiffs nor their intestates

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could *at any time heretofore have made claim to these lands by an action at law, nor is that the object of these proceedings—they are only intended to charge them with the payment of a debt due by the mortgagor. How then can it be said, that the statute of limitations operates as a bar? No one can maintain an action for the land, until it shall have been regularly sold, and the equity of redemption foreclosed; and if, notwithstanding, the statute of limitations shall begin to operate, either from the date of the mortgage or from the time of the condition broken, it might well happen that the mortgagee would be barred, notwithstanding the facilities which the Courts afford, and all the diligence which he might use: for we know that suits in Law and Equity are sometimes protracted even longer than necessary to complete the bar of the statute.

I know that the rule of the statute is frequently adopted in Chancery, when it does not operate as a technical bar; and here I think the question, whether recording shall be regarded as notice or not, becomes important. The act requiring mortgages to be recorded, seems to have been intended principally to settle the priority between them—but the motive for recording them is so great, that few would neglect it, who thought it a necessary security, and few men who feel the stimulus which interest usually imparts, would neglect to profit by the information which the Register's office would impart when they were about to purchase a tract of land, unless they had implicit confidence in the representations of the seller; and if they suffered themselves to be deceived, they ought to take the consequences. Through this mean, a purchaser has it in his power to inform himself, and if he neglects to do so he has no claim on a Court of Equity, for the application of the rule of the statute. On the other hand, if the mortgagee neglect to record his mortgage, and by this means puts it out of the power of the purchaser to inform himself, he is protected as a purchaser without notice. In this view, therefore, recording the mortgage is notice to the subsequent purchaser.

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*The case of M'Raa v. Smith, 2 Bay, 339, noticed by the Chancellor, is, I think, reconcilable to this view of the subject. That was an action to try titles to land. The plaintiff claimed under a sheriff's sale on fi. fa., against one Woodroof, and the defendant under a purchase from him. The judgment had been obtained against Woodroof before he sold to the defendant, and bound the land; but the defendant had had possession under his purchase more than five years before the sale by the sheriff, and it was held, that he was protected by the statute. Having the judgment, the creditor might at any moment, and in defiance of Woodroof, have sold the land, if he intended to resort to it for the satisfaction of his debt—and his neglecting to do so, furnished a reasonable ground for the application of the rule of the statute.

It is therefore Ordered and decreed, that this motion be dismissed; and that the decree of the Circuit Court be and the same is hereby affirmed.

O'NEALL, J., concurred.

HARPER, J., dissented.

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1 Hill, Eq. 344

BENJAMIN PERKINS and Others, v. MARY R. KERSHAW and Others.

(Columbia. June, 1833.)

[*Arbitration and Award* ⟸29; *Trusts* ⟸145.]

Where a trustee has been legally compelled to pay money, as the surety of his cestuique trust, in Equity the trust estate will be charged with the amount paid; & where the trustee & the principal debtor being devisees of the estate, with the other parties interested, referred all their "claims, rights & interest in said estate" to arbitration, and the arbitrators awarded a portion of the share of the principal to the trustee, in payment of the money advanced by him as security, it was held, that the arbitrators had not exceeded their authority, & the award was confirmed.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 149; Dec. Dig. ⟸29; Trusts, Cent. Dig. § 190; Dec. Dig. ⟸145.]

[*Subrogation* ⟸7.]

A surety paying the debt of his principal, may be remitted to all the rights of the creditor; and where separate judgments were obtained against the principal & surety, for the same debt, and the latter paid the judgment against himself, & thereupon the sheriff entered satisfaction on both executions, the surety will be allowed to vacate the entry of satisfaction on the judgment against the principal, and to set it up as a lien on his estate.

[Ed. Note.—Cited in Wilson v. Wright, 7 Rich. 404; Brown & Wellsman v. Gadsden, Speers, Eq. 42; King v. Aughtry, 3 Strob. Eq. 156.

For other cases, see Subrogation, Cent. Dig. § 17; Dec. Dig. ⟸7.]

This case was heard by Chancellor Johnston, at Camden, July 1831. The bill was filed to confirm and enforce an award made between the parties, as devisees and heirs at law of the estate of Col. Joseph Kershaw dec'd., adjusting their rights, and making partition of that estate. The only objection to the confirmation of the award was on the part of Mrs. Sarah Kershaw, the widow of

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Joseph Kershaw, and sole *representative of her estate. She insisted that the arbitrators had exceeded their powers in assigning a part of the shares of her husband to Henrietta Perkins the only surviving heir and representative of James Kershaw, in satisfaction of a debt due by Joseph to James Kershaw; and on this ground objected to that part of the award; and the question for the determination of the Court was whether on the facts before them the arbitrators had in this particular exceeded their powers under the submission. The Chancellor held that in this respect they had exceeded their authority: in all other respects he confirmed the award. From this decree Henrietta Perkins appealed and moved this Court to modify the same so that the award may be entirely confirmed, on the ground that the arbitrators had not exceeded their powers under the terms of the submission. The facts are stated in the judgment delivered by this Court.

W. F. DeSaussure, for the appellant, cited and relied on the following authorities. Kyd on Awards, 242; 1 Ld Ray. 115; Kyd, 147–171; 1 Black. Rep. 475; Com. Rep. 547; 3 M'C. Rep. 487.

M'Cord, for the defendant, argued that parol evidence could not enlarge or explain the terms of the submission; and that it was received to ascertain what was parcel of the submission—whether this subject matter was part "of the estate of Col. Joseph Kershaw,"—so that the whole question is, what was submitted?

This is in the nature of a bill for specific performance, Wood v. Griffin, 1 Swanston, 53. There is no allegation in the bill as to this claim—none, that it was within the terms of the submission or that it had any connexion with the estate of Col. Kershaw which was to be divided, and can evidence be admitted beyond the pleadings, and relief granted which was not prayed? But it is said the parties are bound by judges of their own choice. But whether they have decided on the matters submitted to them, can only appear by the submission, and if they have gone beyond that they have exceeded their jurisdiction. See Digest Lib. 4 tit. 8 § 1. 3 Poth. 428–460, 461. "One may refuse with impunity to perform an unjust sentence, that is to say, one

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rendered beyond the *terms of the submission, as where the arbitrators decide on an object other than that upon which they were charged to judge."—Ib. The authority of arbitrators is founded on the will of those who appoint them, and there can be no other

evidence of that will than the writing itself. Domat 223, B. tit. 14; Gibson v. Watts, 1 M'C. Ch. 490. And their power is limited to what is explained in the compromise, 1 Domat 224, B. 1 tit. 14 Sec. 1. 2 Evan's Poth. 180. The award must be limited to the terms of the submission. Kyd 140, lb. 278. And if a submission be of all suits &c. between A. and B. an award between B. and his wife, and A. is void. Kyd 116—The same doctrine is laid down in Waters v. Bridges, Cro. Jac. 639. lb. 663. 2 Show, 61. An award can only be expounded by itself without the aid of an averment of matters dehors to explain the meaning. Bacon Ab. E. And if the bond be given for a specific object, general words are to be construed with reference to that object; 1 Badger and Dev. N. C. Rep. 52. And as to the general authority of arbitrators and how far the award is binding, see 2 Saund. 410; 6 East, 507; 16 John. 166; 3 Mod. 177; 1 Ld. Ray. 235; 1 Bos. and Pul. N. R. 113.

James Kershaw could not claim as a trustee. It does not appear that he was a trustee at the time he made this payment on behalf of Joseph. It is denied that he was, but if he was, the debt he paid was in no way connected with the trust estate, and the trust property can only be charged, and the trustee reimbursed, for expenses incurred in the execution of the trust. 8 Ves. 8. Could Equity entertain jurisdiction of this claim? What could give it? A lien? How is is constituted? Bring a bill in Chancery for money laid out and expended for defendant's use! See Irish T. R. 256; 2 Bridg. Dig. 460. When the principal promised to assign to the surety who paid the debt, but omitted to do so, Equity considers it as done and orders it to be done; but this arises from the understanding of the parties. There was none such in this case.

James Kershaw could have no right to Joseph's share of his father's estate on the ground that he was his surety.—Could he be subrogated to the rights of the creditor? Subrogation is defined to be "where the surety pays he may require of the creditor to

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substitute him to all his rights against *the principal debtor or against the other sureties." 1 Poth. Oblig. 215. "After the surety has paid, if he has procured a subrogation to the rights of the creditor, he may exercise them as the creditor himself might have done, but if he has neglected to acquire this subrogation he has still an action at law to reimburse him." 1 Poth. 246. James Kershaw did not pay the judgment of the State v. Jos Kershaw, administrator. Adamson it is said paid the execution against himself and James Kershaw, and James paid him back his half; so far then James could acquire no rights by subrogation, for this execution was no lien on Joseph's estate, and as regards the payment of the other executions by Adamson, and the contribution afterwards by James, Adamson neglected to take an assignment and the executions are marked "satisfied"—he could not now be subrogated; and after the long neglect of twenty five years, can James Kershaw's heirs at law be entitled to subrogation against the heirs of Joseph, and claim a lien on property which did not become part of Joseph's estate until twenty five years afterwards?

O'NEALL, J. It appears that Col. Joseph Kershaw in 1790 conveyed the whole of his estate to five persons, of whom James Kershaw was one, in trust to pay the debts of the said Joseph out of the said estate; and the residue, if any, to transfer and deliver to the said Joseph, his heirs, executors or administrators. Col. Kershaw died in 1791, leaving a will bearing date in 1788, which devised and bequeathed his real estate in certain specified portions among his eight children, and his personal estate in equal shares among his wife and children. James Kershaw and Joseph Kershaw, jr. were two of the children, heirs at law and devisees of Col. Kershaw. Joseph Kershaw, jr. was a tax collector, and Adamson and James Kershaw were his securities: he made default and was found to be in arrear to the State $2202.-99, for which sum, after his death (which took place in 1791) several judgments were recovered against John Kershaw administrator of Joseph Kershaw jr., (dec'd.) and against Adamson and James Kershaw, the securities of the said Joseph. The whole amount was paid by Adamson, and James Kershaw contributed and paid to him the one

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half of the amount so *by him paid; and the executions issued 16th January 1805 on the judgments, were returned satisfied. These transactions took place during the continuance of the trust, and before the death of James Kershaw, who died in 1815. It is true, that in 1794 the trustees, according to a power to that effect contained in the deed, appointed John Kershaw their attorney and general agent under the said trust deed, and he had from that time the entire management of the trust estate. In 1828, all the original trustees being dead, John Kershaw was substituted as a trustee under the trust deed in the Court of Equity. It is alledged by the complainants that James Kershaw was the surviving trustee: the defendant however contends that Robert Henry was; in this respect there appears to be no proof on the subject whatever; it is allegation against allegation, and no conclusion can be drawn from either—Sarah Kershaw is the widow and the only surviving heir or representative of the estate of Joseph Kershaw, jr. (dec'd); Henrietta Perkins from the award seems to be the only surviving heir and representative of the estate of James Kershaw (dec'd.) The arbitrators to whom were referred "all the claims, interests and rights of the heirs of the late Col. Joseph Kershaw, in his estate,"

undertook to charge the estate of Joseph Kershaw, jr., ascertained and separated by their award from the rest of the estate of Col. Joseph Kershaw, with the payment of the debt to James Kershaw, on account of the amount paid by him as security for the said Joseph Kershaw, jr., by awarding to Henrietta Perkins as the representative of James Kershaw (dec'd.) 13-81, of the 32-81 parts of the estate of Col. Kershaw, which constituted the share of the said Joseph Kershaw, Jr., and to his widow Sarah the remaining 19-81 parts. From the death and minority of some of the parties, it became necessary to have the award confirmed by the Court of Equity. Accordingly a bill was filed for that purpose. Mrs. Sarah Kershaw objected to the confirmation of so much of the award as set up the debt due by her husband's estate to James Kershaw, and vested in Henrietta Perkins 13-81 parts of the estate of Col. Kershaw out of the share to which Joseph Kershaw, jr. was entitled, in satisfaction of the

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said debt, on *the ground that the arbitrators had exceeded the submission. This objection was sustained by the Chancellor, and that part of the award set aside; in all other respects it was confirmed. From this decree Henrietta Perkins has appealed, on the ground that the arbitrators did not exceed the submission in awarding as they did.

The submission by the heirs of Col. Joseph Kershaw, dec'd, is in as general terms as it could well be couched—it is "all our claims, interest and rights in the said estate." This covers every thing which could in any way be connected with, arise out of, or spring from the estate of Col. Kershaw. To see whether the arbitrators, in making up their award, have exceeded their powers under this general submission, it is necessary that we should have evidence of the facts, which, as they supposed, authorised them to make the award which they did. This is not evidence in explanation of the award; but it is evidence to shew whether it is or is not an award binding on the parties. It ascertains whether the thing awarded, which may or may not be within the submission, is within its terms and intention. The facts which have been already stated were either in proof before the arbitrators, or within their knowledge. Upon them they passed and made the award, which is now the subject of complaint. The single inquiry is, had they the right, on the facts before them, under the submission, to make the award? Whether right or wrong, is not now to be investigated. If it was within the submission, it is not pretended that any ground exists upon which the award can be set aside.

Since the able and ingenious re-argument of the defendant's counsel, I have gone over my former views of the case, and have compared his arguments with the facts of the case, and the views of the case heretofore expressed by this Court, and I confess that I have been able to discover no ground upon which the Chancellor's decree ought to be sustained, and the award set aside.

James Kershaw, who was one of five trustees in whom the legal estate in the whole of Col. Kershaw's estate was vested was the security of Joseph Kershaw, jr., and in 1805

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paid *for him the sum of money now claimed to be refunded. He had the right to be refunded this sum, before his legal title could be divested—for it must be recollected, that at law the cestuique trust could have had no remedy—it is alone in Equity that he could have claimed the execution of the trust; and I cannot be persuaded that it ever was doubted, that Equity in decreeing the execution of the trust would secure one of several trustees for all sums of money which he had been legally compelled to pay for his cestuique trust estate. Taking this to be true, what were the claims, interest and rights in Col. Kershaw's estate," to which Joseph Kershaw, jr. was entitled? I answer, that it is clear that his claims, interests and rights, were his share charged with the debt paid for him by his trustee, as his security. In other words, that share could not be taken out of the possession of the trustee, until that payment was made to him. This is compelling a party who asks for equity, to do equity, and it is on this principle that the whole doctrine of a lien of a trustee for advances is predicated.—But if I understand the argument, it is contended that James Kershaw never was entitled to act as a trustee after '94, when John Kershaw was appointed the attorney of the trustees. There can, however, be nothing in this proposition. It would, to give it effect, be making the attorney superior to the principal—the created greater than the creator, and power delegated, irrevocable. John Kershaw's acts were however the acts of each and all the trustees. They and each of them were bound by whatever he did—still, however, the estate was in them; and it was against them, and not their attorney, that the cestuique trust must have proceeded to have the trust decreed. Neither can the substitution of John Kershaw, in '28 as trustee, by the order of the Court of Equity, change the rights of the parties—it is true, the legal estate is then vested in him, but he holds it subject to all the equities existing between the originat trustees or any of them, and the cestuique trusts or any of them. The question, whether Joseph Kershaw's share of his father's estate ought to be charged with the payment to James Kershaw of the money paid by him, as his security, according to the views which I have

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*suggested, was necessarily to be decided upon by the arbitrators under the submission.

There is, however, another consideration, which, to my mind, is conclusive to shew the authority of the arbitrators to award as they did. The security, who pays the debt of his

principal, has the right to be remitted to all the rights and securities of the creditor. He is in Equity substituted for the creditor. The debt to the State was a judgment against the administrator of Joseph Kershaw, dec'd. In Equity the securities, upon shewing that they, and not the administrator, paid the money, would be allowed to vacate the entry of satisfaction on the execution by the sheriff as made by mistake, and to set up the judgment as a subsisting lien on the real estate of Joseph Kershaw, jr. dec'd. The proof is clear, that Adamson first paid the entire debt, and that subsequently James Kershaw paid to him one moiety.—The executions against them were properly returned satisfied, but that against the administrator of Joseph Kershaw, jr., dec'd. was improperly so returned; and James Kershaw, for the amount paid by him or his representative, had the right to claim that the entry should be set aside and the judgment set up for the amount due to him, as a lien on Joseph Kershaw, jr.'s estate. This was in effect done by the arbitrators, when they ascertained that 32-81 parts of Col. Kershaw's real estate belonged to Joseph Kershaw, jr., and of course descended to his heir, and when they set up the moiety of the judgment paid by James Kershaw, as a subsisting lien, and having ascertained the amount due, appropriated 13-81 parts to the payment. This award was, I think, within the submission, and I am not disposed to scan, with great nicety, the decision of men who were the friends of the parties, and intimately acquainted with the affairs which they were called upon to adjust, and which, from the death of the parties and lapse of time, could be only justly arranged by the domestic forum of arbitration, which acts according to good conscience and not by technical rule.

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*It is therefore Ordered and decreed, that so much of the Chancellor's decree as sets aside that part of the award vesting in Henrietta Perkins 13-81 parts of the estate of Col. Kershaw out of the share of Joseph Kershaw, jr. be reversed, and that the said award be confirmed entirely.

JOHNSON and HARPER, JJ., concurred.

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA, DECEMBER 1833,
& JANUARY 1834.

JUDGES PRESENT.

Hon. DAVID JOHNSON, Presiding Judge.
" J. B. O'NEALL.
" WM. HARPER.

1 Hill, Eq. *353

*Ex parte R. B. WIGGINS.

(Columbia. Dec., 1833.)

[*Trusts* ⟸198.]

Where a trustee purchases at his own sale it is at the option of the parties interested, without any inquiry into the circumstances, to have a resale, or to hold the trustee to his purchase. If they elect to have a re-sale, the course is to put the property up at the price bid by the trustee—if more is bid at the second sale the property is re-sold—if not, the trustee is held to his purchase: And such a sale is not less the sale of the trustee, because made under the order of the Court and superintendence of the Commissioner, when procured at his instance.

[Ed. Note.—Cited in Stallings v. Foreman, 2 Hill, Eq. 407; Crispin v. Taylor, Id., 436, note; Sollee v. Croft, 7 Rich. Eq. 43; Farrar v. Farley, 3 S. C. 14, 23; Black v. Childs, 14 S. C. 321; Anderson v. Butler, 31 S. C. 194, 195, 196, 9 S. E. 797, 5 L. R. A. 166.

For other cases, see Trusts, Cent. Dig. § 261; Dec. Dig. ⟸198.]

A bill having been filed by the assignees of Baker Wiggins, against his heirs and creditors to marshall his assets, the Court ordered a sale of his real estate by the Commissioner, under the superintendence of the assignees, who were directed to join in the conveyance to the purchaser. At this sale R. B. Wiggins, one of the assignees, became the purchaser of the whole estate, and afterwards filed this

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*petition to confirm the sale. The Commissioner, to whom it had been referred, reported that the sale was fairly conducted—that the purchase was bona fide, and for an adequate consideration; and that the petitioner was a creditor of Baker Wiggins.

Chancellor Johnston, who heard the petition, at Marion, February Term, 1833, held, that the purchase "could neither be set aside nor confirmed, without knowledge of the will of other persons interested, who are not parties to this proceeding." That "according to decided cases, a trustee to sell cannot purchase, whether he is partly interested or not. If he purchases, the sale will be set aside, or he will be held to the purchase, as of course, at the option of the parties interested; and as the rule forbidding such purchases, is one of policy to prevent fraud, when there is no possibility of preventing it, the inquiry is never made, whether the sale is or is not advantageous." He therefore dismissed the petition, and the petitioner moved this Court to reverse his decision, and to confirm the sale.

Dargan, for appellant

HARPER, J. I concur with the Chancellor, that "a trustee to sell cannot purchase, whether he is partly interested or not. If he purchases, the sale will be set aside or he will be held to the purchase, as of course, at the option of the parties interested." I also concur that the sale "cannot be set aside or confirmed, without knowledge of the will of other persons interested, who are not made parties to this proceeding." It appears however to be matter of much interest to all the parties concerned that this estate should be finally closed, and perhaps it may be in our power without irregularity, to facilitate the doing of this, by directing the persons interested to be made parties to the proceeding and ascertaining their will.

I believe the principle laid down by the Chancellor to be fully settled, that where a trustee purchases at his own sale, it is absolutely at the option of the parties interested, without any inquiry into circumstances, to

have a re-sale, or to hold the trustee to his
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purchase. If they elect to have a *re-sale, the course is, that the property should be put up at the price bid by the trustee. If more is bid at the second sale, the property is resold; If not, the trustee is held to his purchase. I am satisfied too from looking into the cases, that it is at the option of any portion of the creditors or persons interested, or any individual of them, to have a re-sale. The cases, ex parte Hughes, 6 Ves. 824, ex parte Lacey, 6 Ves. 625; ex parte Bennet, 10 Ves. 381, are sufficient to establish the rule, that without any inquiry into circumstances, the sale shall be avoided at the election of the parties. In all of these cases too, the course was to put up the property at the price bid by the trustee, (with the value of improvements, where improvements had been made) and if no more could be got, to affirm the trustee's purchase. In Morse v. Royal, 12 Ves. 372, the Chancellor says in relation to such a purchase, that without any consideration of fraud or looking beyond the relation of the parties, that contract is void." In Campbell v. Walker, 5 Ves. 678, where application was made on behalf of infants to set aside such a sale, a reference to the master was ordered to ascertain whether it would be for their benefit. Being infants, it might devolve on the Court to elect for them. Otherwise, the late cases establish that the right of choice is absolute in the parties without inquiry.

In Whelpdale v. Cookson ——— Lord Hardwicke left it to the majority of the creditors to elect whether the property should be re-sold. But in ex parte Lacey, Lord Eldon expresses his dissent from the opinion of Lord Hardwicke, and doubts whether a majority of creditors can bind the minority. And in a note to that case, the Reporter refers to the cases, ex parte Tanner, ex parte Attwood, and Owen v. Foulkes, decided about the same time, in which the Chancellor repeated the principles and declared the general rule, that no trustee shall buy unless he strips himself of that character, or by universal consent. In ex parte James, 8 Ves. 337, the trustee had satisfied all the principal creditors, and obtained their acquiescence or purchased their claims, yet the purchase was set aside at the instance of a simple creditor, the petitioner. In Davone v. Fan-
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ning, 2 Johns. Ch. Ca. 252, *Chancellor Kent reviews all the cases, and comes to the conclusions I have before expressed—that it is absolutely at the election of the creditors or parties interested to set aside such a sale—or of any individual creditor or party—and that the course is to put up the property at the price bid by the trustee, and hold him to his purchase if more cannot be got.

It was argued that this was not a sale by the trustees, as it was made by the order of the Court and superintended by the Commissioner. The Bill was filed by the assignee to marshall the assets and settle the estate. The sale I suppose was made at his instance, and was not less his sale, because made with the concurrence and under the superintendence of the Commissioner. It is not merely against unfairness in the actual conducting of the sale, that the principle is intended to guard. The cases suppose, that in consequence of his connexion with the estate as trustee, he may have acquired important information as to its value—such as the existence of mines—which the Court can never be sure he has fully communicated, and no one undertaking to act for the benefit of others, shall be permitted to act for his own advantage in the same matter. Ex parte Lacy, 6 Ves. 625; ex parte Bennet, 10 Ves. 381.

It is Ordered that the petition be referred back to the Commissioner to enquire and report to the next sitting of the Circuit Court, whether any of the creditors or parties interested desire a re-sale of the land in question, and that the said creditors and parties be notified to attend before the Commissioner at a time appointed by him for that purpose; that if any of the said creditors or parties shall require such re-sale, the said land shall be again exposed to sale, at such time and on such terms as the Circuit Court shall direct, and put up at the price bid for the same by the petitioner; but if none of the said creditors or parties shall require a re-sale, or if upon being again offered for sale, no greater price shall be offered than that heretofore bid by the petitioner for the said land, then that the petitioner's purchase be confirmed.

JOHNSON and O'NEALL, JJ., concurred.

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1 Hill, Eq. *357

*JOHN BANKHEAD, Administrator de bonis non, cum test. ann. of Gideon Glenn, v. THOMAS A. CARLISLE, Administrator de bonis non cum test. ann. of James Glenn.

(Columbia. Dec., 1833.)

[*Wills* ⟸634.]

Testator, by his will, devised his estate to his wife during widowhood, and then adds, "which said property I wish and devise, at the marriage or death of my wife, to be equally divided amongst my children as above named;" G., one of the testator's sons there named, survived him, but died before the widow; *Held*, that this was a vested remainder in G. & his representatives are entitled to his share.*(a)*

[Ed. Note.—Cited in Evans v. Godbold, 6 Rich. Eq. 37; Shaw v. Monefeldt, Id., 243; Rivers v. Rivers, 9 Rich. Eq. 209; Aaron v. Beck, Id., 414; Gourdin v. Deas, 27 S. C. 487, 4 S. E. 61; Brown v. McCall, 44 S. C. 516, 518, 519, 22 S. E. 823; Tindal v. Neal, 59 S. C. 14, 36 S. E. 1004; Logan v. Cassidy, 71 S. C. 201, 50

(a) See Cole v. Creyon, ante, 322, [26 Am. Dec. 208.]—R.

S. E. 794; Roberts v. Herron, 78 S. C. 119, 58 S. E. 968.

For other cases, see Wills, Cent. Dig. § 1495; Dec. Dig. ⊂=634.]

[This case is also cited in Logan v. Cassidy, 71 S. C. 175, 50 S. E. 794, and distinguished therefrom.]

Johnston, Chancellor. James Glenn, of Chester, in this State, by the first ten clauses of his will, gave specific legacies to his ten children, by name, of whom Gideon Glenn was one. The eleventh clause relates to the education of two of his sons. The twelfth clause is as follows: "I lend to Elizabeth Glenn, my beloved wife, during widowhood, (or life, in case she does not marry) all my estate, real and personal, not stipulated as aforesaid, consisting of a tract of 150 acres of land, in Union District and State aforesaid, on Broad River; one other tract of 150 acres of land, in Chester District and State aforesaid, on Broad River, being the place whereon I now live; also eleven negroes, namely, Aaron, Esther, Mary, Mourning, Aga, Samuel, Cato, Pompey, Jesse, Jacob, and Milley, with their increase, if any they should have; also all my stock of horses, cattle, sheep, and hogs; which said property I wish and devise, at the marriage or death of my beloved wife, to be equally divided amongst my children, as above named, with one exception, relative to [the] dividend or share, falling to my beloved daughter, Hannah Carlisle, which is, I lend to her such dividend or share, during her life, and at her death, to go to the heirs of her body"

The testator's son Gideon survived him, but was survived in his turn, by the testator's widow, who continued discovert until her death. On her death, the original executors of the testator being dead, the defendant took out letters of administration de bonis non, with the will annexed; and possessed himself of so much of the personalty in which she had the life interest under the will, as remained, or he could find and has declined to account to the plaintiff, for one-tenth of it, which he claims, as the administrator de bonis non with the will of Gideon Glenn annexed. The bill is filed among other things, to compel such account.

The plaintiff also claims an account of a

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share of New*ton Glenn, another son of James Glenn,—stating that by Newton's death he became entitled to it but in what way, the bill does not inform us The only question argued before me, is therefore, the only one I am to decide, and relates to the interest which Gideon took in the personal property under the twelfth clause of his father's will.—The plaintiff contending that he took a vested remainder, which was not lost by his dying before his mother; the defendant, that his was a mere contingent interest, which lapsed by his death, before the happening of the event on which its vesting depended.

The will, in point of form, does not limit over the property to the testator's children, on their mother's death or marriage, but merely directs, that on the happening of that event, it be equally divided among them. Yet I think the direction to divide it among them, substantially includes a bequest of it to them. Gideon, by surviving the testator, was in a condition to take under the will, whatever passed by the will. The will gave him a portion of the property, with a direction that it be allotted to him on his mother's death. He could have taken it the day of his father's death, and was withheld only by the preferable right of enjoyment, which the will conferred on his mother. Nothing but that prevented him. Here then was a present capacity to take whenever the possession should become vacant. This is the test of a vested interest—and an interest vested, is not lost by the dying of the person in whom it exists, before the period of its being actually enjoyed,—that only transmits it, in the case of realty, to his distributees or legatees, and in the case of personalty, to his representative. The cases relied on by the defendant's solicitors, were founded on wills wherein the testators had limited remainders to such of their children as should be alive at the termination of the particular estates. Some of their children had died before that event, but left children, who claimed to stand in the place of their parents. What is the effect of these cases? The grand-children claimed as devisees themselves, and not as the distributees of the devisees. They claim-

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ed instead of, and not through, their *parents. Their position was, that a devise to children living at the happening of the contingency, was a good devise to grand-children, then living.—That "children" should be construed to extend to and mean grand-children also, and that of course, grand-children "then living," would come within the description of the testator, and were in fact, devisees. Why were the grand-children driven to take this position? If they could have claimed successfully under or by transmission of rights through the parents, it would have been as beneficial to them. But if they had claimed in that way, it would have resulted, that no rights ever vested in their parents, in order to be transmitted to themselves. Why not? Because their parents were never, in fact, devisees. The devisees were such children, and such only, as should be living at the happening of the contingency. Such was the description given in the will. Who should answer to that description, could not be known until the contingency happened. The devises were made, as it were, ambulatory until that time; and the state of affairs which presented itself then, for the first time, disclosed who the devisees really were. The children who had died in the mean time were not devisees, and no right was transmitted through them.

But we gather from this an inference even favorable to the plaintiff in the case at bar. The parents of the grand-children were excluded, not as children of the testator, because in that respect, they came within his description—but because they fell short of his description, in another particular: they were not living at the event pointed out by him. If they had been "then living," their rights would have been good—and they were excluded only by the force of the words "then living."

In the case at bar, Gideon came within the description of a "child above named," and there is no description given to which he does not answer, so as to exclude him. The plaintiff is entitled to the account he claims. This is not however a case for costs. The parties have come here bona fide to settle what to them was a doubtful question.

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*It is decreed that the defendant account to the plaintiff before the Commissioner, touching the personal property received by him, or for which he is chargeable. The parties to pay their own costs, to be allowed them out of the estates which they respectively represent, if sufficient.—When the Commissioner's report comes in, the decree will be pronounced for the amount. The remaining equities under the bill are reserved, until the expiration of the next Term: unless the plaintiff shall in the meantime discontinue as to them. The further costs to arise out of their prosecution, are not included in the foregoing decree as to costs.

From this decree the defendant appealed on the ground: That from the words of the clause in the will of James Glenn, the property did not vest in his children until the death of his widow, and Gideon Glenn having died before that time, his representatives cannot take under the will.

Thomson & Dawkins, for the appellant, referred to 2 Salk. 415: Farr v. Blair, and Gordon v. Sims, MSS. cases: Columbia.

Williams, contra, cited 3 Eq. Rep. 273: 2 Rob. on Wills, 112; Fearne, 149, 150; 2 Con. Rep. 91.

PER CURIAM. We concur with the Chancellor, for the very satisfactory reasons stated in his decree.

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1 Hill, Eq. 360

W. H. FRASER v. THOS. BOONE and Wife.

(Columbia. Dec., 1833.)

[*Wills* ⇐182.]

Where there are two inconsistent bequests of the same property in the same will, the second revokes the first: And where the testator, by one clause of his will bequeathed a slave to his son, remainder to his issue, and failing in issue, remainder over: & by a subsequent clause bequeathed the same slave to his daughter, with like limitations; *Held*, that the clauses were inconsistent, and the last revoking the first, that the daughter was entitled to the legacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 460; Dec. Dig. ⇐182.]

Bill for account and partition, at Sumter, February 1831.

The only question considered by this Court, was as to the effect of two inconsistent clauses of a will bequeathing the same property to different legatees.

John B. Fraser the father of Mrs. Boone, in his will dated 18th May 1819, bequeathed

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by the fifth clause of the same, a *negro man George with other slaves, to William Hickman Fraser, the plaintiff "for his natural life, and at his death to the lawful issue of his body, and if he should die without lawful issue living at the time of his death, then in that case, remainder to the surviving brothers or sisters, or brother or sister of the said William Hickman." And with a further provision, that in case any of the brothers or sisters should die in his life time, leaving issue of their body, living at the death of the said William Hickman—such issue to take the share which the parent would have taken had they survived the said William Hickman.

By the sixth clause of the same will, the testator bequeathed to his daughter Jane Baxter Fraser, the same negro George with other slaves &c—to her for her natural life, and in case of her death, with the same limitations over in favour of her issue, brothers and sisters, and their issue, as are contained in the fifth clause—the very same words are used, and repeated over again in this clause.

Robert Fraser one of the executors qualified on the will, the 5th of June 1820, and Jane Baxter Fraser wife of the defendant Boone, qualified sometime after, on 31st Dec., 1821. On the 1st Dec. 1828, the plaintiff filed his bill, claiming, that although the testator had bequeathed by distinct and separate clauses the said negro George, first to himself and afterwards to his sister, they took a joint bequest in the said negro.—That she had intermarried with the defendant Thos. Boone who had refused to recognise his claim, he therefore prayed that the slave might be sold and the avails divided. The defendant Thos. Boone, in answer admitted the marriage, and that he had the negro George in his possession thus bequeathed, but contests the construction put by the plaintiff on the will.

Johnston, Chancellor. The defendants contend that the latter clause supercedes the former, and that they being entitled under it have a right to the slave George, given to them in it, in exclusion of the plaintiff, who claims under the superceded clause.

The doctrine is plainly laid down in the older authorities, that a subsequent clause in a will shall prevail over a prior clause. But

it was said by the plaintiff's counsel, Mr.

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*Blanding, that although the older authorities are to this effect, the Courts have subsequently come to a conclusion, that in such cases the clauses shall stand together. Upon looking at the authorities quoted, and others, I find that they use the language attributed to them.

They argue that although the last of two wills supercedes the first, yet that there is a want of the analogy supposed by the early authorities between the cases of two wills, and the cases of two clauses of the same will. That in the case of two wills, the testator assents to them separately, and that to which he last assents is his last will: but that in the case of two separate clauses of the same will, he does not assent to either before the other, but to both together as an unity, after finishing the whole will. That he does not assent to the clauses of the will, as clauses, but to the whole will consisting of clauses. That it is true, that in revolving in his mind the subjects embraced in the will, he can only give them a successive consideration: but that the assent which he gives, after all the details are arranged, is the only evidence we can have that he intended the paper to stand as his will. That in assenting he has contemplated the provisions as a whole, not only separately but in their relations to each other and pronounced his work good. That the power to do this, is what is called a sound and disposing mind and memory.[a]

The case was argued before me on the same point, and in the same way. Upon looking at the authorities I confess I was struck with the plausibility, and at first came to the conclusion that the old doctrine had been over-ruled. But further reflection has satisfied me that properly understood, and as to cases where it has a real application, it has not been. And I am further satisfied that in the cases and authorities where the arguments were used which I have recited, the question which, from the language held, appeared to have been settled, never occurred: and that in them, as in this, an immaterial question was argued.

The ancient doctrine properly understood, is not that all subsequent clauses shall prevail over the prior clauses embracing the same subjects of disposition. But it is, that where a subsequent clause either directly in

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terms repeals a former, *or contains provisions so inconsistent with it, that it cannot stand with it and by implication repeals it, it shall prevail over it.

Now the reason given by the authorities referred to, why the clauses should prevail together, is that the testator has assented to both together, and to one as well as to the other; and that reason is a good one where it can apply, as for instance, where the clauses can be made to stand together. But will any body contend, that when a testator has said in a subsequent clause, "whereas I bequeathed so and so in a prior clause, now I do hereby revoke the legacies and give them to other persons"—that in such a case the legatees shall concur and both the clauses stand, simply because the testator assents to his whole will at once? Yet the reasoning goes that length. If the repeal is indirect, by reason of inconsistency or incongruity, is it not as much a repeal as if it were a repeal in direct terms? The Court to be sure, would be bound to let the former clause stand, if by any construction it could be made to stand. But if after resorting to all the sound rules of construction the clauses be found too incongruous to prevail together, the latter must be regarded as a repeal of the former, notwithstanding both may have been apparently assented to at the final execution of the will.

Accordingly the cases in which the authorities seem to consider the old doctrines overruled, are cases where in fact it never applied, and where the question really ought to have been, whether the prior clauses could be made to stand with the subsequent, or whether the latter were not so inconsistent with the former as to indirectly repeal them. Let us resort to this inquiry.

Where the conflict is merely between detached words or phrases in a testamentary paper, the rule is to bring the conflicting phrases and words together, and ascertain how the testator intended his expressions thus scattered, to affect and modify each other: and in doing this I am not aware that I am warranted in saying that it was ever held, but I incline to believe, that if it be found, that if effect cannot be given to all, those must be rejected which are first in order. But that if by modification, any effect can

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be given to them, it must be *given, and that thus modifying each other the whole of the expressions will be taken together, as an exponent of the testator's intention. This is a rule of construction. I know of no reason why the rule of construction should be different where the conflict is between detached clauses, from what it is where the conflict is between detached expressions.

In this rule by which detached and conflicting expressions are brought together for construction, there is a real want of analogy between the cases of two wills, and the different parts of the same will: although the want of analogy on the point of assent was, I think, a mere supposition. Where there are two conflicting wills there is never any attempt to bring them together for the purpose of reconciling them, but the latter always

[a] Swin. part 7, ch. 21; 2 Atk. 374; 3 Atk. 493.

operates to the extent of the difference between them, as a direct repeal of the former. It is different where the several parts of the same will conflict.

Let us now bring the two clauses of this will in question, together, and see if there be any difficulty. There would have been no difficulty, if the testator, making use of only one clause, had said, "I give my slave George to my son William and my daughter Jane B.," limiting over the share of William, so and so, and the share of Jane, in another way. If he had, making use of only one clause, said, "I give my slave George to my son William—and I give my slave George to my daughter Jane B." &c. would this, although more at length, have amounted to any thing more than filling out the words understood in the sentence I have just before put into his mouth; which, though omitted in that sentence, are really referred to by the copulative conjunction? Would it have amounted to any thing more or less than a gift of George to the one and to the other of his children—that is, to both? Now if this would have been the undeniable effect of using such expressions in one clause, is there any magic to change that effect, in his employing two clauses instead of one?

It was argued by Mr. Mayrant, for the defendants, that the limitations over made the bequests inconsistent—that the clauses could not stand together, on that account; and that the latter clause must be preferred. If the

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limitations over *are so inconsistent in enjoyment, that they cannot stand together, or with the interests of the particular legatees, that is no reason that the particular legatees should not be made to concur until the time that the limitations shall come to take effect. If then they cannot be brought to concur, a partition by sale would be ordered, or the question would then arise between the two clauses, as to the preference to be given to them.

But I see no such incongruity as is supposed. The respective remainders limited over, are precisely of the same extent as the particular estates to which they are attached. One line of remainder men is entitled to what is given to the plaintiff, and another to what is given to Mrs. Boone. Although the plaintiff and Mrs. Boone are jointly interested, yet upon the death of either, that tenancy is severed, and the remainder men of his or her line become entitled to his or her share. They may, if they please, concur in the enjoyment, as tenants in common with the survivor; or if they cannot concur, they can have partition by sale.

It was argued, again, that the subject matter of the bequests could not be enjoyed by more than one, and that therefore, the legatees could not concur. That I do not perceive. A slave may be hired out, or he may labor for the joint benefit of a plurality of persons. But there are cases in which a joint enjoyment of the legacy cannot obtain. What then? If the legatees cannot concur, they must partition by sale. But the objection is too extensive. I will take the strongest case put by the counsel. Suppose that the Pitt diamond, or some exquisite painting, be given to two persons in two different clauses of a will. If it be contended, that the latter clause shall prevail over the former, it must be on the ground that the bequest is not susceptible of joint-enjoyment. If that reason be allowed to prevail, upon the same reason, if such legacy were given to the same persons in the same clause, it must be declared void, or the will must be violated by awarding to one of them in exclusion of the other.

I apprehend, that in such a case (and so

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also in this *case) unless the legatees can be brought to concur in the enjoyment or disposition of the article bequeathed to them, it must, being incapable of division, be sold, and the avails distributed. It is no argument against this, to say, that an article, whose chief value consists in taste, would be sacrificed by sale. That is a matter exclusively for the consideration of testators, and for the reflection of legatees.—The same difficulty would exist, whether it be disposed of in two clauses of a will, or in one only. Nor do I see reason to fear sacrifices. Granting that besides the legatees, the whole community did not contain one individual of taste, to appreciate the legacy, I imagine the legatees themselves would prove competitors to each other, to the extent of the value they set on it; and that neither would suffer himself to be deprived of it, until he received a price at least as gratifying.

I must, therefore, conclude in favor of the plaintiff's construction of the will.

It is ordered and decreed, that the defendants do deliver up the slave, George, the subject of this suit to the Commissioner, who shall, at Sumter Court House, on the first Monday of the next month after he shall have received him, or on the first convenient sale day thereafter, after having given at least fifteen days public notice thereof, proceed to sell him, on a credit of one year, taking bond with good personal security, and a mortgage of the slave, to secure the purchase money,—That upon the collection of the proceeds of the sale, the one half thereof be paid to the plaintiff, to be held by him, subject to the same limitations and conditions as those upon which the said slave was bequeathed to him by the will of John B. Frazer; and that the other half thereof be paid over to the defendant, Thomas Boone, in right of his wife, Jane B., to be held subject to the same limitations and conditions as those on which the said slave was bequeathed to the said Jane B., by the will of the said testator.

And it is further ordered and decreed, that

the said Thomas Boone do pay the costs of this suit.

From this decree the defendants appealed on the grounds:

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*1. Because, where there are inconsistent clauses of a will disposing of the same property, the last is a repeal of the first.

2. Because the limitations contained in the two clauses of the will render them inconsistent and incongrnous with each other, and the last ought to operate, for this reason, as a repeal of the first.

3. Because, in order to give effect to both clauses, the decree defeats the interest of the remainder men.

W. & C. Mayrant, for the appellant.

Blanding, contra.

JOHNSON, J. I have entertained very great doubts about the leading question in this case, and I confess that the very able argument of the Chancellor, in support of the view which he has taken, has, in some sort, shaken the confidence in the early and abiding impression made on my mind, by the maxim of Lord Coke, that "the first grant and the last will, is of the greatest force." The question, so far as I know, is open in our own Courts; and the great diversity of opinion on the subject, leaves the Court at liberty to adopt that rule which is most consistent with sound policy, and the general principles of law. The annotator of Lord Coke says, "that there is great contrariety in the books, on the effect of two inconsistent devises in the same will.—Some hold, with Lord Coke, that the second devise revokes the first, Plow. 541, note—others, that both are void on account of repugnancy, (Ow. 84;) but that the opinion of the greatest number of authorities is, that the devisees shall take in moieties." Co. Lit. 112, b. note 144.

The question is simply one of construction.—What did the testator intend? and the difficulty consists in the selection of the proper rule. That adopted by the Chancellor has for its support apparent equity; but that is opposed, according to my view of it, by the consideration, that in the universal application, inequality would be produced. To illustrate this, I would take the case put by the Chancellor, of the family picture, and suppose that it had been given in one clause

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of the will to a stranger, and *in another to a near and much valued relation. In the canvass itself there is no intrinsic value, and if the stranger takes the entire thing, he gets nothing of value—if the relative, he gets that which to him is invaluable—no price would purchase it. If it be sold for partition, the stranger takes advantage of the better feelings of the relative, and forces him to pay a great price for the one half of that which would be worth nothing to the stranger. And the same inequality would arise, in a greater or less degree, in the bequest of almost every thing incapable of a partition in specie.

In resolving a question of doubtful intention, the Court ought to adopt that conclusion which is the most reasonable and probable; and I think I may refer to the experience of every member of the profession, to support me in the position, that no case has occurred, in which, judging from extrinsic circumstances, a testator intending to divide his property between two or more, has given the whole to each severally. The terms necessary to express the intention are so common place and familiar, that no testator or scrivener, however ignorant or illiterate, could be at a loss for them—and when that was intended, it would be expressed in some form or other. Whilst, therefore, we are unable in cases of inconsistent devises, to fix with certainty the meaning of the testator, it may be affirmed with great confidence, that he did not intend that the devisees should take equally.

This view tends very strongly to the conclusion, that both ought to be rejected, on account of their repugnancy; and yet it is certain that the testator intended to dispose of the thing devised, and here the rule of Lord Coke is most opportunely introduced. Not that it furnishes a certain guide to the intention of the testator; but valuable, on account of its simplicity and the facility of its application: and it certainly loses nothing of its force and authority, by Lord Hardwicke's dissent to the reasoning of the modern cases opposed to it, in Ulrich v. Litchfield, 2 Atk. 374.

There is another consideration which very strongly inclines my judgment in favor of

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this rule. It has been, as *before remarked, fixed in my mind, by very early impressions. I believe, too, that it has been the current opinion of the profession, and I think that is the understanding of the community. One case of the sort has occurred within my own observation, which was precisely like this, (inconsistent bequests of a negro) and was adjusted by this rule; and it is not improbable that many others have occurred, and have not been brought into litigation on account of the supposed propriety of the rule.

It is therefore ordered and decreed, that the decree of the Circuit Court be reversed, and that the complainant's bill be dismissed, with costs.

O'NEALL and HARPER, JJ., concurred.

1 Hill, Eq. 369

DAWKINS & LITTLEJOHN v. DANIEL SMITH.

(Columbia. Dec., 1833.)

[*Judgment* ⇐778.]

Judgments bind lands throughout the State when abstracts of them have been forwarded to the Clerk in Charleston. And where judgment was obtained in one District, and land lying in another was afterwards sold by the defendant: *Held* that it will be presumed that an abstract was forwarded to Charleston, and that the land was bound by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1339; Dec. Dig. ⇐778.]

[*Evidence* ⇐83.]

[Cited in McLarin v. Knox & Cunningham, 6 S. C. 27; Rice v. Bamberg, 72 S. C. 385, 51 S. E. 987, to the point that, in the absence of all evidence on the subject, the officer whose duty it is to record a judgment will be presumed to have done so, even as against a purchaser without actual notice of the judgment.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. ⇐83; Judgment, Cent. Dig. § 1384.]

York, June 1833. This was a petition praying that a judgment the plaintiffs had obtained at Union Court House, might be satisfied out of the proceeds of the sale of a tract of land sold by the Ordinary of York District, to make partition among certain distributees, of whom the defendant was one.

The defendant in his answer stated that he had sold his interest in the land to Aaron Wilkins, for a valuable consideration; and Wilkins who was permitted to come in, in his answer alleged the same fact, and that he had no notice of the judgment. The sale to Wilkins however was subsequent to the judgment. Chancellor Johnston dismissed the petition, and the plaintiff appealed.

Dawkins, for the appellant.

Rogers, contra.

JOHNSON, J. The ground on which the complainant's petition was dismissed, is not

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distinctly stated in the order of the *Circuit Court, but it is understood to have been founded on the circumstance that Wilkins was a purchaser from Smith without notice of the prior incumbrance of the complainant's judgment. The case of Woodward v. Hill, 3 M'Cord 241, decides, that the judgments of the Circuit Courts bind lands throughout the State, when abstracts of them have been forwarded to the Clerk of the Court for Charleston District, to be recorded conformably to the act of 1789; and in the absence of any proof on the subject, it will be presumed that the officers charged with that duty have discharged it. It is then the case of a judgment having a binding effect on lands of which every one is bound to take notice. The object of recording them in Charleston, was to have some common place to which all might resort for information; and if with these means Wilkins neglected to inform himself, it is his own folly and he must take the consequences.

It is therefore ordered and adjudged, that the order of the Circuit Court dismissing the plaintiff's petition be reversed, and that the case be remanded to the Circuit Court for trial on the merits, conformably to the principles herein laid down.

O'NEALL, J., concurred.

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1 Hill, Eq. 370

JAMES ROBERTSON and Others v. EDWARD COLLIER and Wife and Others.

(Columbia. Dec., 1833.)

[*Life Estates* ⇐21.]

Principles applicable to a bequest for life of chattels consumable, or wearing out, in the use.

[Ed. Note.—Cited in Moon v. Moon, 2 Strob. Eq. 332.

For other cases, see Life Estates, Cent. Dig. §§ 5, 17, 19, 20; Dec. Dig. ⇐21.]

[*Life Estates* ⇐21.]

Where an estate consisting of a plantation and slaves, stock, farming utensils &c. are devised to one for life (or widowhood) the perishable articles cannot be considered as belonging absolutely to the tenant for life.—The tenant for life will be considered as a trustee for the remainder man, & must preserve the estate with all its appurtenances, in the same situation in which it was received.

[Ed. Note.—Cited in Chancellor v. Windham, 1 Rich. 168, 42 Am. Dec. 411; Moon v. Moon, 2 Strob. Eq. 332; Calhoun v. Furgeson, 3 Rich. Eq. 169; Glover v. Hearst, 10 Rich. Eq. 335; Brooks v. Brooks, 12 S. C. 462; Orr v. Orr, 34 S. C. 280, 13 S. E. 467.

For other cases, see Life Estates, Cent. Dig. Dig. §§ 5, 17, 19, 20; Dec. Dig. ⇐21.]

[*Life Estates* ⇐11.]

[Cited in Brooks v. Brooks, 12 S. C. 452, 456, to the point that, where a bequest was made of an estate comprehending various articles consumable in their use, the life tenant should have sold them, and invested the money, and used only the interest thereof, and hence was accountable to the remainder-man for such as were consumed.]

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 30; Dec. Dig. ⇐11.]

[*Wills* ⇐616.]

[Cited in Rochell v. Tompkins, 1 Strob. Eq. 117, to the point that, if property strictly consumable in nature be given for life, a remainder over is void.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418–1430; Dec. Dig. ⇐616.]

[This case is also cited in Calhoun v. Furgeson, 3 Rich. Eq. 170, regarding the distinction between an entire estate for life with limited remainder and devise of specific chattels in same way.]

Bill for account and partition—heard before Chancellor De Saussure, at Abbeville, June 1833.

George Robertson, dec'd., by his last will and testament, executed in 1817, devised and bequeathed to his wife, viz.: "I also give her, during her widowhood, the whole of the interest and profit arising from my estate real

and personal, except so much thereof as may

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be necessary for *the education and maintenance of my children, hereinafter mentioned. But in case of her marrying again, in place of the before mentioned use and disposal of the whole of the interest and profit arising from my estate, I give her one-third part of the whole of my estate, real and personal, to be hers and to be at her disposal forever;" and the residue he directed to be divided between his children, after applying so much as might be necessary for their education and maintenance until the period fixed for distribution. By another clause he declared, that "should my hereinafter named executrix and executor, think it necessary, or for the advantage of the estate, to sell or dispose of all or any part of my estate, real and personal, I do hereby authorize them to do so —the money arising from such a sale, to be laid out in such bank stock as they may think most advisable; the interest arising therefrom to be applied as before directed;" and appointed his wife executrix, and John M'Calla executor.

At first M'Calla alone qualified.—He sold all the property except the plantation and the negroes, and other personalty on it; and having paid the debts, vested the balance of the sales in bank stock. After the testator's death, the widow continued to reside with the family on the plantation, having the possession and use of the negroes and other property during her widowhood, and supporting and educating the children. The executor had made an inventory and appraisement of this property, and on delivering it to the widow, had taken her receipt, by which she acknowledged the property was to be accounted for, as the will directed. Of the property thus held by her, there was personalty appraised at $4,318.28, which consisted of perishable articles, such as were consumable in the use, and such as could not be expected to out last an ordinary lifetime. In 1821, the widow intermarried with the defendant, Ed. Collier, and consequently her right to the enjoyment of the whole estate for life ceased, and she became entitled to one-third thereof absolutely, according to the provisions of the will. Shortly afterwards she qualified as executrix.

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*The case came before the Court, on exceptions to the Commissioner's Report. Several questions were made, but the principal and only one which it is thought necessary to notice was, as to the liability of Collier & wife, for the property received by her, which was perishable in its nature, and consumable in the use. The Commissioner, in his report, did not charge them with this property; and the plaintiffs excepted thereto, "Because the Commissioner has not charged Ed. Collier and wife with the property received by her, which was consumable in the use, and that which was perishable in its nature, amounting in the aggregate, to $4,318.28, a part of which having been consumed in the ordinary course of husbandry, and the residue having perished or been worn out by Mrs. Collier and her husband; whereas, by the will, "the interest or profit," only of said property is given to Mrs. Collier, during her widowhood, and one-third thereof absolutely, on her marriage."

The Chancellor sustained the exception, and the defendant appealed, on the ground:

That the devise to the widow during her widowhood, is coupled with a trust to maintain and educate the children—is, both in its terms and substance, a devise as well to the children as to their mother, and by the whole context it is apparent, that the use intended was a use of the property in kind and not in value; and therefore the defendants were not bound to account for any but what remained of it at the termination of the particular estate.

Bowie, for the defendant, cited Howe v. Earl of Dartmouth, 7 Ves. 137. He argued that it was a question of intention—whether the testator intended his widow to enjoy his property in kind or in value.—That having left it to her discretion, whether it should be sold and what part, shews his intention that she should, if she chose, enjoy it as such property is usually enjoyed. And being charged with the maintenance of the children, the testator must have known and intended that it should be enjoyed in kind;

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and *that only such part as remained, on the death or marriage of the widow, and in the condition it then was, should be given over in remainder.

Pope, contra, contended, on the authority of Devlin v. Patterson, that the tenant for life is accountable for the value of perishable property. The intention here is manifest—for the testator gives only "the interest and profit" of the property in express terms, which is opposed to the idea of its destruction. The very direction to sell, shows a different intention; for, would the testator have directed a sale of property which he intended should be consumed in the use, or worn out by enjoyment? The executors ought to have sold this property, and this would have ousted this absolute right now claimed, and not having done so, if the estate should suffer in consequence, Mrs. Collier, as executrix, would be liable for a breach of trust. The testator gives his widow one-third of his estate, if the construction contended for, should prevail, she will have received about one half.

HARPER, J. The whole estate was devised to Mrs. Robertson during widowhood, subject to a charge for the maintenance and education of her children. The annexing of

this charge can make no difference in other respects as to her duties and liabilities as tenant for life. The case of Devlin v. Patterson,[a] decided by this Court and referred to by the Chancellor, was chiefly relied on as settling the principles which are to be applied in the case before us. The general conclusions in that case are, that if chattels, strictly consumable in the use, such as corn, wine, &c. be given specifically to one for life with remainder over, the remainder is void, as being inconsistent with the only use which the tenant could make of them. If there be a similar bequest of articles wearing out in the use, such as farming utensils &c. the remainder man must take them, or such of them as remain, in the condition they are in at the termination of the life estate, deteriorated by the use of the tenant for life. But if such chattels be given by a residuary bequest, comprehending various articles, they are to be sold and the money vested; the tenant for life to receive the interest, and after his death, the remainder

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*man to have the principal. The consequence is, that the tenant for life accounts to the remainder man for all articles of the description mentioned, at the value which they have at the commencement of the estate for life.

In the case before us, the devise was not strictly of a residue but of an estate. There was no bequest of corn, ploughs, carts, horses or mules, but of an estate comprehending all these particulars, as well as lands and slaves; and it seems to me to come within the reason of the rule which has been applied to the bequest of a residue. In this case however, the legatee was not bound, nor could she have been compelled, to sell the estate and vest the proceeds. From the power given to the executrix and executor to sell any part or all of the estate as they may think necessary or advisable, is plainly implied, that if they think proper they may retain and use it in kind, without sale, and hence it is inferred, that if they think proper to retain it, they are to account for perishable articles as if these had been specifically bequeathed. The inference does not seem to be legitimate. The option given by the testator was for the benefit of his estate: and it would seem unreasonable that by adopting one course, the devisee should have an unlimited power of disposition over a large portion of the estate—to consume or wear out—while by the other, she would be compelled to account for every article as she received it.

[a] Columbia, 1829—not reported—opinion lost or mislaid.—R.

An extract from the opinion of Judge Nott, in the case of Devlin v. Patterson will, I think, put the matter upon its true footing. "There is another view of the subject which deserves consideration, and which is somewhat peculiar to the situation of this country. Lands are sometimes given to one for life, together with the slaves, stock of horses, cattle, plantation tools and provisions, with a limitation over. In such case, the perishable articles cannot be considered as belonging absolutely to the tenant for life; neither can they be sold; because they are necessary for the preservation of the estate. The tenant for life must therefore be considered as a trustee for the remainder man, and must preserve the estate, with all its appurtenances, in the same situation in which he received. He may therefore be

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required to give an inventory of *the property, or security for its preservation according to circumstances. The tenant for life will be entitled to the increase of the stock and the rents and profits of the land; but he must keep up the stock of cattle, horses, provisions and instruments of husbandry, in the condition in which he received them. For although some of the articles may be consumable in the use and others are wearing out by the attrition of time, yet when taken altogether, being reproductive, the estate must be made to keep up its own repairs." These views are so full and explicit, that little need be added to them. The principle is the same, though extended in its application, by which a tenant for life in England is forbidden to waste the estate and is required to make ordinary repairs, or any other tenant is required to treat the estate in a husbandlike manner, or the legatee for life of a flock or herd while he takes the increase, is required to keep up the original stock. The tenant for life is entitled to the use of the estate; but it is such use as a prudent proprietor would make of his estate. The profit of an estate is the nett income after defraying all necessary expenses; and to renew a plough that is worn out, or replace a horse or mule that dies, comes under the head of necessary expenses.—Thus the relative rights of the tenant for life and remainder man, will be the same whether the estate be sold and the proceeds vested or retained in kind. If at the termination of the life estate, all the articles of the sort mentioned are not in as good condition as when he received it, the tenant must make good the deficiency.

The decree of the Chancellor is therefore affirmed.

JOHNSON and O'NEALL, JJ., concurred.

1 Hill, Eq. *376

*JOHN RIDDLEHOOVER and Others v. JOHN M. KINARD, Administrator of John P. Kinard, and J. T. SLIGH, Administrator of Catharine Kinard and Others.

(Columbia. Dec., 1833.)

[*Adverse Possession* ⟸106; *Quieting Title* ⟸44.]

Where one being sole legatee under a will administered with the will annexed, took possession of the property and held it for upwards of twenty years & the will was then declared void and the probate revoked;—*Held* that this possession conferred title as against all persons who were not under legal disabilities, and that after such a lapse of time the Court will presume whatever is necessary to give efficacy to the possession.

[Ed. Note.—Cited in Henry v. Stewart, 2 Hill, 334; Lamb v. Crosland, 4 Rich. 542; Gray v. Givens, 2 Hill, Eq. 513, 514; Godfrey v. Schmidt, Cheves, Eq. 58, 60; Myers v. O'Hanlon, 12 Rich. Eq. 208; Wherry v. McCammon, Id., 338, 91 Am. Dec. 240; Colburn v. Holland, 14 Rich. Eq. 234, 243; Massey v. Adams, 3 S. C. 265; McLarin v. Knox & Cunningham, 6 S. C. 27; Craig v. Beatty, 11 S. C. 379; Boyce v. Lake, 17 S. C. 487, 488, 43 Am. Rep. 618; Shubrick v. Adams, 20 S. C. 52; Rabb v. Patterson, 42 S. C. 537, 20 S. E. 540, 46 Am. St. Rep. 743; Miller v. Cramer, 48 S. C. 292, 295, 26 S. E. 657; Corbett v. Fogle, 72 S. C. 319, 51 S. E. 884; Young v. McNeill, 78 S. C. 155, 59 S. E. 986; Lewis v. Pope, 86 S. C. 294, 68 S. E. 683.

For other cases, see Adverse Possession, Cent. Dig. § 611; Dec. Dig. ⟸106; Quieting Title, Cent. Dig. § 89; Dec. Dig. ⟸44.]

[*Husband and Wife* ⟸8.]

The legatee having married, her husband obtained possession of the property; *Held*, that the marital rights attached as against those who were not under disabilities.

[Ed. Note.—Cited in Henry v. Stewart, 2 Hill, 334; Lamb v. Crosland, 4 Rich. 542; Gray v. Givens, 2 Hill, Eq. 514; Colburn v. Holland, 14 Rich. Eq. 234; Shubrick v. Adams, 20 S. C. 52.

For other cases, see Husband and Wife, Cent. Dig. § 26; Dec. Dig. ⟸8.]

[*Ejectment* ⟸132.]

[Cited in Scaife v. Thomson, 15 S. C. 368; Johnson v. Pelot, 24 S. C. 263, 58 Am. Rep. 253, to the point that, when possession of property takes place under an apparently good title, the right to an accounting is limited to the commencement of the action.]

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 444–447, 449–452; Dec. Dig. ⟸132.]

[This case is also cited in Willingham v. Chick, 14 S. C. 103, and Boyce v. Lake, 17 S. C. 486, 43 Am. Rep. 618, on the doctrine of legal presumptions, and cited and approved in Willingham v. Chick, 14 S. C. 94.]

Uriah Wicker being possessed of considerable real and personal estate, died in 1808, without issue, leaving a widow, Catharine, and brothers and sisters, and their descendants, all of whom, except the children of a deceased brother (John) were of age. An instrument purporting to be a will, and alledged to have been duly executed, bequeathing his entire personal estate to his widow Catharine Wicker, was proved in common form, and letters of administration with the will annexed, granted to her. She took possession of the whole estate, made an appraisement, and sold off a portion of the personalty, but made no returns to the Ordinary, and continued in the possession and enjoyment of the balance for many years. She afterwards intermarried with John P. Kinard, who thereby became united with her in the possession of the estate, and in the administration. Catharine Kinard (Wicker) died in 1826, intestate, and without issue, her husband, John P. Kinard, and mother, Mrs. Sligh, her surviving. After her death, her husband John P. Kinard, continued in the possession of the estate, as theretofore, and received the rents and profits, till his death, in 1828. He died intestate, without issue, leaving brothers and sisters; and his brother, J. M. Kinard, one of the defendants, administered on his estate, possessed himself of the property so held by his intestate, and made sale thereof. In the year, 1830, on some discovery of facts, a petition was presented to the Ordinary, requiring proof of the alledged will in solemn form. The Ordinary decreed against the will, and revoked the probate. On appeal to the Court of Common Pleas, his decree was sustained by the verdict of a jury, and finally confirmed by the Court of Appeals, in 1832. After this, the plaintiffs administered on the estate of Uriah Wicker, and are entitled to distributive shares of a moiety thereof. In 1833, John T. Sligh administered on the estate of Catharine Kinard.

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*The original bill was filed in 1829 for partition of the real estate, and after the will had been set aside the plaintiffs filed a supplemental bill. They state, that they are unwilling to disturb the purchasers of such of the property as has been sold, but on having the purchase money accounted for, will confirm the sale.—That the share of Catherine Kinard in the estate of Uriah Wicker, was not reduced into possession by her second husband John P. Kinard so as to vest in him, especially as the will was set up surreptitiously and fraudulently, which was known to him; but that the said share vested in J. T. Sligh, her administrator, and is distributable. The bill prays for an accouut and partition.

The answers set up various grounds of defence, but the principal points made and insisted on in the argument were:

1. That the estate of John P. Kinard should not be held liable for a devastavit (if any) committed by the wife dum sola, no recovery being had during coverture.

2. That Mrs. Kinard held adversely to the plaintiffs, and lapse of time and the statute of limitations ought to protect the possession of the property in her and her husband.

3. That the marital rights of John P. Kinard attached on the property held by him, and consequently his representatives were not liable to account therefor.

The case came to a hearing before Chancellor De Saussure, at Newberry, July 1833. The Chancellor decreed against the defendants on the points made, and Ordered and decreed the administrator of John P. Kinard to account for the estate which went into the possession of his wife, as administratrix with the will annexed; and that bona fide purchasers of any part of the estate, be quieted in their purchases; the defendant to account for the proceeds of the sale.

From this decree the defendant, J. M. Kinard, appealed, on the grounds taken below.

J. J. Caldwell, for the appellant, argued, that as to the account for rents and profits, it can only be claimed from the entry, 7 T. R. 433; 1b. 727; 13 East, 474; and it cannot be carried back more than four years before the filing of the bill, 1 Atk. 524; 2 M'C. Ch.

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317. As regards *the lapse of time, he contended, that according to adjudged cases, it conferred a perfect title, and the minority of some of the parties could not defeat the legal presumption arising from lapse of time—differing herein from the statute of limitations—and cited and relied on Hutchison v. Noland, 1 Hill, 222; Foster v. Brown, ———; 4 Bro Ch. 256.

Fair, contra. The Court held the plaintiffs to be in time when they set aside the will, and of course they are entitled to the account. So long as the will stood in force they had no right of action, and consequently cannot be barred. Nor was there laches in the plaintiffs—they were kept in ignorance of their rights by the fraudulent conduct of Mrs. W.; and in Equity, all those who received the property with knowledge of the circumstances would be considered trustees. He cited 3 Stark. on Ev. 1217–27; 2 Eng. Ch. Rep. 200.

HARPER, J. I shall first consider the ground of defendant's motion which respects the lapse of time or the statute of limitations. Defendants, or those under whom they claim, had been in possession of the estate, claiming it as their own, for more than twenty years before the filing of the bill.—Probate of the will was granted in 1808, and the bill filed in 1829. And it may be observed that at the time of filing the bill, complainant had no right of action, as the will was then in existence. It was in 1830, that the application was made to revoke the probate. If there had been no will and no administration, and defendants, without colour of title, had taken possession of the property and kept it for so long a time, I suppose their title would be good, under the decisions in Reed v. Price, Harp. State Rep. 3, and Hutchison v. Noland, 1 Hill, 222. Administration would have been presumed and that defendants had acquired a title from the administrator. The lapse of twenty years is sufficient to raise the presumption of a grant from the State, of the satisfaction of a bond, mortgage or judgment, of the grant of a franchise or the payment of a legacy, or almost any thing else that is necessary to quiet the title of property. After twenty years, a bill of review will not lie. This is the gen-

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eral equitable bar. *It may be true, in general, as stated in the case between the same parties brought up on appeal from the ordinary, that when the goods of an intestate are converted, the cause of action arises from the time of granting administration, and from that time the statute will begin to run. But the cases to which I have referred shew, that there is a distinction when we come to consider the presumption arising from lapse of time. If defendants would have been protected if there had been no administration or probate, what makes the case worse for them under present circumstances? It is that instead of being trespassers committing a known wrong, they took possession under an apparently good title for aught that appears bona fide, believing the property to be their own? Their possession was still adverse; they claimed for themselves; this was known to all the world, and must be presumed to have been known to the complainants. It is replied that complainants (I speak of those who were of full age at the time of probate granted) were under a disability; they could not sue while the will was in existence; they were misled by the granting of the probate, and ignorant of their rights; in the language of the Chancellor "they wanted light and liberty." It is also said that they took possession in the character of trustees and it does not appear when that possession terminated, and that you cannot make the usual presumptions. You cannot presume an administration, for probate is shown and the will under which they claimed. Nor can you presume a valid will giving the property to them, for the recent decision of the Ordinary affirmed by the Court, shews that there was no will.

It is true that the complainants could not have sued while the will was in existence; nor in the cases of Reed and Price and Hutchison and Noland, could there have been a suit till administration granted. By whose laches was the will permitted to continue in existence so long? According to our decision in the case of the will, the parties who were of full age at the time of the probate, had no right to contest the will after a lapse of four years; shall they be permitted to contest rights claimed under the will after a lapse of twenty? As observed by the Chancellor,

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the complainants or those *whom they repre-

sent, certainly knew that they were the next of kin of Uriah Wicker, and in default of a will entitled to his estate. They must be presumed to have known of the will, of which they were so much interested to be informed. The Ordinary's Office was open to them and they might have known how the will was proved, and most probably did know. They might then have obtained legal advice upon the sufficiency of the proof, and cited the administratrix to prove the will in solemn form. Under what disability did they labour then, which was removed when the application was made to the Ordinary, in 1830? In the case of Nicks v. Martindale, Harp. State Rep. 135, [18 Am. Dec. 647,] it was held that the statute of limitations which had begun to run against an intestate, was not after his death suspended until administration granted, on the ground that it was the fault of those interested in the estate not to have taken out administration sooner. Was it not the fault of the complainants not to have sooner contested the will? If twenty years were not sufficient to mature defendant's title what time would have sufficed? thirty? fifty? a century? Rights consecrated by time must not be held by so impalpable a tenure.

Then as to taking possession in a fiduciary character. By administering cum testamento annexo, Catherine Wicker took possession as trustee for herself, and this was as adverse to all the rest of the world as if the executors appointed by the will had qualified and delivered the estate to her as legatee. It was immaterial whether she held as administratrix or legatee. It is said, we cannot presume either a general administration, or a valid will. It is hardly necessary to say that legal presumptions are not founded on actual belief. As observed by Lord Eskine in Hillary v. Waller, 12 Ves. 267, "mankind from the infirmity and necessity of their situation, must for the preservation of their property and rights, have recourse to some general principle to take the place of individual and specific belief." In the Mayor of Hull v. Horner, Cowp. 162, the grant of certain duties to the corporation of Kingston upon Hull was presumed from long usage, though their charter was produced which contained no such grant.—So in the case of Bedle v. Beard there quoted, (12 Co. 5) the grant of an advowson appendant to a manor

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was presumed *from possession, though the grant of the manor was produced which did not include the advowson. Presumptions must be sometimes made against the well known truth of the fact. If twenty years have elapsed without the payment of interest or any acknowledgment of a bond, we must presume it paid, notwithstanding the fullest conviction that it never has been paid. In Hutchison v. Noland, it was proved by the Ordinary that no administration had ever been taken out till granted to the plaintiff. As said in that case, we will presume whatever is necessary to give efficacy to long possession. If it were necessary to make any specific presumption in this case, I would presume that the parties who were of full age at the time of the probate, released to Catherine Wicker their interest in the estate, or their right to contest the will. The probate cannot be regarded as revoked at their suit, but at the suit of those who were under disability.

It is stated in the bill, and admitted by the answer, that all the brothers and sisters of Uriah Wicker (who were his next of kin) were living and of full age at the time of his death. It appears from the testimony, however, and seemed to be conceded at the hearing, that one brother (John) was then dead, having left infant children. Those who represent the other brothers and sisters are barred by the lapse of time; and as to them, the bill must be dismissed with costs. The children of John Wicker who came of age within four years next before the filing of the bill, are, I think, entitled to an account. But on the authority of Rowland v. Best, 2 M'C. Eq. Rep. 317, I think it must be without interest until the bill filed. It is not stated in that case, that the parties entitled to the estate were infants. The infancy of some of the parties in this case saves their right to an account; but the claim to interest is within the discretion of the Court, according to the equity of circumstances. The defendants or those under whom they claim, believed themselves the owners of the property, and had good reason so to believe. In this confidence they expended the income, and it would be hard approaching to the effect of fraud, to call upon them to account for what they have thus expended. A man

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is not sup*posed to expend the capital of his estate, but he may justly be presumed to expend the income.

Questions are made, whether John B. Kinard is liable for the devastavit, as it is called, of his wife, and whether his marital rights attached on the property in his possession. Catharine Wicker sold the whole estate, and John Kinard very soon after married her. In point of fact there is little doubt that the whole of the proceeds went into his possession. In respect to the assets thus received, he became liable as administrator, in right of his wife, to any one who had a claim on the estate of Uriah Wicker. There is no question of devastavit; but I think the marital rights must be held to have attached as against all the world, but the parties (children of John Wicker) who are entitled to relief under this decree. Suppose the will to have been a valid one, would there have been any question as to the attaching of the marital rights? An executor who is also legatee, may by the the slightest act, signify

his intention to take possession in his character of legatee, and terminate his possession as executor. If the will had been valid, and Kinard and wife entitled, under it, to the whole estate, could any thing be more extravagant than to suppose, that during the twenty years that he possessed the estate and dealt with it as his own, he continued to hold possession in his character as trustee. But as to all the rest of the world, except the parties before mentioned, the case is the same as if the will had been valid. All others are precluded by length of time, from questioning any title that John P. Kinard may choose to set up. They are estopped by their acquiescence. To the children of John Wicker, who are declared to be entitled to relief, the representative of John P. Kinard must account, as for the estate of Uriah Wicker.

It is Ordered and decreed, that the decree of the Chancellor be modified according to the views herein expressed.

JOHNSON, J., concurred.

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1 Hill, Eq. *383

*SARAH YOUNG v. JAMES NAYLOR.

(Columbia, Dec., 1833.)

[*Marriage* ⇐63.]

The defendant having married in Maryland, was divorced a mensa et thoro & afterwards (his wife there living) married the plaintiff in this State, & took possession of her property; on a bill filed to compel an account and surrender of the property, the marriage here was declared void, & the defendant ordered to surrender the property, & account for the rents & profits.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 138; Dec. Dig. ⇐63.]

[*Divorce* ⇐320.]

[A statute granting a "divorce from bed and board, and from mutual cohabitation," does not authorize the parties to remarry.]

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 818; Dec. Dig. ⇐320.]

[*Marriage* ⇐60.]

[Chancery may decide upon the validity of a marriage so far as it affects rights of property involved in a suit in chancery.]

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 127; Dec. Dig. ⇐60.]

Laurens, June 1833. This bill was filed for an account and surrender of an estate which came into the defendant's hands by virtue of a marriage with the plaintiff, which she alledges was void in consequence of a previous marriage of the defendant in Maryland, to another who is still living. To this the defendant answered, that previous to his marriage with the plaintiff, the Legislature of Maryland had passed a statute dissolving the marriage there, and divorcing him from that wife. The statute was produced, bearing date 14th February, 1820, (prior to the marriage here) in the following words: "An Act for the benefit of Margaret W. Naylor, of Charles County." "Be it enacted by the General Assembly of Maryland, that Margaret W. Naylor, of Charles County, be, and she is hereby divorced from bed and board and mutual cohabitation of her husband, James Naylor, of George."

De Saussure, Chancellor. The question for the consideration of the Court is, whether the statute of Maryland was a divorce a mensa et thoro, or an absolute divorce a vinculo matrimonii? If it was divorce a vinculo, then the defendant was entitled to all the rights in his present wife's property, given by our laws to lawful husbands. If it was a divorce a mensa et thoro only, then James Naylor had no right to contract marriage with Mrs. Young or any other woman, and he acquired no right over her property by the mere form of an illegal marriage.

It was argued, that it was not competent for this Court to interpose its authority to give relief for three reasons:—1st. Because it involved the exercise of ecclesiastical jurisdiction, which does not belong to Chancery. 2nd. That if there be any wrong done to the complainant, she has a remedy at law. 3d. That it decides on the law of another State.

As to the first, the Court by its interposition does not undertake to assume ecclesiastical jurisdiction. It does not undertake to pronounce judicially that the parties are

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law*fully married or divorced; but it pronounces the effect of such a state of things. It decides merely incidentally and collaterally, as every Court is often bound to do. In the case of a criminal prosecution against a man, a woman may be called upon as a witness. She might be objected to as being the wife of the prisoner on trial, and incompetent to be a witness. The marriage might be denied. The course of the trial could not be stopped, and the criminal Judge must hear the evidence to ascertain whether she is the wife of the prisoner, and decide on it too—else he could not decide on her competency or incompetency. And the same difficulty would occur in all Courts of justice, if they could not decide on questions not originally within their jurisdiction.

On the second ground, that the complainant has a remedy at law, this does not appear to me to prevent the complainant asking relief of this Court, even if the fact were as alledged. One of the common grounds of jurisdiction in this Court, is to prevent multiplicity of suits. Now, in the case before us, the husband might disperse the property into various hands. There are lands, slaves and other property in question. A multitude of suits would be necessary to secure and protect the complainant's rights. It appears to me that she comes here properly for relief.

The third ground of objection is, that this Court cannot decide on the construction and

effect of the statute of Maryland, divorcing James Naylor from his wife. This objection is founded in error. It is the practice of all Courts of Justice, in all countries, to decide questions in cases brought before them, arising under the laws of other countries.—The enquiry is made, what is the law of that country in which the contract was made or was to be executed and when that is once ascertained, the Court gives it application to the case under consideration. Thus the English Courts have decided in the famous case called the Dalrymple case, what constituted a marriage in Scotland. In that case, which has been followed by others, Sir Wm. Scott decided that the facts proved, constituted a lawful marriage, (against the opinion of

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some of the most learned of the *Scottish bar) and consequently a second marriage contracted in England by one of the parties was null and void. This decision, which has never been questioned, is direct as to the right of this Court to exercise jurisdiction, and to decide on the question of the divorce under the Maryland statute.

We come then to the consideration of the question, what was the intention and effect of the statute of Maryland.—Was it meant to be a divorce a mensa et thoro, or a vinculo matrimonii?

The statute bears date on the 14th February 1820, and is entitled "An Act for the benefit of Margaret W. Naylor, of Charles County," and is in these words—"Be it enacted by the General Assembly of Maryland, that Margaret W. Naylor of Charles County, be, and she is hereby divorced from bed and board, and mutual cohabitation with her husband, James Naylor, of George." Now this statute does not divorce a vinculo matrimonii.—It is from bed and board, which is a mensa et thoro—which, it is well understood, does not amount to such an absolute divorce, as entitles the parties to marry third persons. The addition of the words, "from mutual cohabitation," does not enlarge the nature of the divorce. It is a mere repetition of the idea of separation from bed and board, which of itself would have amounted to a cessation of mutual cohabitation.

A volume of the statutes of Maryland was placed in my hands, in which I have examined various acts from 1820 to 1832, divorcing sundry persons therein named. By a careful reference to these acts, it appears that wherever the divorce from bed and board and mutual cohabitation is enacted, it does not appear to be considered an absolute and final divorce from the binding efficacy of the original marriage contract.

Wherever additional provisions were considered necessary to prevent the control of the acts of the husband, or for other purposes, they are expressly inserted in the statute. In a few cases where there are divorces from bed and board and mutual cohabitation, a special proviso is made that these should not amount to a power to the

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par*ties to contract marriage again, lest those privileges should be construed into an absolute divorce. And in cases where the statute means to divorce the parties absolutely, it enacts the marriages to be null and void, and the parties are declared to be divorced a vinculo matrimonii.

It appears to me then to be quite clear, that the act of divorce between James Naylor and Margaret W. Naylor, was not intended by the law giver to amount to a divorce a vinculo matrimonii; but was simply, as it expresses itself, to be a divorce from bed and board and from mutual cohabitation. Now this does not authorize either of the parties to contract another marriage.—Consequently the marriage contracted by James Naylor with Sarah Young, was null and void, and he acquired no marital rights by virtue thereof.

It is therefore Ordered and decreed, that James Naylor shall not exercise any control over the property of the said Sarah Young; but shall forthwith deliver up the whole thereof to her, subject to her own acts.—And the said property is hereby declared and decreed to be free from the demands, suits, judgments and executions of the creditors of the said James Naylor, or of any other person or persons, other than the said Sarah Young.

It is further Ordered and decreed, that it be referred to the Commissioner to examine and report, what were the debts of Sarah Young, before the alleged marriage with James Naylor—also what were the debts justly and properly chargeable to her after said marriage ceremony.—And that in making up said account, the Commissioner do allow to James Naylor, all just and equitable demands against the said estate for proper improvements or reasonable expenditures.

From this decree the defendant appealed, on the grounds taken below.

Williams & Irby, for the appellant.
Young, contra.

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*PER CURIAM. We concur with the Chancellor in his views of the questions on which the defendant has appealed; his motion is therefore dismissed.

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1 Hill, Eq. 387

TITUS G. FARR and Others v. WM. B. FARR, Executor.

(Columbia. Dec., 1833.)

[*Trusts* ⇐231.]

This Court views contracts between trustees and their cestui que trusts in relation to the trust property with great suspicion.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330–335; Dec. Dig. ⇐231.]

[*Limitation of Actions* ⟸100.]

A party coming into Equity for relief against a fraudulent deed, must come within four years after the fraud was discovered.(*a*)

[Ed. Note.—Cited in Parham v. McCravy, 6 Rich. Eq. 145; Suber v. Chandler, 18 S. C. 528; Smith v. Linder, 77 S. C. 541, 58 S. E. 610.

For other cases, see Limitation of Actions, Cent. Dig. § 488; Dec. Dig. ⟸100.]

[*Limitation of Actions* ⟸37.]

The same lapse of time (four years) will bar relief against fraud in a deed for land, as well as for personalty.

[Ed. Note.—Cited in Parham v. McCravy, 6 Rich. Eq. 145.

For other cases, see Limitation of Actions, Cent. Dig. §§ 182–186, 477; Dec. Dig. ⟸37.]

Heard before Chancellor Johnston, at Union, June 1833. The bill states that Col. Wm. Farr, late of Union District deceased, by his last will and testament executed in 1794, charged his estate with the support of his wife during her life or widowhood, and also with the maintenance and education of his children, and after the death or marriage of his wife, he directed his real and personal estate to be divided amongst his children, and appointed his son, the defendant Wm. B. Farr, and others, his executors. The defendant qualified, became principal acting executor, took possession of the estate and made some sales thereof, and worked the plantation and slaves for many years, taking the entire control and management of the estate, and acting as the guardian of his brothers, the plaintiff Titus G. Farr, and James Farr, who were then minors and lived with him. That during this time the defendant frequently represented the estate as insolvent, and that the property in his possession was his own; which representations are alledged to be false and made to deceive and defraud the parties interested. That the devisees being indigent and necessitous and desirous of enjoying their share of the estate, in order to effect this, on the coming of age of the youngest child, procured the consent of their mother to release her interest, for an adequate provision in her behalf for life: and proposed that partition should then be made according to the will. That the defendant objected and positively refused to enter into any arrangement, unless they would allow him a certain quantity of land, and certain

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negroes, horses *and stock, amounting in value to about $30,000, beyond the share he was entitled to under the will, to remunerate him as he said for his trouble and expense in managing the estate, raising and educating the children, and for advances made for the benefit of the estate. That having confidence in his representations and wishing to avoid any litigation, the other devisees consented, and accordingly a deed of partition and settlement was executed on 14th March, 1819, which allowed to the defendant the land and negroes and stock as agreed on, and to the other devisees their shares, which afterwards went into their possession and have been held by them ever since. This deed the bill charges to have been obtained by fraud, and prays that it may be set aside and the defendant held to account. It also alledges that the plaintiff Titus G. Farr, was kept in ignorance of the true situation of the estate and of his rights therein and that the deed was not valid, until within four years before the filing of this bill. James Farr died on 22d May, 1823, leaving children who are plaintiffs in this bill, and most of them still under the age of twenty one: and Titus G. Farr has administered on his estate. The bill was filed in 183— after the period of the statute of limitations had run out from 1819.

The defendant in his answer avers, that the parties were fully conversant of their rights, and voluntarily executed the deed of 1819 as a final settlement and partition of the estate: and that under the circumstances it was just and equitable—the property retained by himself being no more than he was justly entitled to: and he set up this deed in bar to an account, and pleaded the statute of limitations.

The Chancellor dismissed the bill and the plaintiffs appealed on the following grounds:

1. That the Court should have declared the deed of partition and settlement fraudulent and void, under the circumstances attending its execution.

2. That lapse of time or the statute of limitations should not bar the relief sought, inasmuch as the plaintiffs were ignorant of their rights and of the defendant's fraud, until within four years before the bill was filed.

3. That the minority of the heirs of James

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Farr who are *parties to the bill as plaintiffs, will prevent the bar of the statute of limitations or lapse of time, as to the rights of the other plaintiffs in the real estate—or at all events, will save their own rights.

Herndon, for the appellants, argued that the deed of partition and settlement should be declared void and set aside, on the grounds, that the defendant had kept the parties in ignorance of the true situation of the estate—had availed himself of their necessities and exacted from them one half of the corpus of the estate besides the profits, for doing that which he was bound to do. That by his false representations, that he was the rightful owner of the property in his possession, and that the estate was insolvent, they were induced, to avoid litigation, to consent to his terms—That this might be regarded as a purchase from expectant

(*a*) See Eigleberger v. Kibler, ante, 121, [26 Am. Dec. 192;] Prescott v. Hubbell, ante, 210; Riddlehoover v. Kinard, ante, 376. R.

heirs, which was always regarded with jealousy and set aside especially when, as in this case, there was gross inadequacy of price. And that a deed thus obtained should be set aside, as well on the grounds of public policy as for the fraudulent and unconscientious means employed to obtain it. Butler v. Haskell, 4 Eq. Rep. 687; 1 Maddock 96; 1 M'C. 383; 1 Mad. 112; 2 Ves. Sen. 547; 9 Ves. 292. ——— As to the statute of limitations or lapse of time, he insisted that time could only be a bar from a discovery of the fraud, and a knowledge by the plaintiffs of their rights.—That where the ground of relief is, that the party seeking it was ignorant of his rights, all that is required, is for him to charge the fact, and the defendant must shew that he was not. James Farr's heirs at law being infants, will save the rights of all the plaintiffs, Lahiffe v. Smart, 1 Bailey, 192. By analogy to the statute of limitations, if time is to be a bar in this case, five years will be the time to run, in order to bar the plaintiffs' right to the real estate; that being the period of the statute at that time; James Farr died before five years had elapsed from 1819,—and the minority of his children, if it will not save the rights of the other plaintiffs, will at least protect their own. Starke v. Starke, Law Journal.

Thomson, contra, contended that the deed of 1819 was executed by all the parties un-

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der a perfect knowledge of *their rights.—There was no evidence that they were ignorant of them, nor any circumstance to warrant that conclusion.—General allegations of fraud will not do; it must be specially set out, 2 Saund. Pl. & Ev. 116, 643; Barn. & Cres. 647; 1 Chitty, 339; and the plaintiffs have failed, either to specify the fraud in the bill, or to sustain it by evidence. As to lapse of time, he contended that four years was sufficient to bar the relief sought, which was not a recovery of the land, but to set aside a deed as fraudulent; and four years had elapsed in the life time of James Farr after the deed had been executed; and he referred to 14 John. 407; 1 Pothir. 36; Newl. 452; and the Louisiana Code.

Herndon, in reply, cited Mad. Rep. 133; 1 M'C. Ch. 389; Mad. Ch. 389.

HARPER, J. The point for consideration is the settlement by the deed of the 14th March, 1819. If the application had been made recently after its execution, I should greatly doubt whether that settlement could be allowed to stand. By it, he apparently secures a very considerable advantage. The relative situation of the parties is to be considered. He was the executor in possession of the estate, and had stood in the relation of actual guardian to the parties. They were just then by the consent of their mother, entitled to claim a distribution of the estate, and naturally anxious to get into possession. The defendant stood in a position of advantage in treating with them. The property allotted to defendant over and above his equal distributive share, is said to be in consideration of his services in saving and preserving the estate. This must be regarded as a gratuity, and such gratuities, under such circumstances, the Court always looks upon with the greatest suspicion. In such case, as is said in Hylton v. Hylton, 2 Ves. Sen. 547, the party is supposed to say 'I will not deliver up the estate, unless you grant me this.' Defendant had plausible grounds for involving them in a protracted litigation; and indeed he himself states in his answer that he would not have consented to what he terms a premature division, unless he had

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apparently gained some *advantage. It is true that the settlement was proposed to the defendant by the other parties. But then it is to be recollected that he had previously attempted to alarm their fears by telling them that the property was his; that their father's estate was insolvent, and referring them to the Ordinary's Office for proof of that fact. I do not mean that he deceived them. I believe they well knew, or had good reason to believe, that he could not hold the property as his, and that they were entitled to distribution. But they might justly be alarmed at the prospect of being held out of possession for a long time. He operated not upon their ignorance but upon their will. But it is unnecessary to investigate minutely this part of the cause, as I am satisfied complainants are barred of their claim to relief by the lapse of time, in analogy to the statute of limitations.

The complainants come to be relieved against a fraud.—They come to set aside a deed which is a bar to an account to which they would be otherwise entitled. I am not aware that there is any doubt about the rule that a party coming to be relieved against a fraud, must come within four years (in England six years) from the time the fraud is discovered. In Wymondsell v. the East India Company, 3 Pr. Wms. 143, it is ruled, that the bill must alledge that the fraud was discovered within six years before exhibiting it. And the fact must correspond with the allegation. "If the fraud was known and discovered six years before exhibiting the bill; this though a fraud, would be barred by the statute of limitations. The subject is fully considered by Lord Redesdale in Hoveden v. Annesly 2 Sch. & Lef. 607. The bar of six years is adopted in analogy to the legal bar to an action of account. In the case of Starke v. Starke, Law Jour. 508 [3 Rich. Law, 438], decided by this Court, it was held that while a trust continues, the statute cannot affect it; "but if the trustee does an act which he intends, and which is understood by his cestui que trust, to be a

discharge of his trust, then the statute will from that time commence to run." To the same effect was the case of Moore v. Porcher, not reported, [Bailey, Eq. 195,] decided in Charleston; with the explanation that if there be fraud in the act by which the trust

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pur*ports to be finally executed, the statute will not begin to run till the fraud is discovered.

But what fraud was there in this transaction, which the complainants have discovered since the settlement? I cannot discover a vestige of any. If there was any fraud, it was not, as I have before said, in imposing on their ignorance, but in alarming their fears and taking advantage of their situation and natural impatience to have possession of their property. They certainly knew of the purchase by Richard Farr, at the executor's sale, and seemed to be satisfied that the defendant could not claim under that. They knew of what property the estate consisted, and how it had been managed. They knew that the defendant had not kept, or at all events, had not returned any accounts. They knew that if he purchased property with the proceeds of the estate, a trust resulted for those entitled to the estate. They had able legal advice. I cannot lay my finger on the minutest fact which they know now, that they did not know then; and as said by the defendant's counsel, I am satisfied that they were at least as well informed of their rights then, as they are now. If they were alarmed into offering such terms as the defendant was willing to accept, they had four years after being put in possession of part of their property, to institute further proceedings. Having neglected to do so, it is time there should be an end to litigation.

It was argued that the statute could not apply to the heirs of James Farr, who have been minors, so far as respects the land; and that their minority will save the rights of the rest. Five years was at that time required to bar the right to land. There is nothing in this. This is not a suit to recover land—though the recovery of land might be an incidental consequence of it.—It is to be relieved against a fraud. It is to set aside a deed; which deed, while of force, is a bar to the account which they claim. The defendant does not claim the land under the statute, but under the deed. If the deed were out of the way, the defendant, I suppose, could not hold the land by the statute. James Farr lived four years after the execu-

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tion of *the deed. It is that deed which is sought to be relieved against, and from the execution of that, the statute began to run.

The motion is dismissed and the decree affirmed.

JOHNSON and O'NEALL, JJ., concurred.

1 Hill, Eq. 393

DAVID BOOZER v. MARY E. WALLACE, JOHN P. BOOZER and FRANCIS BOOZER.

(Columbia. Dec., 1833.)

[*Husband and Wife* ⇐8.]

An administrator in possession of his intestate's estate died, and the funds fell into the hands of his administrator. The widow was then appointed administratrix, de bonis non, and guardian of her children, who were entitled to distributive shares of the estate, & afterwards married the plaintiff, and together with her husband received the estate from the administrator of the first administrator: *Held*, that in respect to the fund thus received, the plaintiff was not clothed with a representative character—that he received it from the administrator in the character of husband, and consequently that the marital rights attached.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 26; Dec. Dig. ⇐8.]

Newberry, July 1833—before Chancellor Johnston.—Bill for partition, &c. It had been referred to the Commissioner, "to ascertain and report upon the facts alledged in the bill of the plaintiff, particularly as to the matters of account relative to the estates of Howel Wallace, Hugh Wallace and William H. Wallace, and what amount thereof the plaintiff reduced into possession during coverture, and what are the respective interests of David Boozer and the defendants, Mary E. Wallace, John P. Boozer and Francis Boozer;" and he submitted the following report:—

"Howell Wallace died intestate in 1822, leaving a widow, Elizabeth, and two children, William H. Wallace and Mary E. Wallace, his only heirs. Hugh Wallace took out letters of administration on his estate, and also died intestate in 1825. Shortly after the death of Hugh Wallace, William H. Wallace also died intestate, leaving his mother Elizabeth, and sister Mary E. Wallace, his only representatives him surviving. After the death of the said Hugh Wallace, the widow of Howel Wallace took out administration de bonis non on Howel Wallace's estate, and afterwards received of John Jamison, (who is the administrator of Hugh Wallace, who

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was the first administra*tor of Howel Wallace) a part of the funds of the estate of the said Howel Wallace, and in 1827 intermarried with the plaintiff, David Boozer, who, together with his wife, in some instances, and at other times alone, received of the said John Jamison the residue of the funds of the estate of the said Howel Wallace. During the coverture, all of the funds of the estate of Howel Wallace were in the hands of the said David Boozer, as administrator in right of his wife. Mrs. Boozer died in the fall of 1831—no settlement nor actual partition of the estate of Howel Wallace, in the hands of the plaintiff, having taken place before her death. She was survived by the plaintiff and defendants. It may not be improper to

remark, that Mrs. Boozer had also been appointed the guardian of the said William H. Wallace and Mary E. Wallace—that she never received any of the funds of the said William H. Wallace, he having died during the administration of Hugh Wallace on the estate of his father; but that she, before her intermarriage, and also during the coverture, together with her husband, continued to act as the guardian of Mary E. Wallace, until her death, and the said David continues to act.

"These are all the facts material to a correct understanding of the case, and on them the following questions arise:

"1. Was there such a reduction into possession of the share of Mrs. Boozer in the estate of Howel Wallace by the plaintiff during the coverture, as vested the whole of her one-third in him.

"2. Was there such reduction into possession of Mrs. Boozer's interest in the share of William H. Wallace of his father's estate, as vested such share in the plaintiff, in exclusion of the defendants.

"3. Was there any reduction into possession by the plaintiff of the interest of William H. Wallace in the estate of Hugh Wallace.

"These are questions of great difficulty, and the Commissioner has neither time nor inclination to argue them.—On reflection, however, I have arrived at the conclusion that the marital rights of the husband attached on

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the interest *of his wife in the estate of Howel Wallace, and that he is entitled to it in exclusion of the defendants. As to the interest of William H. Wallace, the Commissioner thinks the plaintiff had no right to the possession of the fund, and was therefore holding it for those entitled; and that he is only entitled to such a share of it as he may claim by representation through his wife. The remaining question is on the same footing." The report concludes by stating an account between the parties, according to the principles here laid down.

The Chancellor confirmed the report, and the defendants appealed on the ground:

That there had been no partition of the estate of Howell Wallace, and no such reduction into possession by the complainant as that the marital rights would attach thereon, and therefore the Commissioner and Chancellor erred in allowing the complainant the whole of his wife's interest in the estate of Howell Wallace.

Dunlap & Summer, for the appellants.

J. J. Caldwell, contra.

JOHNSON, J. The choses in action of the wife which are reduced into possession by the husband during the coverture, belong to him—About this there is no dispute, difficulties do however some times arise as to what does or does not constitute a reduction into possession. Here the husband, the complainant, had during the coverture the actual possession of the fund, and in such cases the question whether it does not vest in him jure mariti, depends on the circumstance whether he received it in his character as husband, or in a representative character as trustee or executor. In the first case it vests in the husband, and in the latter it does not. The cases of Marsh and wife v. Ardis and others, decided at December Term 1831, and Spann v. Jennings, decided at May Term 1833, are examples falling within the first class of cases. In both, the husband without administration possessed himself of personal property which descended to the wife during coverture, and it was held to vest in the husband, because the wife was sole heiress of the estate, which was unincumbered and free from debt. The case of

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Baker v. Hall, 12 Ves. 497, is *an example of cases falling within the latter class. There, a trustee and executor married one of the residuary legatees named in the will, and distribution of the residuary estate not having been made, it was held that the marital rights did not attach—so where East India Stock belonging to the wife had been transfered to the husband and another as trustees, it was held that it survived to the wife.

The complainant in respect to this fund was not clothed with any representative character. He received it from the administrator in the character of husband—There was nothing else which entitled him to it, and it must be set down to that account. The circumstance that it was commingled with the money due to his wards does not vary the question, that only made him their debtor to that amount.

The motion to reverse the decree of the Circuit Court is therefore dismissed, and it is ordered, and decreed that the same be and it is hereby affirmed.(a)

O'NEALL, J., concurred.

(a) The judgment of the Court in this case, is predicated on the supposition that the whole estate of Howel Wallace had been administered by Hugh Wallace, the first administrator, and went into the hands of Jamison, his administrator—that no part of the estate was actually received by the plaintiff or his wife, in right of their administration; and consequently that all of this estate received by them was in the characters of distributee and guardian.—The report of the Commissioner on this point is rather uncertain, for it states that the widow, before her marriage, received a part of the estate, and after that the plaintiff, "with his wife, in some instances, and in others alone, received of the said John Jamison, the residue;" and that "during the coverture, all the funds of the estate of the said Howel Wallace, were in the hands of the said David Boozer, as administrator in right of his wife." It is presumed, however, that the fact was as supposed by the Court, or otherwise a different decision must have been made, as regards any part of the estate received by Mrs. Boozer, or her husband in her right as administratrix de bonis non; for on that part, according to the doctrine of Spann v. Stewart, ante, 332, the marital rights would not have attached. R.

1 Hill, Eq. *397

*ROBERT S. BURGESS, and WM. H. BURGESS, a Minor, by Guardian, v. WILLIAM H. HEAPE.

(Columbia. Dec., 1833.)

[*Husband and Wife* ⇐8.]

Where the wife before marriage was a joint tenant of slaves, which went into the possession of her co-tenant in her lifetime: *Held*, that this was such a possession by her, as that the marital rights of her husband would attach.

[Ed. Note.—Cited in Verdier v. Hyrne, 4 Strob. 468; Pickett v. Barber, Dud. Eq. 240; Snowden v. Pope, Rice, Eq. 174, 198; Verdier v. Verdier, McMul. Eq. 110; Hill v. Hill, 1 Strob. Eq. 23.

For other cases, see Husband and Wife, Cent. Dig. § 20; Dec. Dig. ⇐8.]

[*Dower* ⇐16.]

[Cited in Verdier v. Verdier, McMul. Eq. 110, to the point that marital right may attach to property held in cotenancy, even where no partition is made.]

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 61; Dec. Dig. ⇐16.]

Barnwell, February 1833. This bill was filed for an account and partition of certain slaves lately recovered by a decree of this Court, by the defendant and his sister Eliza Burgess, late the wife of one plaintiff and the mother of the other, of which slaves the plaintiffs claim one half.—It appeared, that pending the suit in which the recovery was had, Eliza Heape married Robert S. Burgess; and after a decree in their favor and during the lifetime of Mrs. Burgess, the defendant took possession of the slaves and removed with them out of the State, and since refuses partition. Being accidentally found in this State, this bill was filed, and a ne exeat issued against him. Mrs. Heape died leaving the plaintiffs her only representatives. No administration has been taken on her estate. The plaintiff, Robert S. Burgess, in the bill, claims in the first place for himself the whole of his wife's moiety of the slaves, by virtue of his marital rights, but should the Court adjudge that the same has not vested in him, then he claims an account and partition for himself, and also in behalf of his son as his guardian ad litem, and prays that his (son's) proportion may be delivered to him on his giving the necessary security.

De Saussure, Chancellor. The complainant and his son, W. H. Burgess, a minor, suing by guardian, are entitled, by virtue of a decree of the Court of Appeals, to one half of certain slaves which have come, by virtue of that decree, into the possession of the defendant, W. H. Heape. The latter has removed the slaves out of the State, and beyond the jurisdiction of the Court; and he has also removed himself, and is found accidentally here, and made responsible only by the process of ne exeat. No objection is made to the right of the complainants to the slaves, and an account for the hire and labor of the slaves. But it is objected that as the complainants claim in right of Mrs. Burgess, late the wife of one, and the mother of the other complainant, they are bound to administer on her estate before the Court will

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*decree in their favor. The evidence proves that the complainant, the widower of Mrs. Burgess, is so extremely poor that he has not been able to give the security required by law, on administering. Should this bill be dismissed, and W. H. Heape be discharged from the ne exeat bond, the complainants will be utterly remediless. The rule certainly is, that generally an administration should be taken out. It has, however, been dispensed with in certain extreme cases. There is another ground on which it is more than doubtful whether an administration was necessary in this case. The decree of the Court of Appeals, which establishes the right of Mrs. Burgess and her brother, W. H. Heape, to the negroes in question, was delivered prior to the death of Mrs. Burgess, and the slaves were delivered to W. H. Heape in right of himself and his sister, Mrs. Burgess. He held them for both, and though it is not absolutely certain that this was such a reduction to possession by the husband as to attach the marital rights of Mr. Burgess to them, I am inclined to think, in such a case as this, that as between the husband and W. H. Heape, at least, it may be so considered. If not, I would postpone the decree, to give Burgess a further opportunity to take out administration.

Under my present impression, it is Ordered, that the defendant do deliver up the slaves, to which the complainants are entitled by said decree, and account for hire and labor before the Commissioner. Costs to be paid out of the estate.

From this decree the defendant appealed on the following grounds:

1. Because the decree determines, that the possession of the slaves in litigation by William H. Heape, was such a reduction to possession by Mrs. Burgess, as that the marital rights of Burgess attached on them.

2. Because the decree determines that the defendant should account, although no administration is taken out on the estate of Mrs. Burgess.

The plaintiff also appealed and moves to modify the Chancellors decree, so that the

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costs may be paid by the defendant *in punishment of his fraud, and to allow the plaintiffs to take their value, instead of the slaves themselves.

R. B. Smith, Attorney General, for the defendant. Burgess married before the decree, he never was a party to the proceedings, and the decree does not notice him; this defendant was then the only person authorized to receive the negroes, for if Burgess had applied for them the Court might have ordered a settlement on his wife. Wm. H. Burgess,

the minor, is not properly a party to this bill, for the incidental reference by his father assuming the character of guardian cannot make the son a party, when he admits that he has not given security, and when he claims the whole of the property for himself. So that the bill must be regarded as filed by Robert S. Burgess alone, and if his marital rights have not attached, it must be dismissed.

If personal property is not reduced into possession by the husband in the lifetime of the wife, the marital rights will not attach 3 Dess. Rep. 135-6; 1b. 155; Sturginer v. Hannah 2 N. & M'C. 147. The case of the Ordinary v. Geiger 2 N. & M'C. 151, arose under a deed, which from its delivery implies a right of immediate possession. As to the ground that here is a joint tenancy, and that the possession of one tenant is the possession of the other, it may be remarked that when the defendant got possession, if he did not choose to deliver them, the right of his sister was a mere chose in action; and this is all the right her husband can claim—he can obtain only one third of her interest under the Act of '91.

If however the complainant is entitled to the property as between him and the defendant, he may not be entitled to it as against the creditors of Mrs. Burgess; and for this reason, the Courts have laid it down as an indispensable rule that administration must be taken out, and that "no person though next of kin, can sue at Law or Equity for the personal property of an intestate, unless he takes out administration." Farley v. Farley, 1 M'C. Ch. 514; Gregory v. Forrester, 1b. 324; Bradford v. Felder, 2 M'C. Ch. 169.

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*Elmore, for the plaintiffs. The bill in the suit in which the negroes were recovered, was in the name of the defendant and his sister Eliza—the recovery was in the name of both. The marriage was before the decree, and Mrs. Burgess' death after it. Mrs. Burgess had then the same right to the possession that the defendant had, and Burgess stood exactly in the same right his wife did. As to the objection that the minor is not a party to this bill, it is now made for the first time. The bill first sets up the claim of Burgess to the whole by virtue of his marital rights, and if they have not attached, he then presents the claims of his son as a distributee of his mother; and it was shewn on the trial, that he had been appointed a guardian.

That there must be a reduction into possession before the rights of the husband attach, is not denied. The question is, what shall be considered such a reduction into possession? It is not necessary that there should be an actual manucaption by the husband, either personally or by his agent. The possession of an agent before or during coverture, has been held sufficient, as in the case of a guardian—Davis v. Rhame, 1 M'C. Ch. 195. And in the late case of Riley v. Riley, (not reported) decided in this Court, May 1833, the same doctrine is held. The case of the Ordinary v. Geiger, 2 N. & M'C. Ch. 151, is still stronger, for it makes the possession of a joint tenant in negroes, vest the undivided fourth part of them in the husband of one of the joint-tenants, even against herself, as survivor of her husband. In what did that case differ from this? That was founded on a deed, "giving," says the defendant's counsel, "a right of immediate possession."—This is on a decree, giving an equally clear and undisputed right of possession, to both Heape and his sister. They were joint tenants under that decree in the negroes recovered in their names; each equally entitled, and equally secured by the Court. Heape recovered the property as agent for his sister. If a partition was necessary in this case, before the marital rights would attach, so it was equally necessary in the case of the Ordinary v. Geiger; and as it was not considered necessary there, so it will not be here.

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*As to the defendant's second ground of appeal.—Should the Court determine that the marital rights of Robt. S. Burgess did not attach, then comes the question, is administration absolutely necessary before complainants can recover? As a general rule it is necessary to have administration. It is a wise rule intended to subserve the course of justice and protect the rights of third persons; but like all other rules, if inflexible, it would in some cases defeat its own object. When a case occurs where it would utterly defeat the course of justice, every principle of right and sound policy demands an exception to govern the case. Exceptions have sprung up, been recognized and acted on. In the case of Gregory v. Forrester, 1 M'Cord, Ch. Rep. 325, Judge Nott expressly recognizes this principle;—a number of cases are there referred to in which the rule was relaxed: Burrows v. Elton, 11 Ves. 29, 39, Alsager v. Rowley, 6 Ves. 750. In a late case in our own Courts, decided at Charleston, Walker, administrator of Halls, v. John May, the following facts existed and were considered by the Court as exempting defendant from the technical enforcement of the rule. Hall the father gave by deed four negroes to four sons and died—the widow married Robt. May. All the children in succession died under age—Robt. May sold the negroes and died, leaving his widow, and two children by her. Walker married one of the daughters, administered upon the estate of the young Halls, and filed his bill against the purchaser, John May. The Court below and the Appeal Court also decided, that as all the rights of the young Halls vested in the mother Mrs. Robt. May, no administra-

tion was necessary—that creating an exception to the rule; and to a suggestion as to creditors of the young Halls, it was held, that that was rebutted by the fact that ten or twelve years had elapsed and no claims were presented. Is this case one of such a special character as will come within the exceptions which are admissible? In the first place let it be observed, that Burgess in his own right and as guardian of his child, represents every right that could have belonged to his wife.—Secondly, That he used every effort to procure administration and failed.—Thirdly, That the defendant has run-away to

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Alabama, carrying away and *selling the negroes, and is only to be reached through this suit, and the bond he has given under the ne exeat writ, or in the language of the decree "should this bill be dismissed, and W. H. Heape be discharged from the ne exeat bond, the complainants will be utterly remediless." Could a stronger array of facts be presented showing the absolute and utter failure of justice if the technicalities of the law are to be made inflexible? If so justice is sacrificed to forms, and rules of law relentlessly adhered to, when every reason for their existence has failed. But it is objected that the rights of creditors of Mrs. Burgess may be defeated by supporting this decree. Are they in more, or less danger, from reversing it and discharging defendant? He has run-away—wasted the property—and the only possible chance of securing the fund to any person whatever is upon the ne exeat bond, to which the security is good. Again when they put in any claims it will be full time to protect them—there are none—not one has ever been heard of. This bill was filed the 23d May, 1821. The child of the marriage is stated therein under oath at two years old, and of course Burgess had married his wife in 1817, or 1818. If she owed any debts he was responsible for them. They were paid or barred by the statute of limitations more than ten years ago. No claims of creditors can exist; but if they do, the fund is in Court, and the defendant will not object to its being paid into the Commissioner's hands, and the creditors called in to establish them and receive payment, and the balance only paid out under the order of the Court.

If however the Court should determine that administration is necessary, it will give time to complainant to make further efforts, and in the mean time will order the collection of the amount coming to them, and to remain subject to the order of the Court.

As to the complainants' grounds of appeal:

1. As to costs, this case has arisen entirely from the bad faith and misconduct of defendant Wm. H. Heape, and he ought to pay the costs—at the least he should pay his own.

2. The decree should be so remodeled as to allow the complainants to obtain the value

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of their negroes, as they can*not find the negroes, they having been carried off; or the decree should order, that in case of the non delivery of the negroes by a given day, the bond be forfeited, and collected by the Commissioner in Equity.

Smith, Atto. Gen. in reply. As to the first ground of appeal. The case of the Ordinary v. Geiger, was a case of joint tenancy, not tenancy in common.—It was a case under a deed, where the form of delivery implies a right of possession in all of the joint tenants, and these characteristics plainly distinguish it from the present case.

As an exception in this case to the rule that administration must be taken out upon an estate, before suit can be maintained, the cases of Burrows v. Elton, 11 Ves. 29, and Alsager v. Rowly, 6 Ib. 750, quoted in Gregorin v. Forrester, 1 MC. 325, were relied on, but neither of them apply. These were cases where executors or administrators existed, and the estates were represented, and they only determined, that a rule existing for the benefit of creditors may be waived in favor of creditors—they determine, that creditors may maintain suit against the estate of their debtor, where the executor or administrator is a bankrupt and cannot act, or insolvent and colludes. But the case here is between a distributee and a debtor of the estate. Is the debtor responsible to him without administration, by which the rights of creditors will be protected? The cases of Heath v. Percival, 1 P. W. 682; Plunket v. Penton, 2 Atk. 51; Higginson v. Air, 1 Des. Rep. 427; Riddle v. Mandeville, 3 Cranch, 330; are all cases of creditors going against the heirs or the funds of the estate. The case of Walker, adm'or. of Halls v. John May, decided in the Court of Appeals, in February 1830, is certainly different from these, but still not applicable to this case. In the following extract from the decree, the Court says—"The circumstances of this case are peculiar. The intestates were all infants and incapable of contracting debts. They lived with Robert May, the husband of their mother, whose duty it was, and who did provide for them all that was necessary, and whatever of legal obligation the law raised on them or their es-

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tates vested in him. Thus, not only ne*gativing the existence of any other interest, but showing the utter impossibility that any other could exist. All the objects of an administration have therefore been obtained. The possession of May did wrong to no one—he only had that to which he was entitled. If he held in trust, it was for himself—if as executor it was in his own right, instead of his

own wrong," &c. This case then only determines that where there can be no creditors, a rule made for the protection of creditors must not be complied with or required. Here the presumption is, that there are creditors. The intestate was capable of contracting debts; and it appears that the complainant can give adequate security as guardian of his child, but not as administrator of his wife.

As regards the plea of poverty, if is one so easily made, that it would be exceedingly dangerous in practice. It is against the insolvency of the administrator that securityship is intended to guard. But here it is contended, that because a man is insolvent he is to give no security. A man of property may act fraudulently with respect to an estate committed to his charge, and yet justice be fully done by reimbursement from his property. But he who has no property has nothing but his integrity on which others can rely. Poverty is no argument for a good character, and affords one of the strongest temptations for losing it.

HARPER, J. I understand from the decree of the Chancellor, that the slaves in question were delivered to the defendant in the lifetime of Mrs. Burgess. If so, I have no doubt the marital rights of her husband attached upon them. The case of the Ordinary v. Geiger, 2 N. & M'C. 151, note, is in point; and it is strengthened by that of Davis v. Rhame, 1 M'C. Eq. 195. Mrs. Burgess and her brother were, I suppose, joint-tenants of the slaves; they claimed under the same title, and it is a familiar maxim for preventing the effect of the statute of limitations, that the possession of one joint tenant is the possession of the other. They are regarded as agents for each other, to every beneficial purpose. 3 Bac. Ab. 690, Tit. Joint-tenants

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and *tenants in common, H. 3. So it is said, the entry of one tenant in common is the entry of both, and must be so pleaded, Ib. H. 2. With no propriety could Mrs. Burgess' interest in the slaves in the possession of the defendant, be called a chose in action. Her title was complete and vested. Delivery is said to be necessary to consummate the title to personal property. But will not a delivery to one joint tenant enure to the benefit of both? If not in her, in whom was the title of a moiety of the slaves?

As the slaves have been carried out of the State, so that a writ of partition could not be executed, the complainant applies, that the defendant may be directed to account for the value of the portion of them to which the complainant is entitled, in right of his late wife. This is Ordered and decreed accordingly. In other respects, the Chancellor's decree is affirmed.

JOHNSON and O'NEALL, JJ., concurred.

1 Hill, Eq. 405

B. W. CAPEHART and Wife and Others v. LYDIA HUEY, Administratrix of Wm. Blackburne, and the Administrators of John Huey, Dec'd.

(Columbia. Dec., 1833.)

[*Witnesses* ⇐85.]

Where a wife, before marriage had administered on an estate and done certain acts amounting to devastavits, the monies arising from which on her marriage went into the hands of her husband; after the decease of the husband on a bill filed against her, & the administrators of her husband for an account of the funds so received, it was held, that she was a competent witness on being released from all liability to her intestate's estate; & perhaps even without such release.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 240; Dec. Dig. ⇐85.]

[*Guardian and Ward* ⇐33, 70.]

Generally those acts of a guardian are binding on the infant which are for the benefit of the infant, and for which the guardian can account; he may therefore in a suit brought for the benefit of his wards, execute a release in order to render a witness competent.

[Ed. Note.—Cited in Long v. Cason, 4 Rich. Eq. 67.

For other cases, see Guardian and Ward, Cent. Dig. §§ 148, 308; Dec. Dig. ⇐33, 70.]

[*Executors and Administrators* ⇐152.]

The husband (or if he be dead his administrator) is accountable for the funds of the wife's intestate which have come into his or her hands during coverture, and which may not be left in specie at the husband's death and go into the wife's possession.

[Ed. Note.—Cited in Thackum v. Longworth, 2 Hill, Eq. 274.

For other cases, see Executors and Administrators, Cent. Dig. § 627; Dec. Dig. ⇐152.]

[*Executors and Administrators* ⇐111.]

An executor or administrator who litigates in good faith, will be reimbursed out of the estate for his costs and expenses, but the estate he represents and which is presumed to be benefited by the litigation must bear the expense.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 448; Dec. Dig. ⇐111.]

[*Guardian and Ward* ⇐41.]

[Cited in Moore v. Hood, 9 Rich. Eq. 325, 70 Am. Dec. 210; McDuffie v. McIntyre, 11 S. C. 562, 32 Am. Rep. 500; Werber v. Cain, 71 S. C. 349, 51 S. E. 123, to the point that a guardian cannot change the character of a ward's estate without the sanction of the court.]

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 172; Dec. Dig. ⇐41.]

[*Witnesses* ⇐113.]

[Under an assignment by a husband of his wife's chose in action, the assignee may release the claim, and thereby make her a competent witness in relation to the claim during the life of the husband.]

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 460; Dec. Dig. ⇐113.]

This bill was filed by the plaintiffs, as distributees of William Blackburne, dec'd., against his administratrix and the administrators of her second husband, for an account of the estate, charging devastavits in the course of the administration, and seeking to make the estate of the second husband liable therefor.

On the case coming before Chancellor Johnston, at Abbeville, June 1832, he ordered a reference to the Commissioner to make up the accounts, reserving the legal questions until the coming in of the report. On this reference the following facts appeared:

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*Wm. Blackburne died intestate, possessed of a considerable personal estate, leaving a widow and children. The widow, Lydia, administered and sold all the personal property. With $1,000 of the money thus obtained, she purchased a tract of land, and took the titles in her own name; and she loaned $500 of this money to Thomas Blackburne, and took a bond for the payment to herself in her own right. She afterwards intermarried with John Huey. They sold the land for $600, and Huey received the money, and he also received payment on the bond of Thomas Blackburne. In 1830, John Huey died intestate, and Owen Selby and Joseph Huey administered on his estate. On the reference, Lydia Huey was offered as a witness for the plaintiffs. She was objected to as incompetent; but on a release of her liability being executed by Thomas Blackburne, the assignee (after suit brought) of one of the plaintiffs, and the guardian of the others, the Commissioner received her as a witness.

On the state of facts here presented, the Commissioner in his report, charged the estate of John Huey with the money received by him on the sale of the land, and also with the money received by him on Thomas Blackburne's bond, with interest on both amounts; and allowed credit for payments made by him on account of the estate; but refused to allow the administrators a counsel fee in this case, out of the amount charged against the estate of Huey.

To this report the administrators of John Huey filed the following exceptions:

1. That the Commissioner received the evidence of Lydia Huey, one the defendants, she being incompetent to give evidence, and the release not rendering her competent.

2. That the Commissioner charged the estate of John Huey with the sum he obtained for the land, when his estate is not liable therefor, inasmuch as the purchase by Lydia the administratrix, in her own name with the funds of her intestate, was a devastavit for which the estate of John Huey is not now answerable.

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*3. Because Lydia was at all events guilty of a devastavit to the amount of four hundred dollars the difference between the sum given for the land and that for which it sold.

4. That the Commissioner erred in charging John Huey's estate with Thomas Blackburne's bond, inasmuch as the taking of this bond was a devastavit on the part of Lydia the administratrix, for which the estate of Huey is not now liable; and also inasmuch as it was payable to Lydia in her own right, and John Huey had no notice that it was for money of the estate of Wm. Blackburne.

5. That the Commissioner refused to allow credit to the administrators of John Huey for a counsel fee in this case, out of the sum with which their intestate is charged on account of Wm. Blackburne's estate.

The case was heard on these exceptions before Chancellor De Saussure, at June Term, 1833. The Chancellor overruled the four first exceptions, and sustained the last.

The administrators of John Huey appealed, because the Chancellor overruled the four first exceptions as above stated; and the plaintiffs appealed, because he sustained the last.

Burt, for the plaintiffs.
Noble & Calhoun, for the Adm'ors of Huey.

O'NEALL, J. The questions made in this case may be referred to three general heads to wit: 1. The competency of the witness Lydia Huey. 2. The liability of the representatives of her (dec'd.) husband John Huey to account for the funds of William Blackburne (dec'd) which came to his hands, during the coverture of the said Lydia. 3. The propriety of the allowance of the counsel fee to the defendant's solicitor out of the funds of Wm. Blackburne (dec'd.) These subjects of inquiry embrace all the grounds of appeal taken by the complainants as well as the defendants; and will be considered and decided in their order.

1. The fact of being particeps criminis will not render a witness incompetent to testify for or against the other parties: it generally goes to the credit and not the competency:

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it is *true that when the witness' testimony would subject him to punishment or infamy, he may decline to answer the questions propounded to him. But this is the protection of the witness; it would be no objection in the mouth of either plaintiff or defendant. A party to a deed, contract or other matter, is a competent witness unless disqualified by interest in the event, or in the record as matter of evidence. Knight v. Packard 3 M'C. 71.

To determine on the competency of the witness Lydia Huey, it is necessary to inquire as to her interest in the event of the suit to be produced by her testimony. For although she is a defendant, and at law could not be sworn, yet in Equity the rule is that she is competent if she have no interest in the point to which her testimony is directed.—Wright v. Wright 2 M'C. Eq. R. 185. Farr v. Sims et al. [Rich. Eq. Cas. 122, 24 Am. Dec. 396] decided at this place January sittings (in Equity) 1832.

There is I think no doubt that she as well as her late husband Huey is chargeable with the fund in question, and a decree against

him would not of itself discharge her, Adair v. Shaw, 1 Sch. & Lef. 255. It must be accompanied with satisfaction to have such an effect against the claims of the complainants. I think she might have been a witness for the complainants without a release. For her evidence establishing the liability of John Huey, would not of itself discharge her: it only subjects his estate to a concurrent, but not a paramount liability, and hence she had no direct pecuniary interest in the event of the suit, or in the record as matter of evidence.

But if there is doubt on the position assumed, there can be none as to her competency if she has been properly released. This depends upon the power of Thos. Blackburne legally to release her.

It seems that the complainant Capehart assigned his wife's interest to Thomas Blackburne, who is the guardian of the minor complainants. As assignee and guardian he executed the release. It is necessary therefore to look to his power in each of these characters.

The husband had the right to receive from the defendants his wife's distributive share

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of her father's personal estate; *such a reduction into possession would defeat the wife's equity. So too the husband might assign it; and if the assignee for a valuable consideration can and does reduce it into possession without the aid of the Court of Equity her equitable rights would not be allowed to be set up against his legal estate. Clancy's rights of married women, 345. In all cases where the wife's equity, and the husband's or his assignee's right to possession, are brought in collision, the wife, or the Court for her, must make the question; if she is content that the question should not be made, the defendants who may be in the possession of her funds cannot make the objection.—After there is a recovery at the instance of the assignee and before he reduces the fund into actual possession, the Court might interfere and set up the wife's equity. The assignee of the husband has, in equity, all the rights which he has; in it, he is regarded to all intents and purposes as the owner of the funds assigned. His release will operate to the same extent which the husband's would. The husband may release the chose in action of his wife, and his release would at all events bar and prevent any recovery upon it during his life. I think it would operate as an entire discharge. Either point of view is enough for this case; for if the release is only good for the life of the husband, it is a discharge of the witness from any present interest in the event of the suit—it may be that a future possible interest may exist, but this would be only an objection to the credit and not the competency.

A guardian, as the officer of the Court of equity, is charged with the preservation of all the rights and interests of the ward. He cannot, however, generally, change the nature or diminish the capital of the estate: but with this exception, he is authorized to do any act for the infant which a prudent man in the management of his own business would do. Such an act must of necessity fall within the rule which is, I think, well stated in Bingham's Law of Infancy, 152, to be, that "it seems generally that those acts of the guardian are binding on the infant, which are for the benefit of the infant, and for which the guardian can account; for so far his authority extends." In Miller v.

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Lord, Harewood, 18 Ves. Jr. 259—it *was held that an act of the guardian without authority, if beneficial to the infant, would be sustained.

The release here is an act for which the guardian can and must account, if he thereby fails in recovering the shares of his wards. No loss can result to them in this respect, for his release makes him personally liable for the fund; and it is to be presumed that he has given good security for the discharge of his duties. So far I think there is no difficulty in allowing his release to prevail. It does not change the nature or diminish the capital of his ward's estate in the hands of the defendant or in those of the guardian; they are alike money, and the amount continues the same. The release is only the means of reaching the justice of the case, and fixing the defendants' liability. It may be (and I ought so to conclude) that the defendants' liability is a better security for the wards of the guardian, than Mrs. Huey's. The release is I think good, and the witness competent.

2. This brings up the question, are the administrators of John Huey liable to account for the proceeds of the land, and also for the amount received on the bond? In the case of Adair v. Shaw, 1 Sch. & Lef. 255, Lord Chancellor Redesdale decides the very question as to the general liability of the surviving husband or his representatives, (if dead) to account for the funds of an intestate which came to his hands during coverture, through the administration of his wife. He says "but on principle and what I conceive to be the established rule of Courts of Equity, I think there can be no doubt that Mrs. Shaw is responsible, and that the assets of Mr. Shaw are responsible to this extent, viz: Mrs. Shaw for the whole, and Mr. Shaw's assets for whatever came into his hands, that is what came to the hands of himself or his wife during the coverture, except so far as Mr. Shaw left assets in specie of the testator, after his death, which might have come into the hands of Mrs. Shaw: whatever might have been so left he would not have been accountable for, but she alone would."

Taking it to be well settled law, that the husband or his administrator is accountable for the funds of the wife's intestate which may come to his or her hands during cover-

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ture, and *which may be not left in specie at the husband's death and come to the wife's possession, it is only necessary to inquire how the facts stand in this case. It seems that Mrs. Huey with the funds of the estate of Blackburne purchased a tract of land and took the title in her own name; that subsequent to her second marriage she and her husband sold it, and he received the proceeds of the sale. It is plain on authority and principle, that on the purchase of the land by the administratrix of Blackburne with the funds of his estate, a trust resulted in favor of the estate: and the land or its proceeds when sold, were the assets of the intestate Blackburne. Watson, Ordinary, v. Whitten, not reported, [3 Rich. 224,] decided at this place, May Term 1832. The proceeds of the land being assets and coming to Mr. Huey's hands during coverture, he is properly charged with the amount thereof. The bond is still plainer, for that was given for the money collected and loaned by the administratrix, as was her duty: the amounts received upon it by Mr. Huey, were received by him in a plain course of administration, viz.: to receive and let to interest the money of the intestate—and he is accountable for the sums which he so received.

3. I think there can be no plainer proposition than that the defendants, the administrators of Huey, are not entitled to charge and be allowed against Blackburne's estate, the counsel fee paid to their solicitor in this case. The general rule in Equity is settled in so many cases that it has ceased to be necessary to refer to them to establish its existence—that an executor or administrator who litigates in good faith is entitled to be reimbursed out of the estate for his costs and expenses. The estate represented by the executor or administrator and legally presumed to be benefited by the litigation, is the one which must bear the expenses. In this case the defendants the administrators of Huey represent his estate alone, and for its benefit their defense was made, and out of it the counsel fee is properly payable. Blackburne's estate is not represented by them, they stand in no relation of confidence to it, their claim and defense are hostile to the rights of the complainants, and were an injury instead of a benefit to the estate represented by the

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complainants. The allow*ance of the counsel fee out of Blackburne's estate was improper.

It is Ordered and decreed, that the Chancellor's decree be reformed as to the allowance of the counsel fee of defendant's solicitor out of the estate of Wm. Blackburne; in all other respects it is affirmed, and the Commissioner's report confirmed generally.

JOHNSON and HARPER, JJ., concurred.

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1 Hill, Eq. 412

Ex parte FORGY M'CLELAND.

(Columbia. Dec., 1833.)

[*Costs* ⇐=56.]

Costs not allowed for a defense to a petition in Chancery.

[Ed. Note.—Cited in George Wagner & Co. v. Ludeens' Assignee, 8 Rich. Eq. 188

For other cases, see Costs, Cent. Dig. § 27; Dec. Dig. ⇐=56.]

[*Costs* ⇐=3.]

[Cited in George Wagner & Co. v. Ludeens' Assignee, 8 Rich. Eq. 188, to the point that no costs can be allowed, except where authorized by statute.]

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. ⇐=3.]

Newberry, July 1833. This was a petition praying compensation for the board of certain minors, of whom the defendant, Rudd, was guardian. The petition was resisted, and on the hearing before Chancellor De Saussure, dismissed with costs. In taxing the costs, the Commissioner refused to allow costs to the defendant's solicitor, for filing the answer and making the defence. On appeal to the Chancellor, he ordered the costs to be taxed; and an appeal was taken to this Court.

Caldwell & Fair, for the motion.
Dunlap & Summer, contra.

JOHNSON, J. None of the acts of the Legislature regulating the fees of the officers, make any provision for a defence to a petition in the Court of Chancery, and however meritorious the claim may be, the Court has no authority to regulate it. Costs are not allowed by the common law, and whoever claims to charge them, must put his finger upon the act which allows it. The order of

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*the Circuit Court, directing that ten dollars should be taxed as costs, is therefore reversed, and the motion in behalf of the defendant is dismissed.

O'NEALL and HARPER, JJ., concurred.

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1 Hill, Eq. 413

WM. PINCHBACK v. JAS. M'CRAVEN.

(Columbia. Dec., 1833.)

[*Costs* ⇐=57.]

Generally, where a party makes a single question in a case, and that is decided against him, he will not be entitled to costs; if he make several questions, some of which are de-

cided for, and others against him, he will be entitled to tax costs under a decree allowing them to him.

[Ed. Note.—Cited in Guignard v. Harley, 11 Rich. Eq. 6.

For other cases, see Costs, Cent. Dig. § 249; Dec. Dig. ⟸57.]

[*Costs* ⟸247.]

A charge for copies of opinions of the Appeal Court is admissible.

[Ed. Note.—Cited in Guignard v. Harley, 11 Rich. Eq. 68.

For other cases, see Costs, Cent. Dig. § 960; Dec. Dig. ⟸247.]

Abbeville, June, 1833. The plaintiff had obtained a decree in this case against the defendant, for a certain amount with costs. In the progress of the case the plaintiff filed an exception to the Commissioner's report, which was overruled by the Chancellor—an appeal taken thereon, and the Chancellor's decision sustained by this Court. In taxing costs, the Commissioner allowed the plaintiff's solicitor costs, for the exception, the argument in the Court below, and the briefs and argument in this Court; and he also taxed costs against the defendant for copies of the opinions of this Court, which, however, it was admitted, were necessary on the trial. Chancellor De Saussure sustained this taxation, and the defendant appealed.

Burt, for the motion.

Caldwell, contra.

O'NEALL, J. We think that the complainant is not entitled to tax the costs of his exception to the Commissioner's report, the argument in the Circuit Court, the briefs for, and argument in, the Court of Appeals.

It seems that the complainant was dissatisfied with the Commissioner's report in a single point.—That was decided against him by the Chancellor, and on it alone he appealed to this Court, where the decision was also against him. His costs, incurred in this re-

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spect, were therefore *unnecessary, and his adversary is not bound to pay them. Generally, where a party makes a single question in a case and that is decided against him, he cannot and ought not to expect costs.—He is, in this respect, in default. If, as is most usual in Chancery, he makes several questions, some of which are decided for him and others against him, he would be entitled to tax costs under a decree allowing them to him.

The charge for copies of opinions of the Court of Appeals, was properly allowed—it was cost actually paid, and for which the party paying it was entitled to be reimbursed.

The Chancellor's decree is modified according to the rules stated in this opinion; and the Commissioner is directed to reform his taxation accordingly.

JOHNSON and HARPER, JJ., concurred.

1 Hill, Eq. 414

JOHN C. VAUGHAN and Others, Official Creditors of Thomas P. Evans, Commissioner in Equity, v. THOMAS P. EVANS, THOMAS LANG, JOHN CANTEY, JOHN WHITAKER, BEN. HALE, and Others.

(Columbia. Jan., 1834.)

[*Officers* ⟸130.]

Where a Commissioner in Equity who had been re-elected at the expiration of his first term, had received monies during his first term which were not demanded or ordered to be paid over or invested during that term, the securities to his official bond for the first term, are not liable therefor, unless it be shewn that the Commissioner had wasted, or converted to his own use, the funds in his hands; and in the absence of such evidence, the presumption is that he retained the funds and that they were in his hands as his own successor.

[Ed. Note.—Cited in Field v. Pelot, McMul. Eq. 384, 400, 401; Enicks v. Powell, 2 Strob. Eq. 200; Whitmire v. Langston, 11 S. C. 389; State v. Lake, 30 S. C. 49, 50, 8 S. E. 322; State ex rel. Causey v. Causey, 93 S. C. 304, 76 S. E. 707.

For other cases, see Officers, Cent. Dig. § 235; Dec. Dig. ⟸130.]

[*Officers* ⟸130.]

But where the Commissioner, by orders of the Court during the first term, was directed to pay over a part of the funds then in his hands, and to invest a part, & neglected to comply with these orders; it was held, that the failure to pay over or invest, was a breach of the condition of the bond, and that the application for such an order, was prima facie evidence of a demand, and the sureties to the bond of the term in which the orders were made were liable. Harper, J. dissenting, held with Chancellor Johnston, that the orders to pay over, were only an authority to pay over, and that there was no default until demand made; and that the failure to invest could only make the sureties liable for the interest which would have been made if the funds had been invested.

[Ed. Note.—Cited in Gray v. Brown, 1 Rich. 363; Field v. Pelot, McMul. Eq. 399; Enicks v. Powell, 2 Strob. Eq. 206; Whitmire v. Langston, 11 S. C. 389; State ex rel. Van Wyck v. Norris, 15 S. C. 258; State v. Lake, 30 S. C. 52, 8 S. E. 322.

For other cases, see Officers, Cent. Dig. § 235; Dec. Dig. ⟸130.]

[*Assignments for Benefit of Creditors* ⟸37; *Equity* ⟸395.]

An assignment by a debtor to a trustee, in trust, first, to pay existing liens; 2d, to pay his sureties whatever sums they might have to pay for his defaults as Com'nr. in Equity; 3d, to pay the balance to such of his creditors as should exhibit their demands within a year, and agree in writing to take a dividend of the surplus; is valid.

[Ed. Note.—Cited in Niolon v. Douglas, 2 Hill, Eq. 446, 452, 30 Am. Dec. 368; Bird v. Aitken, Rice Eq. 78; LePrince v. Guillemot, 1 Rich. Eq. 218; Stewart v. Kerrison, 3 S. C. 295.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 151; Dec. Dig. ⟸37; Equity, Cent. Dig. § 854; Dec. Dig. ⟸395.]

Kershaw. In December 1821, Thomas P. Evans, one of the defendants, was elected Commissioner in Equity for Kershaw District, and on the 20th of that month executed his official bond for $10,000, conditioned for

the faithful discharge of his duties as Commissioner, for four years; in which bond the defendants, Thomas Lang, John Cantey and Benjamin Hale joined as sureties. At the expiration of his term, he was re-elected Commissioner, and on the 6th February 1826,

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he executed another official *bond of that date, in which Thomas Lang, John Cantey and John Whitaker joined as his sureties. Evans failed to discharge his duties as Commissioner, and his official creditors being about to sue his bond for the second term, his sureties thereto, Lang, Cantey and Whitaker, filed a bill in Chancery on the 13th July 1830, against the present defendants, the Charleston Fire & Marine Insurance Company, and the present complainants, the Vaughans, calling upon them and all others who had claims against Evans, under his second bond, to come in and prove their demands before the Commissioner, and praying that suits at law might be enjoined, and the sureties discharged upon paying into Court the amount of the said bond, $10,000, if the defaults during the second term amounted to that sum. In that suit various creditors came in, to wit:—all the parties to this suit as complainants and defendants, (except Evans and his sureties,) and proved their demands under the order of the Court, and the Commissioner reported their united claims against Evans, for defaults during his second term, to amount to the sum of $32,935.-98½. Of the monies so reported against Evans and his sureties, under the second bond, the following were received by Evans during his first term, and never paid over to the parties thereunto entitled, to wit:

Charl'n Fire & Mar. Insur. Co. (part of their claim,)	$1,596 55
Edward Newhall	129 31
T. & F. Dwight	96 83
Thomas Scott	228 39
John Hudson	262 60
G. Archer & H. M. Archer, (part of their claim.)	— —
Lene Dubose & N. Dubose, besides interest from March '25	378 33
James Dunlap's estate	297 36
J. C. Vaughan, E. V. Vaughan, and C. R. Vaughan, part of their claim, besides interest from 20th March, 1825.	2,599 45

At June Term, 1825, during the first term of office, an order was made by the Court, in

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the case of J. Chesnut & *G. L. Champion, and the Charleston Fire & Marine Insurance Company, that Evans should pay to the Insurance Company all the money then in his hands, or which might come to his hands, being the proceeds of the bonds due by the Chesnuts, with which order he failed to comply.

At June Term 1824, he was ordered by the Court to invest $1,000 which he had received as the property of H. M. & G. Archer—he did invest $800, but failed to invest $200, and has never paid it over or accounted for it. At June Term 1825 he was ordered by the Court to pay to the Commissioners of the Poor $131, which he had received of the estate of the lunatic John Craven, with which order he failed to comply. Except in the cases stated, there were no orders by the Court, during the first term, to pay over; and there was no proof of any demand made in any of the cases during the first term. In Archer's case and in others, the funds were in his hands in the shape of bonds, which he has never accounted for during either his first or second term. Upon going out of office at the close of his first term, he did not, as required by law, turn over to his successor or deposite among the records of the Court, his account book, in which his accounts with the estates under his charge were, or ought to have been kept; nor the monies, bonds, notes and other property held by him as Commissioner, under the authority of the Court: nor did he sign any schedule or account, shewing what remained in his hands at the expiration of his office.

William J. Grant, Esq. was elected the successor of Evans, and on the 18th of January 1830, entered upon the duties of his office. Evans has not turned over to him the bonds and monies of the plaintiffs, nor paid the plaintiffs. On account of his official defaults during his second term, he is indebted to the plaintiffs and other suitors in Court, in an amount far exceeding his official bond.

On the second April 1830, Lang, Cantey and Whitaker, the sureties for the second term, finding that Evans was a defaulter to a large amount, and that his private property would not be adequate to make good his official defaults, procured Evans to make an assign-

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ment of all his *estate to a trustee in trust, first to pay judgments and executions, which were liens: then, second, to pay Cantey, Lang and Whitaker, whatever they might have to pay for Evans' defaults: Third, to pay the balance to such of Evans' creditors as should exhibit their demands in a year, and agree in writing to take a dividend of the surplus. The trustee accepted the trust, and received upwards of $7,000 of Evans' private estate. With the same view the sureties on the 12th March 1830, took from Evans a bond for $20,000, and a confession of judgment thereon, and have lodged execution. The amount of both the official bonds together will not be sufficient to satisfy the demands of the official creditors, and at all events, if the official sureties are allowed to sweep from the official creditors all Evans' private estate, the plaintiffs and creditors under the second bond will not receive 33 per cent. of their demands. The bill is filed by the plaintiffs claiming under the second bond, to compel such of Evans' official creditors as have a right to demand

payment from either the sureties to the first or second bond, at their option, to resort to the first bond and leave to the plaintiffs, who have only a single fund, the benefit of the whole of it. The prayer is, that all may come in and establish their demands, and that the plaintiffs may be paid out of the second bond. —That the assignment to the trustee, &c. may be set aside, or that the trustee hold in trust for the plaintiffs.

The plaintiffs offered to prove by a witness that the property of Evans was very small when he first went into office, and that he was dependent for his support upon the profits of his office. That the property he assigned in trust for his sureties, was purchased with funds in his hands as Commissioner, partly during his first term, and partly during his second term. The Chancellor over-ruled the testimony.

Johnston, Chancellor. The object of this bill is, 1st, to set aside the judgment confessed by Evans to the sureties to the second bond, and the assignment in trust, executed by him to John M. De Saussure; 2nd: To charge

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certain of the claims *against Evans, as Commissioner, to his sureties for his first term of office, instead of his sureties for his second term.

I. If the assignment stands, the judgment by confession must, for the last is less assailable than the first. I shall therefore confine myself to the assignment.

It is not denied that a debtor, in failing circumstances, may, by assigning his estate in trust, prefer one creditor over another, if the assignment be executed in good faith, and if it destroy no existing lien, unless there exists, in the country a bankrupt, or other law, prohibiting a preference.(a)

We have no law prohibiting a bona fide preference of one creditor over another. "Undue" preferences are prohibited: which word "undue" has been construed to mean only fraudulent preferences.(b)

That liens did exist at the term of the assignment, the assignment, itself, recites. But I do not perceive evidence that any of the claimants before the Court held liens at that time. Some of them, the Insurance Company, for instance, had obtained orders that Evans should pay over to them monies in his hands as Commissioner; but this formed no lien on his property. The only effect of such orders, was to subject him for failure to obey them, to process in personam. Although, upon the foot of the orders, proceedings might have been instituted against him, which would have eventuated in judgments which would have bound his property, the orders, themselves, formed no liens.

The claimants here, having no liens at the assignment, cannot take advantage of liens held by persons not before the Court, to set the assignment aside—throw the assigned property into assets, and thus entitle themselves to a share of it.

The assignment not being affected by existing liens, is it affected by any other circumstance?

The first objection to it is, that it was fraudulent, inasmuch as it was intended to indemnify his sureties, at the expense of the very persons whom, by the spirit of their undertaking, the sureties were bound to protect.

The arguments of counsel on this point could not fail to produce a powerful effect on the Court. But however strong may be the appearance of policy and justice, by

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which they *are supported, it must never be forgotten that to the judicial tribunals the people have not delegated a particle of legislative power. The question for the Court is, what is the law? Whatever the law is, that is what the sovereign authority has decided as its rule of policy and justice. Whenever that authority ceases to consider its rule as either politic or just, it can and will change it. The power of repeal or amendment is with it, to be exercised through the legislature, and not with the judiciary.

Whether it is fraud for the surety of an insolvent officer to take an assignment of his property, for indemnity, is the precise question negatived, in Hooe's case, 3 Cranch 73, [2 L. Ed. 370;] a case of great interest, and decided upon full consideration.

But the assignment from Evans is attacked on its terms. The provisions objected to are—1st, the power given to the trustee to sell upon such credit as he may deem fit. 2nd, The declaration that after paying off the existing liens, and indemnifying the sureties, such creditors as would, within a year accept, should be paid rateably.

It is said that these provisions tend to delay and hinder Evans' creditors in their remedies.

1. The power given to the trustee to sell upon such credits as he may deem best, is not to be construed as necessarily intended to delay the creditors. It may be, and ought rather to be, considered as one of the means of advancing their interests, by procuring the best price for the property. To say that the trustee might abuse this power, is no argument against the trust itself. If he had attempted to act captiously or fraudulently under his power; if he had shewn, in any way, that he was not governed by a sound discretion, or that he was disposed to defraud the creditors, who are his cestuique trusts, they could have enforced an honest execution of his duties. This was a sufficient safeguard to the creditors against fraud.

(a) 1 Kent, Com. 420; 5 J. C. R. 332, Seaving v. Brinkerhoff.

(b) P. L. 457; 2 Brev. 137; 2 M'C. R. 366.

"It may be said" with truth "that every conveyance in trust for creditors, interposes a delay, and necessarily retards them in the prosecution of their remedies." But "if any creditor complains of this, the ground of his complaint must be, that he is deprived of the

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opportunities of securing *his whole debt, at the expense of other creditors equally meritorious. He is prevented from making use of an advantage against other creditors, not from enforcing his rights against the debtor himself."(c)

2. The declaration that the residue after paying off liens and indemnifying the sureties, should be distributed rateably among such creditors as would accept within a year, does not, in my opinion, vitiate the assignment.

The argument is that it was an attempt to drive the creditors into terms: and decisions are referred to, in support of this position. I think the decisions do not support it.

In Lord v. The Watchman, American Jurist, No. 16, p. 284, "there was a condition in the assignment, that all creditors who became parties to it, thereby released the assignor from all further claim of the demand." There was an attempt to drive the creditors into terms. The terms to which they were attempted to be driven was a release of their claims, and if they did not account on that condition, they were to be excluded.

The case turned upon the attempt to coerce the creditors to release.(d)

In Hyslop v. Clark, 14 Johns. R. 458, 463, the assignment contained a similar condition; and the judgment turned on it.

Seaving v. Brinkerhoof, 5 Johns. C. R. 329, was on a conveyance containing a condition that creditors should not take unless they released. There existed liens, and the decision partly turned on them: but that has no application here. The condition compelling a release was the principal, and only other ground of setting the conveyance aside, or enjoining, which is the same thing.

Mr. Justice Ware, who decided Lord v. The Watchman, says, the assignor "had a right to lock up his property against any one creditor, for the benefit of all, and he had a right to determine the order in which his creditor should be paid out of the trust fund." He says "Lord transferred the whole of his property to Watts and Pray, in trust for the purpose, first, of paying such creditors as should become parties to the deed, in the order of preference established by the assignment. Thus far it is admitted he had a right to go."

In another part of his opinion, the same learned judge shews most distinctly the

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ground upon which he set the as*signment, in that case, aside. "A creditor" says he "who is postponed, cannot avoid the conveyance—because he may take what the favoured creditors leave for him—and still pursue his remedy, for what remains, against the debtor." But "the debtor cannot compel a creditor to receive, in satisfaction for his debt, any thing short of the full amount due."

Mr. Justice Van Ness, in delivering the opinion of the Court in Hyslop v. Clark, takes his ground thus. "One object evidently was to coerce the creditors to acquiescence in the terms offered to them. The language held to them is "if you will release your debts, you may participate," &c.

Now, for any thing contained in Evans' assignment, every one of his creditors after accepting, would have been still at liberty to pursue Evans and any other property he then had or might subsequently acquire. Where then is the contrivance to drive any of them to terms?

The postponement of the claimants here to the liens and to the claims of the sureties was lawful. They were offered a fair chance and an equal chance after that, if they would accept, and there was no condition annexed to the acceptance. If any of them chose to accept, he could still retain all his remedies for any balance which the assigned property left unpaid. If any of them chose not to accept, can he make it a ground to impeach the assignment, that by reason of others accepting while he stood back, he himself, and not Evans, gave those others a preference over him? I think not.

3. It is objected that the assignment is silent as to what is to be done with any overplus, that might exist, after paying the liens, the sureties and the accepting creditors—that, therefore, as to such overplus, a trust results to Evans, which is a preference of himself over his creditors, and avoids the assignment.

What results to Evans, and in what case is it to result?

By the terms of the assignment any creditor is allowed and invited to come in, and take without condition of the assets, until his debt be fully paid, or the assets exhausted. If the assets do not hold out, there is nothing to result to Evans. If there is an overplus, the creditors who have been paid cannot complain. The only case in which

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any thing could *result to Evans, without paying every creditor or exhausting the assets, would be when a creditor, to whom the property had been unconditionally surrendered, with an invitation to accept his whole debt or his just proportion of the assets, had defrauded himself by obstinately refusing to be paid.

But an assignment to be set aside must be fraudulent on the part of the maker. The person seeking to set it aside must shew fraud in that quarter. It is not sufficient,

(c) American Jurist, No. 16, p. 295.
(d) Ib. 292–4–5.

merely that he has been defrauded, if it turn out that all are innocent of that fraud but himself. All that a creditor has a right to expect of the law, is, that it secure him a fair chance to be paid, and a protection against the frauds of others. In this case, the assignment gave each creditor a fair chance, and no one has practised any fraud on the creditor.

But it by no means follows from what I have said, that if there were any surplus in the hands of the trustee, the Court would permit that to go to Evans, in preference to any creditor who had not accepted. All that I have said is, that such creditor, in such case, cannot overturn the assignment.

If it were not clearly given up that the trust property has fallen short of the liens and the indemnity of the sureties, I would order the trustee to account for the assets, in order to decree payment to the creditors here, out of the surplus. But it is conceded there is no surplus. The assignment and confession of judgment must stand.

II. The second matter to be considered is, whether any of the claims are chargeable to the sureties for Evans' first term of office.

Let us consider the claims which it is contended should be so charged, separately.

1. The claim of the Charleston Fire & Marine Insurance Company. The fund was received and partly disbursed, during the first term of office, leaving a balance in Evans' hands, during that term.

On the 10th of June 1825, and during the first term, this Court in the case (John & James Chesnut v. The Charleston Fire & Marine Insurance Company & others) in which the fund had been paid into Court,

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"ordered that *the funds now in the hands of the Commissioner, and such as may come into his hands, before a final report, be paid over to the Fire & Marine Insurance Company—subject to the rights of the contesting claimants, and subject to the further order of this Court."

There is no evidence that the money was ever demanded from Evans by the Insurance Company.

The principles of Wright v. Hamilton, 2 Bailey R. 51, [21 Am. Dec. 513,] are as applicable to a Commissioner as to a sheriff. That case is, therefore, an authority that a right of action could not arise to the Insurance Company against Evans, until demand of payment. If he was not liable, neither are his sureties. But if no action could have been maintained against him, it was because he had committed no official default.

Then up to the last day of his first term, he was guilty of no default as respects this fund, unless it was misconduct to perform his duty, by receiving and holding it until demand.

On the last day of his first term, it was his duty to turn it over to his successor in office. But he was that successor himself. He, by this succession, became debtor to himself, and creditor of himself. The person bound to pay, was then also the person to receive. Did he demand of himself? What must have been the answer he gave himself? "The money is in your own pocket. You are paid. I have turned over the money to you. Give me a receipt: or if you cannot do that, charge yourself, in your books, as my successor, with the fund."

Now, if he had the money as successor, and being in office, as successor, failed to charge himself with it, was not that a default in his second term? And are the sureties for the first term to be charged, ex-post-facto, for that? Are they to be charged for the misconduct of the principal of another set of sureties?

It appears to me the decisions in Wankford's case, 1 Salk. 299, 3 Ib. 162, and in Cobb's case, 2 Bailey, 60, go to the discharge of the sureties for the first term.

2. The claim of the children of Wilie Vaughan is still less tenable.

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*There was no order to pay out the fund received by Evans during his first term. There was no demand. Nor could any payments have been made to the children, they being infants.

3. Edward Newhall's claim.

The fund was received during the first official term: no order made to pay out—nor any demand until the second term. Of course, upon the principles I have applied to the foregoing claims, this cannot be charged to the first set of sureties.

4. Tim. & F. Dwight's claim stands on the same ground as Newhall's.

5. So, also, does Thomas Scott's.

6. John Hudson's claim.

The fund was received during the first term of office: no order to pay out, nor demand made. The first set of sureties are not liable for this claim.

7. H. M. & G. Archie's claim.

A thousand dollars were raised during the first term, and ordered to be invested. Evans only invested eight hundred; which he received back again in the second term. It is not contended that the first sureties are liable for the eight hundred dollars. But it is contended that they are responsible for the two hundred, on account of Evans' default in not complying with the order to invest them; and so they are; but not under the charges in this bill. No such default was alleged, and the proof must be rejected.(e)

8. The claim of Lene Dubose's children.

Carter, who was Evans' predecessor in office, was ordered to take charge of, and did

(e) 1 Br. C. C. 94; 14 J. R. 501; Gilb. 219; 6 J. R. 543; Mitf. Pl. 34; 2 Atk. 182; 2 Ves. 225; 11 Ves. 240.

take charge of these children's slaves. When Evans came into office, he acted as Carter had acted, but without special order.

The slaves were hired out, and notes taken for the hire, which notes fell due the 20th March 1823, in Evans' first term. There is no evidence when these notes were paid, but they were paid, and the principal has been paid out. A claim is now made for the interest which accrued from the maturity of the notes, until the principal was paid out.

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*And it is contended that the first set of sureties is liable for it—although there was no order to pay it, nor demand of it, during the first term of office; neither was there any one to receive it, the children being minors during the whole of that term.

Although I think Carter's acts in relation to the children's property were in the line of his duty, as Commissioner, and that Evans succeeding him in office, succeeded to his duties; yet, there is no default proved in his first term, and his sureties for that term are not responsible for this claim.

9. The claim of the Commissioners of the Poor, on account of John Craven.

The proceedings relating to this matter are very extraordinary.

Craven, a lunatic, had been, from 1812 to 1818, under the care of the Commissioners of the Poor. In 1818, he obtained (without the intervention of a committee, as it would appear,) a decree in this Court; under which the Commissioner of the Court, who preceded Evans, sold a tract of land, for his benefit, at 1120 dollars. The Commissioner supported him on the avails until Evans' election. Then Evans took charge of the lunatic and the fund, and supported him on the latter until his death; which happened in ——, during Evans' first term.

After the lunatic's death, and during his own first term of office, Evans reported to the Court, that the funds left, belonging to the lunatic, were in cash, $176.06, and in bonds, besides interest, $273.

He also reported that the Commissioners of the Poor had a demand for $573.33, to the payment of which he recommended that the fund, after deducting the costs of Craven's suit, should be applied, so far as it would go. This was ordered, although there does not appear to have been any administration to Craven, taken out.

The costs of Craven's suit left but $131 of the fund, for the Commissioners of the Poor, from which it would seem that Craven's capital was very much trenched upon.

The Commissioners of the Poor now demand the $131, from Evans' first sureties,

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without ever having demanded *the money the first term of office. No default was committed during the first term, and the sureties for it are not responsible.

There is no ground, as respects the assignment, or as against the sureties, for the bill in this case; and it must be dismissed as against all the defendants, but Evans: As against him it will be retained until further order.

The plaintiffs move to reverse this decree, and that the relief prayed by the bill be granted; upon the following grounds:

1. Because the sureties in the first bond are liable for all monies received by the Commissioner during that term, unless they shew that the same were paid over to his successor.

2. Because the fact that Evans was his own successor, does not discharge the sureties to the first bond, unless by some schedule signed by the Commissioner at the expiration of his first term, and filed in his office, he had acknowledged the amount then in his hands and ready to be paid over; and by a receipt endorsed thereon, when he was re-elected, had admitted his receipt of those sums under his second term.

3. Because the receipt of money during the first term, charges the sureties; and the fact, that when called upon he is not able to pay, is conclusive evidence of default during that term, until the contrary is made to appear.

4. Because an order to pay over, fixes the default during the first term, though no demand was proved to have been made.

5. Because the failure to invest money ordered to be invested, constituted an immediate default.

6. Because where bonds were lodged in the Commissioner's hands during his first term, his first sureties are liable, unless they produce the bonds or the money.

7. Because the Court refused testimony which was offered to prove a default during the first term, by shewing that Evans converted the funds in his hands to his own use, during his first term, and because the same evidence was offered to assail the assignment.

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*8. Because the assignment made in trust for the sureties ought to be set aside.

Wm. F. De Saussure, in support of these grounds, argued, 1st, That the sureties to the first bond were liable for all monies received by the Commissioner, during that term—that it was the receipt of the monies, and not the neglect or refusal to pay over, which fixed the liability of the sureties: and where there has been a demand made and a refusal to pay over, the default will have relation back to the time when the money was received. At all events the refusal of the Commissioner to pay out money according to the order of the Court, was evidence of a conversion during that term, and his neglect to invest funds ordered to be invested, was a default in the first term—and were violations of the orders of the Court prescribing these duties, which constituted breaches of the con-

dition of his bond, for which his securities of that term were liable. 2. That the assignment was void, as well from its terms, which were intended to coerce creditors to a compromise, as on grounds of public policy. That the community have the right to look as well to the private fortune of a public officer, as a security for his official conduct, as to his bond. And he cited and relied on, the American Jurist, No. 16, p. 284; 10 Johns. Rep. 459; 20 Johns. Rep. 442; 4 Dallas; 5 Johns. Ch. Rep. 329, 332.

Blanding, contra. As to the question, whether the securities to the first bond were liable—argued, that the breach assigned was that Evans had received money which he had not paid over according to the condition of his bond; and that there could be no such breach when the creditors stood by, and did not set up their claims until the second term. As to the funds in his hands during the first term, which were ordered to be paid over, no cause of action accrued until after demand; Hamilton v. Wright, 2 Bailey, 51; and State v. Martin, Columbia, May Term, 1830. And as regards the order to invest funds, a failure to comply with it could only make the sureties to the first bond liable for the interest. Evans was his own successor, and the

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fund remaining in his hands un*til the second term, his sureties to that term are liable.—As regards the assignment, he insisted that there was no ground on which it could be impeached. It was executed bona fide for the benefit of his creditors, of whom were his sureties; and he had a perfect legal and equitable right to give preferences among his creditors, and indeed he might have paid in $10,000, and discharged his bond. There is nothing in the terms of the assignment to prevent creditors from proceeding against him, or to compel them to compromise their claims; and, finally, if the assignment should be set aside, the securities are protected by the judgment confessed to them.

HARPER, J. It will be necessary to add very little to the very satisfactory reasoning of the Chancellor, on the several points involved in the case. The four first grounds of the motion, together with the sixth, may be considered together. If it were shewn that the Commissioner had wasted or converted to his own use the funds officially in his hands, as by purchasing property with a bond taken by him as Commissioner, during his first term of office, I should think the sureties of that term ought to be answerable. But in the absence of any testimony on the subject, the presumption is that he retained the funds, and that they were in his hands as his own successor. Such seems to be the natural inference, and I think it is sustained by the authority of the cases to which the Chancellor refers. Such was the opinion of the presiding judge in the case of the State

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v. Martin, (*f*) and it is sup*ported in some degree by the case of The Treasurers v. Taylor, 2 Bailey, 524. What other conclusion could you draw? By what data could you fix a default during the first term of office? And what is the evidence here of default during the first term? The strongest cases are those in which the Commissioner was ordered to pay over the funds. These orders were an authority to pay over the money, and made it his duty to do so, if it were demanded. Certainly, however, it did not impose on him the duty of seeking out the parties wherever they might be found, and making a tender. According to the case of Wright v. Hamilton, 2 Bailey, 51 [21 Am. Dec. 513,] there was no default and no cause of action against Evans, till the money was demanded and he refused to pay it, and no demand was shown during the first term. Besides, as observed in argument, by their delay to make any demand of the sureties of the first term, and by establishing their demands against the sureties of the second term, the creditors have concluded themselves. If Evans had the funds in his hands during his second term of office, if he did pay over to himself as his own successor, the surties of the second term were liable, and if they were liable, those of the first term could not be.

The fifth ground of appeal is, because the failure to invest money ordered to be invested

(*f*) THE STATE v. MARTIN, Commissioner, and sureties—Before Mr. O'Neall, at York, Spring Term, 1830. This was an action on the official bond of the Commissioner in Equity for his second term of office, to recover money received by him and not paid over. The jury found a special verdict, which stated among other things, that a part of the money for which the action was brought was received by the Commissioner during his first term, but was not ordered to be paid over until during the second term; and one of the questions made, was whether the sureties to the second bond were liable for the money received during the first term. The presiding Judge awarded judgment for the plaintiff; and an appeal being taken, in his report of the case, on this point he remarks: "Let it be admitted that he received the whole of the money during his former term and that he received part of it in his own debt, what would be the effect of it? Upon his entering on his second term, he had so much

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*money belonging to the complainants in the case in Equity. He was ordered to pay it out in his second term, and for his failing to do so, his securities to his second bond would appear to be answerable for a breach of duty. See M'Dowell v. Caldwell, 2 M'C. Eq. 43, [16 Am. Dec. 635;] Hall v. Hall, Ib. 269. During however, his second term, on the 30th May, 1826, the Commissioner accounted with the executors and legatees of Feemster (for whose benefit this suit is brought) and admitted the balance of $329.48, to be then in his hands as Commissioner, for their use and benefit. This admission is conclusive on the defendants, and they are bound for the amount thus admitted to be in his hands, with interest thereon." The judgment of the Circuit Court was affirmed, but the case was decided on other grounds. R.

constituted an immediate default. I suppose it was so; yet it does not follow that for that, the Commissioner was liable to the extent of the money ordered to be invested. He might be liable to the parties for the interest which would have been made if the fund had been properly invested; but no such claim is made

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in *this case. If he neglected to invest, the money remained in his hands, and the same presumption arises with respect to that, as to any other money in his hands.

The seventh ground has been abandoned since the hearing; the counsel having become satisfied that the testimony which was offered could not have been given.

On the eighth ground, it is not necessary to add any thing to the reasoning of the Chancellor. The assignment was only impugned in argument, by supposing that it was intended to coerce creditors by requiring them to release part of their demand, before they could have the benefit of it. But this was plainly a misconception. The assignment is for the benefit of creditors who shall consent to accept (not accept and release) within a year; and this was proper, that the trustee might know for what creditors he was to provide.

Per JOHNSON and O'NEALL, JJ. We concur generally in the views expressed in this opinion, but we are of opinion that the neglect of the Commissioner to pay over or invest money as ordered by the Court, was a breach of the condition of the bond, and that the application for such an order ought to be regarded as prima facie evidence of a demand; and that the sureties to the bond of the term in which such order was made are liable: and the decree of the Circuit Court is ordered to be accordingly so modified. In other respects, it is affirmed.

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1 Hill, Eq. 430

CHARLES JUGNOT v. BENJ. HALE, and Others.

(Columbia. Jan., 1834.)

[1 *Appeal and Error* ⇐954.]

[Cited in Ellis v. Commander, 1 Strob. Eq. 193, to the point that the court of appeals will not control the discretion of the chancellor in granting an injunction upon the coming in of the answer, under the act of 1825, except in case of obvious error or mistake.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3818; Dec. Dig. ⇐954.]

By the act of 1825, p. 19, an injunction granted by the Commissioner continues in force no longer than the coming in of the answer; after which the Chancellor may in his discretion grant a new injunction or make such other "order on the bill and answer as the case may require"; and this Court will not attempt to control him in the exercise of this discretion, but upon a plain case of obvious error or mistake.

1 Hill, Eq. *431

*SINCLAIR & KIDDLE, Assignees, v. A. B. MOORE and CHAS. MOORE, Administrators of Thos. Price, Deceased.

(Columbia. Jan., 1834.)

[1 *Appeal and Error* ⇐893.]

The Court of Appeals in Chancery has the right to order an issue at law, and it has exercised this right ever since its organization.

[Ed. Note.—Cited in Leaphart v. Leaphart, 1 S. C. 208; Shaw v. Cunningham, 9 S. C. 272.

For other cases, see Appeal and Error, Cent. Dig. § 3630; Dec. Dig. ⇐893.]

[*Equity* ⇐383.]

The Court ordering the issue, has the power of deciding on a motion for a new trial; but unless the decision upon the verdict in issue involve a reversal of some previous decree in the case, the Chancellor on the Circuit should hear and determine a motion for a new trial of an issue ordered by the Appeal Court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 787; Dec. Dig. ⇐383.]

[*Appeal and Error* ⇐70.]

According to the practice of this Court, if a party except to the Commissioner's Report, and some of his exceptions are sustained and some overruled, and the case is sent back by the Chancellor to the Commissioner, he may at once appeal to this Court, or wait until there is a final decree of confirmation, and then bring up the whole case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 377; Dec. Dig. ⇐70.]

[1 *Appeal and Error* ⇐1202.]

[The chancellor may order a new trial of an issue at law, granted by the court of appeals upon the hearing of an appeal from chancery.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4669; Dec. Dig. ⇐1202.]

Spartanburgh.—The bill in this case was filed by the assignees of Geo. Keenan, against the defendants, as administrators of Thomas Price, for an account of Keenan's estate,—charging that Price and Keenan, having been concerned together in trade for many years, Price, before and at the time of his death, had in his possession funds and merchandize of Keenan's, not accounted for; and that they had colluded for the purpose of defrauding Keenan's creditors. The administrators set up, by way of discount to the plaintiff's demand, a bond and mortgage from Keenan to Price, for $6442; in reply to which the assignees produced a receipt against, or defeasance of the bond, and contended that the bond and mortgage were merely colourable, without consideration, and intended to screen Keenan's property from his creditors; but this instrument the defendants insisted, was not genuine.

On the case coming up before Chancellor Thompson, he ordered an issue at law, to try whether the alleged defeasance was genuine, and of full force at Price's death. The jury found for the defendants on this issue; but the Court of Appeals at December Term, 1830, granted a new trial, and at the same time enlarged the order for the issue, so as to embrace the question, whether the bond and

mortgage were for a valuable consideration. The issue was tried before Mr. Justice O'Neall, at Fall Term 1832, [2 Hill, Eq. 160,] and the jury found that "the bond and mortgage are not colourable, but on valuable consideration, and that the signature 'Thos. Price' to the paper called a defeasance, is not the hand writing of the said Thomas Price."

The Commissioner, meanwhile, had made up his report on the accounts. It was excepted to by both parties, and their exceptions argued before Chancellor De Saussure, at June Term 1830, from whose decree thereon both parties appealed, and this Court reformed the decree, and settled the principles involved in the points then made. After the

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*last trial of the issue, the Commissioner reformed his report according to Chancellor De Saussure's decree, and the decision of the Appeal Court, and allowed the defendants credit for the amount of the bond.

The case came before Chancellor Johnston, at June Term 1833, on exceptions to the Commissioner's Report, by both parties, and on a motion by the plaintiffs for a new trial of the issue, on several grounds.

Johnston, Chancellor. The verdict rendered to me is not open to my examination, being grounded on an issue ordered by another Court. That Court, if it had authority to order the issue, (having ordered it for the satisfaction of its own conscience, and not for that of this Court,) is alone competent to decide whether the verdict is sufficient to remove the scruples which occasioned the order.

If it was competent for me to examine the verdict, I am free to say that it is as satisfactory as any verdict could be, rendered by a Jury having before them only part of the materials which form the nature of the case, that bore as evidence upon the point at issue.

The Court of Appeals, in conceding that the existence or want of consideration for the bond and mortgage of the 3d of May, 1819, might influence the opinion of the Jury upon the question, whether the accountable receipt of the same date, called a defeasance, was signed by Price, admits in substance, that the consideration of that bond and that mortgage, is matter of evidence on the question last mentioned. Thus, if the direct evidence as to the subscription to the receipt, was equally balanced, and under these circumstances it was proved that the bond and mortgage were upon full consideration, it would be difficult to believe the receipt was genuine: since that would imply that Price had signed a paper giving away upwards of 6,000 dollars of his own money. But if, under the same circumstances, it was established that the bond and mortgage stood upon no consideration, the mind would conclude it more probable that Price, losing nothing by it, might have signed the receipt. The evidence, therefore, touching the bond and mortgage, was circumstantial testimony as to the

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genuineness of the *receipt for them. If, therefore, there ever was any propriety in sending the latter point to a Jury, the evidence respecting the consideration of the bond and mortgage ought then to have been received; whereby the parties would have saved the expense and delay of a second trial.

But I do not believe a Jury could have ever enquired profitably into the consideration of the bond and mortgage. How could they have ascertained the consideration of them, without examining the accounts from beginning to end? But this a court of law, from its structure, could not well do: and hence a court of law is never required or permitted to examine matters of account, except when they spring up collaterally to a matter of which that Court has original jurisdiction; and, then, only from the necessity of the case.

Now, the accounts here were never left to the Jury, but were all disposed of and sent back to the commissioner in the same decision which ordered the issue on the accountable receipt: nor did the commissioner make up the accounts under the appeal decree, until after the Jury rendered their verdict.

But, inasmuch as the accounts, as made up, upon principles which have been settled both here and in the Court of Appeals, from the best examination I have been able to give them, shew a probability that the bond and mortgage were executed upon consideration, I should, if the verdict were returnable to this Court, agree with it. I should say that the bond and mortgage were valid; and that the accountable receipt for them was a forgery; indeed, as to the latter, I think there is greatly preponderating evidence of the forgery, independently of the consideration upon which the former stands—so preponderating that I should have decided without subjecting the parties to the expense and delay of an issue at all: in which decision, to be sure, I should not have neglected the light which the accounts and the bond and mortgage would have afforded me.

Being convinced that so far from being bound, I am not at liberty to take cognizance of the verdict rendered upon the issue order-

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ed by the Court of Appeals, while on the *other hand, I am bound to decide on the accounts as made up by the Commissioner, that part of the case having been re-committed to this Court, with directions pointing out the errors to be avoided; I cannot express my embarrassment; for it is necessary to a full decision on the accounts that the matters of the bond, mortgage, and accountable receipt, be taken into consideration; yet they constitute equities reserved in the Court of Appeals. I felt very much the same difficulty in Fraser and Vaux, where the equities were

not remitted by the Court of Appeals, but held in their own hands for decision, while, to satisfy themselves, they ordered certain enquiries by the Commissioner. In that case, I could not decide on his report when it came in.

In this condition, what am I to do? The order for the issue is not one of this Court, so that if I were satisfied the jury were wrong, I could not supersede it, either for the purpose of deciding for myself on evidence, or for the purpose of ordering another trial, either on the same terms or others. I do not know what the doubts of the Court of Appeals were founded on, so as to say whether the verdict would or ought to resolve them.

On the whole, after much reflection, being determined not to embarrass the case or delay the parties, if any thing I can do can avoid it, I have come to the conclusion, inasmuch as I think, on the evidence and accounts independently of the verdict, that the bond and mortgage are founded on a consideration, and that the receipt is a forgery; that my best course is to sustain the former and reject the latter, in deciding upon the Commissioner's Report.—This is but an affirmation of the former Circuit decree. If the Court of Appeals should, on considering the verdict, come to the same conclusion, the case will have been forwarded: if not, they can correct the report.

Will the difficulty in which I have found myself, authorize me to state with deference, very briefly and imperfectly, why I think the Court of Appeals cannot order an issue in an Equity case? If it be not presumptious, I would venture to do so.(a)

An issue, such as this, is intended to ascertain a fact.

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*It belongs to an appellate jurisdiction, supervising a law decision, to correct, by the Appeal decision, errors of law; but, as to errors of fact, the only correction it can make, is to remit the case to the original tribunal for another trial.

The appellate power, as respects an Equity case, extends to the correction by the Appeal decision, of errors of fact as well as those of law.(b)

In remitting a law case upon matter of fact, the appellate Court cannot remit one or two points only; it must remit the whole case, and put the Court below in possession of it, so far as the facts are concerned, in as full and ample a manner as it had at the first trial. Why? Because the people, by the Legislature, have committed to the Court below, as constituted by them, the decision of the facts; and have only allowed the decision to be supervised, by way of appeal. Under the guise of supervision, the Court of Appeals cannot send the facts to a tribunal more satisfactory to themselves. It belongs to the Legislature, under the Constitution, and not to the Court of Appeals, to parcel out the judicial power.(c)

With regard to Equity cases, there is no difference, as respects the power of the appellate jurisdiction to correct errors of law. Neither, speaking for myself, do I question its power to correct errors of fact: although the Appeal opinion, in this very case, speaking of the credit given by the Chancellor and Commissioner, to paper evidence, says "both of them having concurred in giving full credit, this Court has neither the inclination nor the power to question the correctness of their conclusion.

But, when an Equity decision on a matter of fact comes up, the correctness of which is doubted in the Court above, what has it power to do?

Although the members of the appellate Court may think the evidence so doubtful, that if they had been sitting on the Circuit in the Court of original jurisdiction, they would have ordered an issue; yet, can they say, under the acts constituting the Court of Equity, it was error of law in the Circuit Court not to have ordered one? This Court is constituted by act, with a direction to "proceed, adjudge and determine, in all causes

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brought into the said Court, as near *as may be, according to the known laws, customs, statutes and usages of the kingdom of Great Britain; and, also, as near as may be according to the known and established rules of his Majesty's High Court of Chancery, in South Britain"—and again it was declared, by act, that "this Court shall have full power and authority to establish such standing rules and orders (not repugnant to that act) for regulating the practice of the said Court, as they shall deem most consistent with justice and equity, and as may effectually tend to the despatch of business without unnecessary delay to suitors." By the Act of 1808, the Judges of the Court of Equity were directed to convene at stated periods, "to try all appeals that may be brought up from the Circuits."(d)

The Act of 1824, constituting a separate Court of Appeals, gives it "appellate jurisdiction in all cases brought up from the Circuit Courts, both of Law and Equity, in the same manner, and with the same powers and authority, in all respects whatsoever, as are now exercised by law, by the constitutional Court, and the Court of Appeals, [in Equity,] or by either of them separately."(e)

With regard to the Constitutional Court, it can hardly be necessary to remark, that its appellate power related solely to cases car-

(a) Wilks' case, Columbia Appeals, 1831.

(b) 11 John. Rep. 406, Rolle. Abr. 805; Bac. Abr. tit. Error, M. § 2.

(c) Const. of S. C. art. 11, sec. 1.

(d) Trott. No. 460; A. A. 1721, § 10; P. L. 337-9; A. A. 1784, § 5. Vide 1 Faust, 29, 34. A. A. 1808, § 4.

(e) A. A. 1824, p. 17, § 1.

ried from the Law Circuits: and consisted, under the constitution, merely in "hearing and determining all motions for new trials, and in arrest of judgments and such points of law as should be submitted to them," at the end of each law circuit.(f)

In this manner has the Legislature parcelled out the Judicial power, so far as this Court and the Court of Appeals are concerned: which partition has the sanction of the Constitution; which declares that "the judicial power shall be vested in such superior and inferior Courts of Law and Equity, as the Legislature shall from time to time direct and establish."(g)

Now, can the Court of Appeals, as an appellate Court, pronounce it error of law, in any case, in a Chancellor, not to have directed an issue on a matter of fact? The Legislature has given him the decision of facts, with no other qualification than that, if he

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feels himself at a loss *upon the evidence, he may, after the pattern of the English Court, ask the aid of a Jury.

If he orders an issue, the question involved in it is still with him; and he may supersede his order, if his doubts vanish, or if the parties, depending on the fact that the Court of law cannot nonsuit the action for want of diligence, are guilty of gross delay; or he may differ from the verdict, upon its return to him: or he may order a second trial, if his judgment is not satisfied by the first. All this is "according to the known and established usages in chancery in South Britain." Is it error to pursue it when the legislature directs?(h)

It is not error, before an appellate Court, that the Circuit Court having authority to do it has refused a new trial: can it then, on principle, be error, that the Court of Equity has not asked the aid of a jury?(i)

The Court of Appeals occupies the same relation to this Court which the House of Lords does to the Court of Chancery in England. I have searched diligently, but in vain, for a single instance in which that house has either ordered an issue, or held it error that the Chancellor failed to order one.

The legislature has given this Court the decision of facts, and this it holds under the Constitution. Can it be taken from it by another Court without a violation of that instrument? The legislature has intrusted this to its capacity and judgment: who is authorized, but the legislature, to say that the functionaries thus intrusted are not capable? Others intrusted with the supervision of their errors, may correct them, if it be apparent they have committed any: but it can never be allowed that, because they doubt whether error has or has not been committed, they should cashier them for incapacity, and transfer their trust to others: thus in reality constituting those whom the legislature has appointed judicial officers, mere commissioners to take testimony, the original power of decision being in reality in the Court above, who aid themselves in exercising it by calling on a foreign tribunal.

If the legislature had thought a jury indispensable to the decision of facts, they would have annexed one to this Court. I value the judgment of a jury so much my-

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self, that, with de*ference to the better opinion of the legislature, I wish this Court had the power of impanelling one, on suitable occasions. I would frequently consult them, but for the delay and expense attending the orders of issues. It puts back parties at least a year, and the expenses are very great.

But to return: it may be asked if an appellate Court cannot order an issue, when it may doubt whether the Court below has decided correctly on a fact. What is it to do?

What is a Court of Appeals intended for? Is it intended for any other purpose, than to correct errors? Then if it is not able to say that error exists in the circuit decision, it is not at liberty to disturb that decision, but must let it stand.(j)

What authority has the Court of Appeals over a verdict at law? Can it set it aside unless it is against evidence? If the evidence leaves the fact doubtful, in the minds of the Appeal Judges, is it not their constant habit to say that the jury, the authority established to decide facts at law, having decided, they are not at liberty to set their verdict aside? Verdicts cannot be set aside but for manifest error.

The Court of Appeals has put the decisions in equity upon the same footing with verdicts at law. The late Judge Nott, in a case in which he delivered the opinion of the Court of Appeals, speaking of a matter of fact, said "that was properly for the consideration of the Chancellor, and this Court will not interfere unless the decree were manifestly contrary to the weight of evidence. The decree of the Chancellor must in that respect be considered in the nature of a verdict at law."(k) Mr. Justice Johnson, in delivering the opinion of the same Court in another case, says, the Court takes this occasion "to lay down a few rules" "which have become the more necessary under the recent modification and present organization of this Court." He then speaks of "unmixed questions of fact." He acknowledges that the Court of Appeals is not so competent as the Circuit Court, which hears the evidence, to decide such questions. I may be allowed to observe by the way, that if they are not so competent, merely because they do not see the witnesses, their merely doubting is no reason ei-

(f) State Const. art. 10, § 3.
(g) Art. 3, § 1.
(h) 17 Johns. R. 267.
(i) 4 Wheat. 220.
(j) 2 M'C. Ch. R. 15, 59, 71, 73, 74, 194–5, 95.
(k) Ib. 71, 73, 74, 75.

ther for reversing a decree or ordering an issue to relieve their doubts, since it might be
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that if they heard the evidence, as *the Chancellor does, they might, like him, have no doubts. The Judge goes on and says, "where there is evidence on both sides, this Court will not weigh it: for that belongs to the jury; and their view of it is conclusive. And so, unless it appears they have acted under a mistake, or have been so palpably influenced by some improper motive, that the enormousness of their conclusion is such as to strike the understanding with conviction at once, this Court will not set their verdict aside. Now all the reasoning upon which these rules are founded" (he continues) "applies with equal, indeed with greater force, to a case coming up under a report from the Commissioner, through the medium of the Chancellor, because we are removed one stage farther from the original source—and this Court feel warranted in adopting these rules for its future government."(*l*)

These remarks spring from a true conception of the nature and duties of appellate jurisdiction. It was never intended to provide for two full trials in every case. It was never intended that as a prerequisite to a decision, there should be found two tribunals equally concurring in it; it was not intended to set up judicial machinery so calculated as that would make it, to wear out the citizen by delay and impoverish him by expense. It was not intended that the circuit decision should be void and go for no decision unless affirmed by another Court, but that it should be a valid judgment, unless disaffirmed, forever; therefore the Court undertaking to set it aside, must see that there is error; not merely doubt whether there may or may not be error; it was intended to terminate litigation as speedily as it could be done, by a decision of which none could say it was erroneous. It may be said of a large proportion of controversies, that if they should be subjected to 500 trials, doubt could not be removed, or a certainty of justice obtained; but society must adjust controversies; and as soon as it can do so without injustice and error, it is its duty to do it.

Now, under the rules laid down by the Court of Appeals itself, for its government, (and as an appellate tribunal it could lay down no other) that Court must acquiesce in every circuit decision in equity, containing no error of law, and no manifest error in fact.

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*If there be manifest error in fact, if such circuit decree be manifestly against evidence, it must reverse the decree. If the error be not palpable, the decree by their own rule must stand.

But even if that Court were at liberty to withhold its confirmation from a circuit decree because they doubted on it; (which by the way is a misconception, circuit decrees not requiring confirmation in order to their validity) but even in that case, it does appear to me, that, by analogy to what is done in new trials ordered at law, the Appeal Court is bound to remit the case to the Circuit Court for new trial, exactly upon the same terms as it stood at the first trial.

I trust I have not transgressed in the observations I have ventured. It was not my intention to do so. I have studied to avoid language calculated to throw any reflection upon the enlightened tribunal of whose powers I have been speaking: and if any such has crept into what I have said, it was against my will. All I intended was to protect the tribunal to which the legislature has appointed me, from violation: to preserve it in the same condition in which it was by the legislature, under the constitution, delivered to me.

His Honor then took up the Commissioner's report and considered the exceptions thereto, but refused to allow any exceptions to such parts of this report as were not excepted to in the former report, and to consider any exception which had been put into the former report, unless supported by the former decree. After having overruled the exceptions and confirmed the report, there appearing a large balance in favor of the defendants, the Chancellor dismissed the bill.

From this decree the plaintiffs appealed, on the ground of error in the Chancellor's decision, in refusing the motion for a new trial, and in overruling the exceptions.

[For subsequent opinion, see 2 Hill, Eq. 160, note.]

A. W. Thompson, for the appellant.
Farrow & Williams, contra.

O'NEALL, J. The Chancellor has at great length, and with much learning, discussed and denied to this Court the power of ordering an issue. Until he agitated the question, we did not suppose there was a doubt entertained upon the subject by any member of
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the Bar in South Carolina. The *practice can in our own reports be traced back to a period within five years of the origin of the Court of Appeals in Equity. Taylor & wife v. Mayrant et al. 4 Desaus. Eq. Rep. 505. From that time to the present, it has been constantly used by the former Court of Appeals in Equity and the present Court.

Without pretending to argue the question on the precedents from England or New-York, it will surely be enough to satisfy the Chancellor, to remind him that a Court of Appeals in Equity, organized as ours, is unknown to the jurisprudence of the countries from which he has drawn so largely.

The act of 1808, after providing for the

(*l*) Id. 73–4, 5, 1827.

establishment of a Court of Appeals in Equity, and for the arrangement of two semi-annual Courts, at Charleston and Columbia, provides, "and it shall be the duty of all of the Judges of the Courts of Equity to attend at the said Courts of Appeal, and to hear and try all Appeals that may be brought up from the Circuits hereby annexed to the said Courts respectively." The succeeding section directs the manner in which any person may appeal from "any order or decree of any Judge presiding on the Circuit." These provisions do not merely create a Court of Errors for the revision of decrees in Chancery; but they create an appellate tribunal "to hear and try all appeals" whether of law or fact. The Court thus constituted became pro hac vice the Chancellor, and in his place exercising his power of hearing and trying, must render the appropriate judgment which he ought, but has perhaps failed to give. To enable the Court of Appeals to do this it must have all the Chancellor's powers, among which is his discretionary power of ordering an issue to inform his conscience on a doubtful question of fact. This is as necessary to three judges, as it can be to one. For they may have consciences desiring information as well as he. I presume no one of the five Judges who originally constituted the Court of Appeals in Equity ever doubted, that as a Court of Appeals collectively, they had in cases of appeal all the powers which individually on the Circuit they could exercise. If any did, why did they unanimously

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order an issue *in Taylor v. Mayrant? If the former Court of Appeals in Equity had the power, this Court unquestionably has the same. For the act of 1824 abolished the Court of Appeals in Equity and the constitutional Court, and created this Court in their stead, giving it all the powers which belonged to either. It is true we are reluctant to decide upon questions of fact, we generally prefer to follow and adopt the Chancellor's decision. In expressing our concurrence on questions of fact in which the Commissioner and Chancellor have united in judgment, we have used the loose expressions "this Court has neither the inclination nor the power to question the correctness of their conclusion." But in using such expressions it was not intended to disclaim the power of examining a Chancellor's decision upon facts in every case; but merely to say in the particular case, that according to previous decisions we could not interfere with that decision. I am sure after the short experience I have had on this Bench, that I can safely say we have no wish to increase our jurisdiction, or to trench in any way upon the jealously guarded jurisdiction of Chancery. But it is our duty as well as that of every other Judge, to "judge righteously between every man and his brother and the stranger that is with him." We as well as the Chancellor are charged "ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man, for the judgment is God's." In the exercise of such a duty, appellate as it happens to be in our case, we must be satisfied that the judgment which we are to pronounce is correct. If we do not perceive manifest error in the Chancellor's judgment, upon the facts, we may be justified in resolving our doubts by the arbitrio boni viri: but if we do perceive error, and yet are not satisfied to say that the Chancellor's decision is so manifestly wrong that we will reverse his decree, we surely have the right to inform our consciences by the verdict of a jury, before we give a final judgment in the place of the Chancellor.

We agree with the Chancellor, that the Court ordering the issue has the power of deciding upon the motion for a new trial of the issue. Taylor v. Mayrant, 4 Desaus. Eq.

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Rep. *515. But unless, as in the case of Taylor v. Mayrant the decision upon the verdict in the issue may involve a reversal of some previous decree in the cause, I see no impropriety in the Chancellor hearing and deciding upon a motion for a new trial of an issue ordered by this Court. In some cases such a course may be necessary (as in this) to bring up the whole case to this court. The Chancellor can have as little difficulty in saying whether the result of the issue would be satisfactory to our consciences as he would have in determining whether the result of an issue ordered by his colleague, would be to him.—His conscience would, in each case, be the conscience of the Chancellor seeking information. But it seems to me, in this case, that he ought, according to his own principles, to have decided on the motion. Chancellor Thompson ordered the issue in the first instance—this Court, in the former opinion, enlarged the order, and directed the issue to be made up anew, conforming to this enlargement. This surely was not ordering an issue for our information alone—the doubt originated in the conscience of the Chancellor, he ordered an issue: we thought his object would be better obtained by adding another inquiry. So that, in this point of view, the Chancellor ought to have met, considered, and decided upon the motion for a new trial of the issue. But as his decree, dismissing the bill, is in effect, a refusal of the motion for a new trial, it will not be necessary to remand the cause to the Circuit for an express adjudication upon that motion.

[His Honor here went into an examination of the grounds of the motion for a new trial, which having been considered, the motion was refused. As they relate entirely to the facts, and involve no legal principles, the remarks on them are omitted.]

This brings us to consider of the questions arising out of the accounts; and it is to be regretted that the complainants' counsel had not, on the former occasion, when this case was before us, presented his objections. If this had been done, the case might have gone back, with such instructions to the Commis-

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sioner as would have enabled him to *have presented a report, calculated to do equal justice to the parties. But as it is, he has been limping on in the dark, with instructions to direct him, on a part of the case, but none, as to the other parts. That injustice has been done, under such circumstances, is not to be wondered at; and that the case must once more go back, almost to its beginning point, is to be regretted, (but is no great marvel) after a pilgrimage of ten years in Chancery.

I agree with the complainants' counsel, that he was not bound to appeal to this Court, on any of the points involved in the Commissioner's report, so long as any thing remained to be done by the Commissioner to complete it for confirmation generally, and until it was confirmed by the Chancellor's decree. But although I think he was not, according to the practice of this Court, bound to appeal, yet, I think he could have appealed, on any point which the Circuit decree finally settled.

The Chancellor is correct in saying that a report of the Commissioner must be regarded as correct, unless the party complaining of it will specify its errors by exceptions. The rule is very well stated, by Mr. Justice Spencer, in the case of Wilkes v. Rogers, 6 John. Rep. 591, in the following terms: "It appears to me, that exceptions partake of the nature of special demurrers; and if reports are erroneous the party must put his finger on the error. When he does so, the parts not excepted to are admitted to be correct, not only as it regards the principles, but as relates to the evidence on which they are founded." If a party does not think proper to except to a report at all, he cannot be heard against its confirmation, on account of any error, either of law or of fact, committed by the Commissioner. Foote v. Van Ranst, ante, 185, decided at Charleston, April sitting, 1833. But under the practice heretofore pursued by this Court, if a party excepted to the Commissioner's report, and some of his exceptions were sustained, and some overruled, and the case sent back by the Chancellor to the Commissioner, he might appeal at once, to this Court; or wait until there was a final de-

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cree of con*firmation, and then bring up the whole case. This is in the language of Judge Nott, in the case of Harrison v. Jenkins, allowing the party the right to appeal as "long as there is a fragment on which he can lay hold." The complainant, it appears from the Chancellor's decree, excepted to the Commissioner's report, before Chancellor De Saussure, on all or nearly all the points on which he excepted to it before Chancellor Johnston. It is true, that he could not allow the exceptions contrary to his predecessor's decree; still, however, under the rule of practice, which I have stated, the complainant has the right of appeal, and it thus becomes necessary for us to decide on the merits of the various exceptions put in by the complainant, to the Commissioner's report.

[Having examined the exceptions and sustained some of them, Chancellor Johnston's decree was reversed, and the case sent back to the Commissioner, with instructions to restate the accounts.]

JOHNSON, J., concurred.

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1 Hill, Eq. 445

JOSEPH PRICE, Exor. of John Turner, and REBECCA TURNER v. WILSON NESBIT.

(Columbia. Jan., 1834.)

[*Appeal and Error* ⇐73.]

By the Act of 1808, a party has the right to appeal "from any order or decree of any Judge presiding on the Circuit," whether it be interlocutory or final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 403; Dec. Dig. ⇐73.]

[*Appeal and Error* ⇐870.]

Where there has been no final judgment in a cause, a party may on appeal examine the whole case, and open for consideration all prior or interlocutory orders or decrees any way connected with the merits of the decree from which he has appealed; and this too notwithstanding such orders or decrees may have been affirmed by the Appeal Court.

[Ed. Note.—Cited in Edgerton v. Muse, 2 Hill, Eq. 52; Britton v. Johnson, Dud. Eq. 28; Brown v. Postell, 4 Rich. Eq. 78; Verdier v. Verdier, 12 Rich. Eq. 141, 142.

For other cases, see Appeal and Error, Cent. Dig. § 3493; Dec. Dig. ⇐870.]

[*Appeal and Error* ⇐84.]

A Circuit decree affirmed by the Court of Appeals, if it is a final decree, can never again be examined, either on appeal, by bill of review or on a re-hearing; but if it merely establishes a general right of recovery and leaves the extent of the recovery to be afterwards ascertained, if it does not end the controversy, but still leaves something to be done to enable the Court to pronounce judgment, it is examinable on an appeal from a final decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 529; Dec. Dig. ⇐84.]

[*Appeal and Error* ⇐1096.]

So long as a decree operates merely as authority, or as the reasoning of the Court to prove the party's right in whose favor it is pronounced, it may be reviewed and reversed whenever it comes up properly before the Court of Appeals in any of the subsequent stages of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4357; Dec. Dig. ⇐1096.]

[*Executors and Administrators* ⟸32, 376.]

A sale by an administratrix, where the administration was afterwards revoked on a will being admitted to probate, is valid if there be no fraud; and that the administratrix was herself the purchaser does not render the sale void. —It can only be avoided at the instance of the legatees and not of the executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 212, 1539; Dec. Dig. ⟸32, 376.]

[*Executors and Administrators* ⟸375.]

A decree of the Ordinary at the instance of the parties interested, against the administratrix which includes the price of the negroes purchased by her, is a confirmation of the sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1529–1538; Dec. Dig. ⟸375.]

[*Equity* ⟸43.]

[The fact that a party cannot recover at law is no ground of equity jurisdiction, unless there is some impediment in the way of asserting his legal title at law which equity can remove.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 164; Dec. Dig. ⟸43.]

[*Equity* ⟸363.]

[Where a bill was filed by two parties, making distinct claims and requiring different proofs and decrees, the bill was dismissed as to one plaintiff and retained as to the other.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 768; Dec. Dig. ⟸363.]

[*Equity* ⟸421.]

[A decree, fixing the right of the plaintiff to recover the subject of the suit, but referring it to the commissioner to ascertain and report to the court the amount and value thereof, is an interlocutory decree.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 949; Dec. Dig. ⟸421.]

[*Executors and Administrators* ⟸291.]

[Where the estate of a testator is not indebted, the executor is bound to assent to a specific legacy, and cannot claim it against a legatee or his alienee in possession.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1153; Dec. Dig. ⟸291.]

[*Executors and Administrators* ⟸380.]

[Cited in Re Estate of Mears, 75 S. C. 485, 56 S. E. 7, to the point that a sale by an administrator under a decree carries the legal title, and will be presumed to have been in good faith, until the contrary is proved.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1562; Dec. Dig. ⟸380.]

[*Trusts* ⟸198.]

[Where a trustee purchases the trust property at his own sale, the parties interested, by claiming the price, are estopped from avoiding the sale.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 262; Dec. Dig. ⟸198.]

Spartanburgh. The bill states that John Turner executed his last will and testament on the 9th May, 1813, and shortly afterwards died leaving it of full force. That the will was presented for probate in July 1813, but the Ordinary refused to admit it to probate, and granted letters of administration on his estate to his widow Rebecca Turner, and the defendant, Wilson Nesbit, was the security to her administration bond. By virtue of

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an order from the Ordinary the *personal estate was sold by the administratrix, and at the sale she purchased the negroes Job, Reuben, Sarah, John and Ephraim, but neither inadequacy of price nor unfairness in the sale is charged. That on the 17th August, 1818, more than five years after the sale, the will was again presented to the Ordinary and admitted to probate, and the plaintiff Joseph Price qualified as an executor. The reason assigned by the bill for the delay in procuring probate is that some of the witnesses were legatees who refused until that time to prove it, preferring administration as in a case of intestacy. That by the provisions of the said will, the negro Job was bequeathed to Nathan Turner, (one of testator's sons) and Sarah to his daughter Sarah, during their lives, and at their deaths to be equally divided among the other children, and the residue of his property he devised to his wife for life and at her death to be equally divided amongst his children named in the will. That Rebecca Turner, previous to the probate, on the 20th November, 1817, being then aged and infirm and insane and incapable of executing a contract, by the persuasions of her son Matthias Turner, executed a bill of sale to him of the said slaves, on the condition that he would maintain her during her life: that the defendant Nesbit drew the contract between them and became bound in a bond as the surety of Matthias Turner for her maintenance, and that the bill of sale was fraudulently procured, and the condition of the bond has not been performed. That about a year after the negroes went into the possession of Matthias Turner, he sold them to Nesbit, who had a full knowledge of all these facts, and Matthias Turner having died he is his executor, and retains possession. The bill further states that by a decree of the Ordinary in 1820, against Rebecca Turner, as administratrix of John Turner, there is due to each of the distributees (there being twelve in number) the sum of $239.34, of the sales of the personal estate made under the order of the Ordinary. And it is further stated that Rebecca Turner has executed a bill of sale for the negroes to Joseph Price and Nathan Byers, to enable them to recover them from Nesbit.

The bill prays that the bill of sale from

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Rebecca Tur*ner to Matthias Turner, may be declared null and void—and that if the sale by Rebecca Turner, as administratrix, and purchase by herself, should not be declared void, that then the negroes should be delivered up to her—and if that sale should be annulled, that the negroes, Job and Sarah, be delivered to Joseph Price, the executor of John Turner; and that Nesbit should give security that the other negroes should be

forthcoming at the death of Mrs. Turner.—That if neither the bill of sale nor the sale by the administratrix should be declared void, that the defendant, Nesbit, as the surety to the administration bond, should be decreed to pay Joseph Price, as the executor of John Turner deceased, the respective shares of each distributee, according to the Ordinary's decree; and to support Rebecca Turner, during her life.

The answer of Wilson Nesbit denies the charge of fraud, both as to himself and Matthias Turner, and states that he is a purchaser for a valuable consideration, upwards of seven hundred dollars of which he has paid, and denies the plaintiff's right of recovery.

The case was first heard by Chancellor James, at June Term, 1822, who refused to hear evidence, and decreed on the case made in the bill and answers against the defendant, Nesbit, for the negroes and their hire, on the grounds:

1. That the negroes were purchased by the administratrix, at her own sale. 2. Because a sale of the negroes was incompatible with the terms of the will: and, 3. Because Nesbit was a purchaser with notice—and ordered a reference to the Commissioner, to ascertain the value of the hire. On appeal, the Court of Appeals in Equity (this being before the organization of the present Court of Appeals) affirmed the decree. On the reference under this decree being held, the Commissioner reported that the personal estate was all sold at full value, under the administration of Rebecca Turner, the parties in interest being all of full age and present assenting thereto, and have since received their full shares, amounting to $227 each—that Rebecca Turner did not purchase more than her one-third part, and that she subsequently sold the negroes

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to Matthias Turner, who sold *at a fair price, to the defendant, Nesbit; and that the will was not admitted to probate, until 1818, when the estate was settled up under the administration.

The defendant contended before the Commissioner, that as the plaintiff, Joseph Price, and the other children of John Turner, had received their full shares of what the negroes sold for at the sale, and under the administration, they could not again receive the value of the negroes under the will and decree, without refunding—and the Commissioner submitted the question for the decision of the Court; but also reported that the value and hire of the negroes would make the sum of $2,495.85 with interest from the 27th May, 1827.

The case was argued before his Honor Chancellor De Saussure, at June Term, 1827. He decreed that the complainant Joseph Price, and the other distributees of John Turner, having once received their full shares of the value of the negroes, under the sale made by the administratrix, they could not receive them again without accounting for the amount first received. He ordered the case back before the Commissioner, with instructions to re-investigate the real and moderate value and hire of the slaves in question; and to ascertain the amount actually received by the plaintiffs, out of the sales of that property, made by the administratrix, and to make up the accounts accordingly, and to allow interest on both sides. No appeal was taken from this decree—and no reference or other proceeding was had in the case before the Commissioner.

At June Term 1829, the Commissioner reported that from a review of the evidence taken on a former reference it appeared that the fact stated by the then Commissioner in his report—that the legatees of John Turner had received their full shares of his estate, is erroneous—Some have received their full shares, others have received a part, and without a further and minute investigation the Commissioner could not report on the state of these accounts, and required a decretal order to govern him in the investigation. These several views were submitted to Chancellor Harper, at June Term 1829. His Honor decreed, confirming the Commissioner's report made in 1827, as to the value and hire

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of the negroes, *without referring the case back before the Commissioner under the decree of Chancellor De Saussure, made at June Term 1827: from which decree the defendant appealed and moved this Court to reverse all the decrees and decretal orders heretofore made, and to dismiss the bill or send the case back on the grounds:

1. Because the Court had no jurisdiction of the case, the plaintiff Joseph Price, having complete and adequate remedy at law.

2. Because the decree exceeds the case made in the bill, and furnishes of itself evidence, that it is based upon erroneous legal principles and statements of facts, and is therefore void.

3. Because the parties interested were all of full age, and not only consuant but advising to all the actings under the administration, and have received their shares of the proceeds of the sale by the administratrix—and if that sale is to be set aside at their instance, they should be compelled to refund the amounts received by them under that sale.

4. Because it is never too late, while a case remains in this Court, and the minutest order is required of the Court, for it to interfere to prevent injustice from its mistakes of law or fact, when evidence of such mistakes is furnished by the case itself, as in the present case.

5. Because if the decree of the Court of Appeals, affirming Chancellor James, is Irreversible—the decree of Chancellor De Saussure in 1827, ordering the heirs of John Tur-

ner to refund, not having been appealed from, is equally so; and that the Chancellor, therefore, when the case came up at June Term, 1829, had no authority to decree farther than on the state of the accounts, made under the decree of 1827.

6. Because as there are no debts due by the estate, any amount recovered in this case, will be in trust for those who have already received their shares of the proceeds of the sales of this property, and the decree of Chancellor De Saussure, ordering them to account for the sums first received, was correct —the more especially so, as since the original decree Rebecca Turner is dead, and those

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who will *be benefitted by the decree, (and who sue by their trustee, the executor) will be entitled to the property—thus receiving their shares twice.

7. Because the report, as to the hire of the negroes, is excessive, and would have been excepted to, had not the decree of 1827 ordered a reference as to that point, as to which purpose the Chancellor had an unquestionable right to order a farther reference.

8. Because the defendant, as to the purchase from Matthias Turner, who purchased from Rebecca Turner, has a right to the shares of Matthias and Rebecca Turner, under their warranties, as well as a right to the share of Matthias Turner in the estate of his father, and to his interest in the shares of Nathan and Sally Turner (all of whom are dead,) as the executor of Matthias Turner.

9. Because, whilst one ground of the jurisdiction of this Court is to redress injuries resulting from mistakes of others, it should not refuse to correct its own mistakes.

The cause was argued before this Court in January, 1831, postponed for consideration, re-argued and finally determined at this Term.

Irby, for the appellant, argued that if the case made is not such an one as entitles the plaintiff to recover either in law or Equity, the Court may at any stage interpose and dismiss the bill. Rees v. Parish, 1 M'C. Ch. Rep. 56. The bill is filed to enforce a legal remedy. It sets out an accounting before the Ordinary and a decree thereon for the value of the property, which is a confirmation of the sale; Cates v. Edgar, (———) and on which an adequate remedy at law exists. If the decree adjudicates questions not made in the pleadings it can be set aside at any time, 1 Vernon, 292, and the Court will rectify errors apparent on the face of a decree. 6 Ves. 92, 3 Eq. Rep. 616. The decree of Chancellor James, afterwards affirmed by the Court of Appeals, is predicated on the idea that the will having been set up avoided the sale, but the case of Byers and Price v. Benson, 2 N. and M'C. 577, decides that the sale was valid. A decree to refer is not final. 10 Ves. 34; 2 Cranch, 33; 17 Johns. 548. And if a decree is not final it may be opened and examined by a Circuit Judge. 4 John.

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Ch. 545. And a decree which *does injustice may be rectified if it is not enrolled, 2 Atk. 386. As regards the case of Hall v. Goodwyn, 4 M'C. 442, there is a distinction between a judgment which merely settles a legal principle and one which vests a right. The defendant may set up against the executor a claim which he has on the estate. He has Matthias Turner's original interest in the estate of John Turner, and his share of Sarah's and Rebecca's part, and to this extent he may hold. But in any event Chancellor De Saussure's decree not having been appealed from is of equal validity with that of Chancellor James, and it sets aside the report of the Commissioner made under the first decree, and must be considered as obligatory on the rights of the plaintiff.

Gregg, contra. The question is, whether, according to the law and practice of our Court, the decree of the Appeal Court affirming Chancellor James's decree, can be reversed? If our Courts have settled this question, we need not look to England or New York, for lights to guide us. According to the fixed and settled principles of this Court, a final decree on the merits, will not be opened and reviewed. In 1826 this Court refused to entertain a petition for re-hearing in this case. See also Haskell v. Raoul, 1 M'C. Ch. 22; S. C. 2 Tread. App. 852; Carr v. Green, Law Jour. 371. In England, the Chancellor habitually reviews the decrees of the Master of the Rolls and Vice Chancellor, and corrects their errors; but after a case has been heard by the Chancellor, it will not be opened, but under strong convictions of error; and there is no instance in which the judgment of the House of Lords has been re-heard—nor any instance where a case has been re-heard, after judgment, by the Court of Errors, in New York. The decree having settled all the leading points in the case, is conclusive on the parties, and this Court cannot now inquire into the grounds on which it is based. It has been assumed, in argument, that there was no evidence; but after this lapse of time, this cannot be known—and it may be, that the decree was predicated on statements and concessions, made on the trial.—At all events, the Court will be careful in laying down a rule which will open a door for the examination of all the decrees of the old Court.

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*W. Thompson, for the appellant, in reply. When the Court has finally acted on a case and the rights of parties are fixed, the decree will not be disturbed; but as long as the Court has possession of a case it is a right which it claims for itself to correct any error into which it has fallen. Regularly no case should be brought before this

Court until it is finally disposed of on the Circuit. The Court will refuse to enforce a decree when there is error, and will correct instructions, 16 Ves. Senr. 218, 239. In New York interlocutory orders must be appealed from in 15 days, and yet seven years after, the Court being of opinion there was error, reviewed and reformed the decree. 17 John. 548. No decree is final unless it have the binding efficacy of a judgment. 2 Cranch 33; 16 John. 415; 2 Atk. 438; and the Court habitually corrects errors committed in the progress of a cause, 12 Ves. 458; 3 Eq. Rep. 616. Where there is a want of jurisdiction the party will be entitled to an appeal "as long as there is a fragment on which he can lay hold." Harrison v. Jenkins, (MS.) Rees v. Parish, 1 M'C. 56; Wilson v. Cheshire, 1 M'C. Ch. 242; Farley v. Farley, 1 M'C. Ch. 506. According to the plaintiff's (Price's) own shewing the Court has no jurisdiction, for he has either no right of relief, or he has a remedy at law in trover, or by action on the administration bond. If the sale by the administratrix be void, he can recover the negroes as executor; and if valid he can proceed on the bond and recover the amount of the Ordinary's decree. There is nothing to impeach the sale to the defendant—as a bona fide purchaser he is entitled to the protection of this Court; and the estate having been settled up under the administration when all the parties were conusant of their rights, should be considered as conclusive, or otherwise according to this decree the parties will have received their distributive shares twice.

O'NEALL, J. The determination of this ancient and vexatious case, on grounds satisfactory to the parties, is hardly to be expected; but it is to be hoped, that it may be sustained by such reasons, as will satisfy the bar and the intelligent disinterested com-

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munity, who have taken so deep an *interest in it. This hope is expressed, not with a view to deprecate censure, or to prevent a critical examination of our judgment; but from a feeling, which has been eloquently described by our learned, venerable, and amiable Chancellor (De Saussure) when he said in this very cause, that "next to doing justice, the greatest consolation of Judges, is so to administer that justice, as to satisfy the parties that the merits of their causes have been fully brought out, well considered, and impartially decided."

It is first to be examined and determined whether the appellant has now the right to go back beyond the decree of Chancellor James, at June Term 1822, and that of the Court of Appeals in Equity affirming his decree, at December Term 1823. This will depend upon the character in which they are to be viewed; if they are together a final judgement in the cause, then there can be no doubt that the appellant will be estopped. But if they have not this character, then they cannot preclude the appellants from examining the whole case.

The distinction between a final and an interlocutory judgement has not been heretofore generally understood; and the Court have been again and again embarrassed in determining on the question whether the party had the right to appeal, which has been supposed to depend on the question whether the decree was interlocutory or final. On looking into the act of 1808, 1 Brev. Dig. Tit. 58, Sect. 63, I am perfectly satisfied that a party has the right to appeal from "any order or decree of any Judge presiding on the Circuit." The words quoted are those used in the act when speaking of and directing the manner in which appeals are to be taken. The distinction between interlocutory and final orders or decrees is not noticed, and a general right of appeals is plainly given from any order or decree from which any person may wish to appeal. The circumstance therefore that Chancellor James' decree was appealed from and affirmed by the Court of Appeals, does not aid us in giving character to the judgement —Both may be interlocutory only.

In the case of Travis v. Waters, 1 John. Ch. Rep. 88, Chancellor Kent, speaking of a

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decree which he declared to *be a final one, said "It was made upon the coming in of the Master's report, ascertaining the lands to be conveyed, and the balance to be previously paid. It was the final end and closing of the controversy, and was analogous to a final, as contradistinguished from an interlocutory, judgement at law." This concluding illustration of Chancellor Kent seems to me to point us to the true conception of a final decree. Every one having only a slight acquaintance with legal proceedings, knows that at law an interlocutory judgement is predicated upon the default of one of the parties, and determines that the party in whose favor it is rendered is entitled to recover. But it may as of course be opened and set aside on terms in some cases—in others it is final as to the right to recover; but the extent of the recovery is yet to be ascertained. Keeping this illustration in our minds we should class interlocutory orders or decrees into two kinds. 1st. those which are of course to be opened and set aside on a party applying to have it done and complying with the usual terms; 2nd. those which fix the right of the party to recover, and which cannot be vacated by the Chancellor, but which still require some thing farther to be done in order to ascertain and fix the nature, amount, or quantity of the recovery.

The case of Travis v. Waters, was for a

specific performance of a contract, for the sale of land, and for an account. "In October, 1808, the Court decreed a conveyance of part of the premises, and directed a Master to take an account of the quantity to be conveyed, and of the payments, and to ascertain the balance due, if any, to the defendant—that the same be paid, and that the conveyance thereupon be made; and the question of costs was reserved until the coming in of the Master's report. From this decree there was an appeal to the Court of Errors and the decree was affirmed." The question was, whether this decree, or that of 1813, upon the Master's report, made up under its direction, was the final decree? The Chancellor, as I have before said, held the latter to be final, and in declaring his judgment, assigned the reasons which I have already quoted. Speaking of the decree of 1808, he said it "cannot be so regarded (i. e. as a final decree) for though

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the right of *a specific performance was declared generally, yet the extent of that right and the conditions upon which it was to depend, were not ascertained." An appeal was taken from this decision of Chancellor Kent, and his decree affirmed by the Court of Errors, 12 John. Rep. 500.

In the case of the Methodist Episcopal Church v. Jaques, 1 John. Ch. Rep. 450, decided in June, 1815, the decree declared the principles on which the account should be taken, viz: 1st. That the marriage settlement of the 25th of September, is valid and binding; 2d. That the defendant, J. D. J., should account for the whole personal estate of his wife, which came to his hands, but without interest; 3d. That he should account for the rents and profits which he received of her real estate, including the lease-hold, and freehold estate purchased in by him, under the operation of Heyl's mortgage. 4th. No allowance was to be made to the defendant, J. D. J., for the maintenance of his wife and family, during the coverture. 5th. That the real estate left by Mrs. Jaques, including the lands in which the Chancellor, under his third head, had set up a resulting trust in favor of her estate, should be sold, and the proceeds brought into Court, to the end, that the same might be distributed according to the deed and will of Mrs. J. In 2 John. Ch. Rep. 543, September, 1817, the cause came again before the Chancellor on a collateral question of practice, in relation to the evidence taken before the Master; and in 3 John. Ch. Rep. 1, a disposition of part of the fund in Court was decreed. In 3 John. Ch. Rep. 77 (in October and November, 1817) it was again presented to the Chancellor, on exceptions to the Master's report. Some of the exceptions were allowed, others disallowed. In the course of his decree, he examined the question, what power of disposition a feme covert has over her separate estate, and decided that she was to be considered a feme sole, to the extent only of the power given her by the marriage settlement. The case was re-committed to the Master, with instructions: he reported in conformity thereto; and in June, 1818, there was a confirmation generally. The defendants, J. D. J. and R. J. appealed from this decree, and in January, 1820, the cause was heard in

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*the Court of Errors, 17 John. Rep. 548. A preliminary objection was interposed, which raised the question, which is the final decree in the cause? It was held by all the Court, that the decree of June, 1818, was the final decree. Ch. J. Spencer (at page 559) said "an appeal from a final decree opens for consideration all prior or interlocutory orders or decrees any way connected with the merits of the final decree." This rule was concurred in by the whole Court, and the appellants were heard on the whole cause. The Court reversed the Chancellor's decisions in various respects, holding that a feme covert, in respect of her personal estate, is to be regarded as a feme sole in Equity, so far as regards her power of charging or disposing of the same, unless specially restrained by the instrument under which she acquires her separate estate. From the leading error of the Chancellor, in this respect, (as the Court held it to be) they deduced the corollaries that the Chancellor had erred, in the 2d, 3d, 4th and 5th heads or principles of the decree of 1815, directing the account, or so much of them as went to charge the husband with money or property, given by the wife to the husband, during coverture—to establish a resulting trust in the lands purchased with the proceeds of choses in action, once belonging to the wife, but given by her to her husband; or to disallow the defendant J. D. J., for the maintenance of his wife and family during the coverture; the wife having clearly agreed to bear the expense thereof out of her separate estate.

From these authorities, it would hardly admit of a question, that the last decree (that of Chancellor Harper) in this case, was the final decree; and not the decree of Chancellor James, and that of the Court of Appeals affirming it.—For, by the latter (Chancellor James's decree) it was decreed that as the defendant, Nesbit, had sold all the negroes but one, "that he do deliver up that one to the executor, pay for the other negroes, according to their value at the time of his purchase, and their hire, and the hire of the negro retained, from that time to the present time;" and "that the case be referred to the Commissioner, to ascertain the value and hire of the said negroes."

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*This decree, so far as it related to the value and hire of the negroes, is like that in the case of Travis v. Waters. In both a general right of recovery is established, "yet

the extent of that recovery" is "not ascertained." Compare, however, this case, in this respect, with the case of the Methodist Episcopal Church v. Jaques, and it seems to me that the decree (of June, 1815) in the latter, went farther to fix and establish a right of recovery, than the decree in hand. For it will be remembered that it declared a resulting trust in the land purchased by the defendant, J. D. J., and directed it to be sold, and the money brought into the Court to be distributed according to the deed and will of Mrs. J. This was certainly as final as that part of Chancellor James's decree, directing the delivery of the negroes. For the decree establishing the resulting trust, denied the equitable title to be in J. D. J., and the decree of sale and direction for distribution, established the rights of the complainants. The reference in each case was, however, necessary to enable the Court to "end the controversy," and all the decrees prior to the decree confirming the Commissioner's report, are to be regarded as not conclusive of the right of the parties to re-examine them on appeal. For the appeal from the final decree, "opens for consideration all prior or interlocutory orders or decrees any way connected with the merits of the final decree."

But it was supposed in the argument, that the fact that the case had been adjudged by the Court of Appeals in Equity, was conclusive of the rights of the parties. Independent of the reason which I have already assigned, why the decree of the Court of Appeals cannot give character as a final decree, to Chancellor James's decree, it may be remarked, that in Travis v. Waters, a decree of affirmance by the Court of Errors, in New York, (which is there as well as the Court of Appeals is here, the Court in the last resort) was held not to be final, and it would, of course, be examinable on an appeal from the final decree.

I agree with the respondent's counsel that if the decree could be regarded as a final decree, that it never could be again examined, either by appeal, by a bill of review, or

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a *re-hearing. Haskell and others v. Raoul, 1 M'C. Eq. Rep. 22; Perkins v. Lang, 1 M'C. Eq. Rep. 30, note; Carr v. Green, [Rich. Eq. Cas. 405,] Carolina Law Journal, 371. The Court of Appeals, under the act of 1808 and 1824, is the Court in the last resort; and like the House of Lords in Great Britain, and the Court of Errors in New York, a decree by it of affirmance or reversal of a final decree, cannot be examined by a bill of review, or on a motion for re-hearing, for error in matter of law, apparent on the face of the decree. In such a case there can be no appeal to bring the decision in question, for the controversy is ended. But if the decree of the Court of Appeals does not end the controversy, and still leaves something to be done, to enable the Court to pronounce a judgment, it will be examinable on an appeal from such final judgment.

In the case of Harrison v. Jenkins, decided December Term 1828, at Columbia, the defendant did not appeal from the decree of the Chancellor, directing the land in dispute to be delivered up, and the defendant to account for the rents and profits. When the account for the rents and profits was about to be taken, the complainant entered a disclaimer for the rents and profits, and then the appeal was entered. It was held that the defendant was not bound to appeal, until the account for rents and profits had been taken; and in that case, which is one of vast importance to the profession, and ought to have been long since published, Judge Nott, on the question as to the party's right to appeal, makes the following remarks—"I think that generally, where the object of the bill is to obtain the possession of a specific property, the party may, and perhaps ought to appeal from the decree, and not to wait the event of a reference to take an account of hire, or rents and profits, which are mere incidents that necessarily follow from the decision of the principal question. Perhaps he may not lose his right by thus waiting, unless some change of property or circumstances would render it improper for the Court to interfere: or, unless by some act or acquiescence of the party, he may have waived his right. But in a case like this, where the Court has no jurisdiction of even

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a fibre of the *case, he will be entitled to appeal as long as there is a fragment on which he can lay hold."

The case of Harrison v. Jenkins, it seems to me, is decisive of the question we are considering. The act of 1808, after directing that the Circuit Courts of Equity shall be held by any one of the five Judges, who were by it clothed with equitable powers, provides "that the orders and decrees of the said Judges in all cases wherein appeals shall not be made to the Court of Appeals, hereinafter established, shall have the same effect with decrees sanctioned by the Court of Appeals." The defendant had lost the right of appeal from the Circuit decree directing the land to be delivered up, by not giving notice of his appeal in due time, and on this account the case had been struck from the Appeal docket, at Spring Term 1828. The Circuit decree, according to the act of 1808, was entitled to have the same effect as if it had been affirmed by the Court of Appeals. In that point of view, the right to appeal from the final decree, on the account for the rents and profits, whether the account was taken or disclaimed, would, if pursued, open all prior decrees, whether of the Chancellor or Court of Appeals, for consideration, and according to the most just, righteous and

legal result of that case, all prior decrees might be reversed.

So long as a decree operates merely as authority, or as the reasoning of the Court to prove the party's right in whose favor it is pronounced, it may be reviewed and reversed whenever it comes up properly before the Court of Appeals in any of the subsequent stages of the case. Hall v. Goodwyn, 4 M'C. 442; Peyton v. Smith, Ib. 476, [17 Am. Dec. 758;] Dunlap v. Crawford, 2 M'C. Eq. Rep. 171; Lenoir v. Sylvester, 1 Bail. 641; Rose v. Tidyman, in Equity, February Term 1832, Charleston. The decrees of Chancellor James and of the Court of Appeals in Equity, being not final, are to be regarded as authority constituting a strong reason why the complainants are entitled to recover; but examinable on the appeal from the final decree. I concede to them not only the respect of authority, but also of the veneration and admiration with which I always have and al-

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ways shall regard several of *the names then composing the Court of Appeals in Equity: but still that both of those decrees are manifestly wrong, is I think so plain and obvious, that the only reason which can be given why it has so happened is because the case was never brought out before either the Chancellor or the Court of Appeals. Each decree is predicated upon a statement of facts, which if the case had rested upon them alone would have justified the decrees. But the bill itself stated other facts which rendered those on which the decrees were based wholly unimportant, and which showed that Price the executor had no right to recover the slaves, and that the only real controversy was between Rebecca Turner and the defendant, whether her conveyance to Matthias Turner should be set aside as fraudulent. This question was not touched, not even hinted at in either of the decrees.

I shall now proceed to shew that taking every thing for granted as stated in the bill, that Price the Executor has no right to recover. The bill, after setting out the will and the fact that the witnesses refused to prove it, and that administration was granted to Rebecca Turner, who under the order of the Ordinary sold the personal estate and purchased a considerable part of it—that subsequently the will was proved and the executor Price qualified—that there were no debts against the testator—that the Ordinary had decreed against Rebecca Turner as administratrix, a sum which she was in arrear on account of her administration including the price of the negroes sold and purchased by her, refers to a copy of the decree filed as an exhibit, from which it appears, that "Joseph Price executor of the estate of John Turner, returned the citation issued requiring the attendance of Rebecca Turner administratrix of said estate, with an acknowledgement of the service, but refused to attend—and at the request of the executor to find each legatee's distributory share of said estate under the administration, find her proceedings to stand as follows: An inventory was returned, but there were orders from the Ordinary to sell at different periods the whole of the goods and chattels of the said dec'd, which I suppose (says the Ordinary) to have been done, and the sale bills being returned of different sales, amount to $4308.15: deduct

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*one third for the widow, leaves $2872.10. There being twelve legatees, the twelfth part of that sum is $239.34, exclusive of expences, there being no return thereof—which is each legatee's distributive, which the executor ought to have the government of, agreeably to the returns of the administratrix, which is the decree of the Ordinary." The bill also sets out the conveyance by Rebecca to Matthias, which she alleges to be fraudulent and which has not been tried, and the sale by Matthias to Nesbit with notice.

In the case of Benson administrator v. Rice and Byers, 2 N. and M'C. 577, it was held that the sale by Rebecca Turner as administratrix was valid. In that case as well as the one before us, there was no fraud alleged on the part of the administratrix. In it Judge Colcock who delivered the opinion says, "when an administration which has been granted, is properly revoked, the latter administrator may sue the former, for money had and received, or in trover for any goods remaining in his possession by him converted or not duly administered. Any other doctrine would be fraught with the most monstrous inconvenience. The community who are not under the authority of judicial power should be certain of protection in their rights." In the case of Foster v. Brown, 1 Bail. 221, [19 Am. Dec. 672,] administration had been obtained by a fraudulent suppression of the will in which the executor as well as the administrators concurred; at the administrator's sale the slave in dispute was purchased by one of the administrators, from whose possession he went into that of the defendant, the administrator's son-in-law. It was held that "all acts done in the due and legal course of administration are valid and binding on all interested, although it be afterwards revoked. Nor can the manner of obtaining the administration, whether fairly or fraudulently, vary the question." To this I would add as another necessary conclusion from the facts of that case and the reasoning of my brother JOHNSON, that as between the executor and the administrator, the fact that the latter bought at his own sale would not, when he had bona fide parted with the possession of the slave, render the sale invalid.

From these cases I deduce two conclusions,

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either of which *is fatal to the plaintiff, Price's right of recovery, as executor. The

first is that if he pursued the property as unadministered assets of his testator, his only remedy was by action of detinue or trover at common law. For in this point of view he sets up a legal title, and for its enforcement he has plain and adequate remedy at law. That he could not recover at law, is no reason why he should come into Equity; unless there was some impediment at law which prevented the assertion of his legal title and which this Court could remove. He has stated none in his bill. For the fact that the administratrix might not be able to pay the distributees or legatees their respective shares of the sum which she was in arrear, is no ground for the interference of the Court of Equity: it may be true, and the parties wholly remediless, and the Court of Equity might be unable to aid them. But if the administratrix was unable to pay, her securities in the administration bond we should legally presume to be sufficient for that purpose; and in the case before us it turns out that Nesbit the very defendant sought to be charged by this bill with the value of the slaves, is the security of the administratrix. So there is nothing in law or fact in this respect to give color to the jurisdiction of the Court. The second conclusion from the cases cited, is that Price's legal title as executor is defeated. It does not lie in the mouth of the executor to say to the administrator whom he may succeed "you purchased at your own sale and therefore your title is defeated." The legatees may if they choose say so: it is at their election whether the sale is to be set aside or supported. If the administrator had the slaves in possession the executor might be entitled to recover—his legal right would be paramount to that of the administratrix, on shewing that she had not accounted for the price. But until then, according to Brown and Foster, he could not recover. It can be shewn that Price has no title to recover the slaves from the administratrix. For on looking through the proceedings it appears, that exclusive of her own share, she or Matthias Turner paid to the legatees more than the value of the slaves in dispute.

The conveyance by the administratrix to Matthias Turner is to be regarded as fair and

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bona fide, according to its *terms, until the contrary is shewn, and for present purposes is conceded to be so by the former decrees. This was before the act of 1824, and according to the case of Legge v. Magwood, Harp. State Rep. 116, her conveyance conveyed to the defendants the legal estate in the said slaves. This too at once ousts the executor's title, which is altogether a legal one. The legatees might possibly set up the trusts of the will against the administratrix's voluntary donee, or her alienee with notice.

If the purchase by the administratrix at her own sale may be set aside, it is equally clear that it may be confirmed. If the executor could have raised the question, the decree of the Ordinary, which as to him is conclusive, must be regarded as a confirmation of the sale. Conceding for the present, that the executor had the right to set aside the sale, and pursue the specific property—or to have an account for its value, he has elected the latter, in the account before the Ordinary, and is bound by his decree, which estops him from averring that the sale was void.

On the shewing contained in the bill, that there were no debts against the deceased, the executor would have been bound in Equity to assent to the legacies. Rebecca, Ephraim and John, three of the negroes in dispute, were, by the residuary clause, bequeathed to Rebecca Turner "during her natural life, for her support and maintenance."—In Equity she would be regarded as the owner of the slaves, and be entitled to the possession. If her conveyance to Matthias was bona fide, he too, and of course his alienee, would be entitled to the possession during the life of the said Rebecca. The bequest being for her support and maintenance, would not lessen her estate; to accomplish its purpose a sale might be necessary. It is true that her alienee, under the circumstances in this case, if his title alone depended upon her title as legatee, ought to be compelled to give security that the property should be forthcoming at her death. This however shews that if Price had been entitled to a present decree for John and Sarah, he was not for Rebecca, Ephraim and John.

The claims of the claimants, Price and Re-

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becca Turner, *are totally distinct and hostile, and ought never to have been united in the same bill. Indeed they present two totally distinct causes, requiring different proofs and different decrees; and on this ground, as Rebecca Turner's case has been dropped and Price's pursued, which is now found to be unsustainable, the bill might be dismissed. But looking to the antiquity of the case, and the possibility that the errors of the case since 1822, are not to be attributed to the complainants, and especially as the defendant, Nesbit, in his brief and imperfect answer, did not make the objection that he was called on by the same bill to answer to two distinct cases, we shall dismiss the bill as to the complainant Price, executor of John Turner, and retain it for all other purposes.

It is said Rebecca Turner or Matthias Turner paid to the legatees of John Turner, dec'd., the whole or the greater part of their shares of the value of the said slaves.—This fact makes it necessary that they if alive, or if dead their legal representatives, should be parties. On looking into the will, it appears that the negro man Job was bequeathed to John, and the negro woman Sarah, to Sally Turner during their respective lives, and the residue of the estate to Rebecca Turner, and

at her death to be equally divided among all the testator's children. Sally Turner died before the bill was filed, and her interest under the will, passed, by the residuary clause, to Rebecca for life. John, I presume, is alive, but is a lunatic, he ought to be represented by his committee. Rebecca Turner, we are informed, is dead—it is therefore necessary that administration should be taken out on her estate, and a bill of revivor and supplement filed, before any other or further order or proceeding (save that which is about to be made) can be made in the cause. We abstain from any comment on the case, which may be made out under the bill of revivor and supplement.

It is Ordered and decreed, that the decrees heretofore pronounced in this cause be reversed, and that the bill, so far as Joseph Price, executor of John Turner, dec'd, is concerned, be dismissed; that the bill for all

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other purposes, be re*tained: and that the cause be remanded to the Circuit Court, with directions that upon administration being taken out on the estate of Rebecca Turner, dec'd, and a bill of revivor and supplement filed by her administrator, to which the legatees of John Turner, dec'd, if alive, or if dead, their legal representatives shall be parties, complainants or defendants, as they may elect, setting out the facts to which allusion has already been made, and requiring the present defendants to answer as to them, the cause be heard de novo on the bills, answers and proof, without any prejudice to any of the said parties from any of the former decrees.

JOHNSON, J., concurred.

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1 Hill, Eq. 465

JOHN STONEY, JOHN MAGRATH, and Others v. HENRY SHULTZ, THOMAS HARRISON, and Others.

(Columbia. Jan., 1834.)

[*Estoppel* ⟸22; *Mortgages* ⟸533.]

The general rule that there is no implied warranty in sales made by a sheriff or other ministerial officer, applies exclusively to the quality and property of the thing sold; it does not apply to cases where the sheriff or other officer assumes an authority where none is given by law. In every case there is an implied covenant on the part of the sheriff, that he has authority to sell; and the recital in his deed of his authority, as effectually estops him, as if it had been an express covenant.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 33; Dec. Dig. ⟸22; Mortgages, Cent. Dig. § 1554; Dec. Dig. ⟸533.]

[*Mortgages* ⟸538.]

Under the act of 1791, the Court of Law has no authority to foreclose a mortgage of lands where the mortgagor is out of possession; and the sheriff having in such case, under an order of the Court of Law, sold the mortgaged premises & received the purchase money and applied it to the satisfaction of the mortgage & a judgment against the mortgagor, the sale is void, and the purchaser has the right to be reimbursed the sum paid. Primarily the sheriff is liable, as also are the parties who received the benefit & at whose instance the sale was made; but in order to avoid multiplicity and circuity of action in the Court of Law, this Court will order the lands to be sold to reimburse the purchaser, and in relief of the mortgage and judgment creditor.

[Ed. Note.—Cited in Givins v. Carroll, 40 S. C. 416, 18 S. E. 1030, 42 Am. St. Rep. 889; Williams v. Washington, 40 S. C. 461, 19 S. E. 1.

For other cases, see Mortgages, Cent. Dig. § 1559; Dec. Dig. ⟸538.]

[*Partnership* ⟸220.]

Judgment creditors of a copartnership may be compelled by the purchasers of the individual property of one of the partners, to exhaust the partnership property before they resort to the property purchased by them; and if the creditors release the partnership property from the lien of their judgments, they are without any remedy against the purchasers. (Ob. dict.)

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 446–465, 467–469; Dec. Dig. ⟸220.]

[*Mortgages* ⟸199.]

At common law the legal estate vests in the mortgagee; after condition broken he is entitled to the possession of the land, and may maintain a possessory action against any one in possession, and is entitled to receive the rents from the tenants. The act of 1791, (1 Faust, 63) has made no change in the common law in this respect, where the mortgagor is out of possession; the proviso of the Act renders it wholly inoperative when the mortgagor is out of possession; and therefore in such case the mortgagee still has a right to receive and retain the rents, having given notice of the mortgage to the tenants in possession.

[Ed. Note.—Cited in Mitchell v. Bogan, 11 Rich. 689; Laffan v. Kennedy, 15 Rich. 260; Drayton v. Marshall, Rice, Eq. 385, 33 Am. Dec. 84; Norton v. Lewis, 3 S. C. 34; Reeder & Davis v. Dargan, 15 S. C. 184; Hardin v. Hardin, 34 S. C. 81, 12 S. E. 936, 27 Am. St. Rep. 786.

For other cases, see Mortgages, Cent. Dig. § 516; Dec. Dig. ⟸199.]

[*Assignments* ⟸48; *Mortgages* ⟸534.]

A sale & conveyance of land by the sheriff, in pursuance of an order from the Court of Law for the foreclosure of a mortgage, when the mortgagor was out of possession, altho' void as official acts, for the want of authority in the Court of Law to make the order, will still operate as an assignment of the legal estate of the mortgagee. The sheriff will be regarded as the private agent of the mortgagee, and altho' his authority be only by parol, the answer of the mortgagee admitting the facts, is a sufficient compliance with the Statute of Frauds.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 133; Dec. Dig. ⟸48; Mortgages, Cent. Dig. § 1555; Dec. Dig. ⟸534.]

[*Mortgages* ⟸290.]

In ordering a sale of mortgaged premises which had been sold by the mortg[illegible] subsequent to the mortgage, in lots to s[illegible]al purchasers at different periods, the Court directed the sale of the lots in the order in which they had been conveyed—beginning with the last, and

proceeding according to the order of the dates, to the first.

[Ed. Note.—Cited in Steinmeyer v. Steinmeyer, 55 S. C. 30, 33 S. E. 15.

For other cases, see Mortgages, Cent. Dig. § 792; Dec. Dig. ⇐290.]

[*Mortgages* ⇐518.]

Allowing credit on a sale of land for the foreclosure of a mortgage, is not a violation of the obligation of contracts.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1520; Dec. Dig. ⇐518.]

[*Mortgages* ⇐510.]

Order by the Chancellor for the publication of notice to creditors to come in and prove their demands reversed, sufficient notice having been previously given.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1512; Dec. Dig. ⇐510.]

[*Mortgages* ⇐199.]

The mortgagee is only entitled to the land and the rents accruing from it in the condition it was when mortgaged; & where the mortgagor had sold the land, and the purchasers had improved, and thereby increased the rents, the Court directed the rents to be so apportioned that the mortgagee should only receive the ground rents.

[Ed. Note.—Cited in Moore v. Williamson, 10 Rich. Eq. 328, 73 Am. Dec. 93.

For other cases, see Mortgages, Cent. Dig. § 517; Dec. Dig. ⇐199.]

[*Mortgages* ⇐151.]

[Cited in Bank of Hamburg v. Howard & Garmany, 1 Strob. Eq. 178, to the point that where a company mortgaged their property to a bank belonging to the company to secure the bills to be issued the mortgage did not take precedence of a subsequent mortgage to a third person as security for a loan.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 310; Dec. Dig. ⇐151.]

[*Sheriffs and Constables* ⇐128.]

[The fact that a purchaser at a sheriff's sale has notice of the circumstances under which the sale is made does not bar an action by him against the sheriff for breach of the implied covenant that the sheriff had authority to sell, which was recited in his deed.]

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 262; Dec. Dig. ⇐128.]

[This case is also cited in Matthews v. Preston, 6 Rich. Eq. 309, note, without specific application.]

On the 5th of May, 1823, Henry Shultz purchased 398 acres of land called the Leigh Tract, from Whitefield Brooks, Commissioner in Equity, for $15,500 and mortgaged the same for the money. The mortgage was not paid, but Shultz built a town on the land, and added it to the town of Hamburg; and on the 4th June 1824, mortgaged the same land with the exception of one lot, to W. E. Snowden for $36,000. On the 3d December 1824, W. E. Snowden failed, and assigned this mortgage among other things to John Stoney and John Magrath, in trust for his creditors. On the 18th January, 1825, Shultz sold at public sale a number of lots in Hamburg—being part of the mortgaged land. The sale was continued on the 22d February and 28th March 1825, and many lots were disposed of. By the terms of the sale half the purchase money was to be paid in cash, and all notes or debts of Henry Shultz to be received in payment: the other half to be secured by

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*bonds bearing interest at 7 per cent, the interest payable annually, and the principal at the option of the purchaser.

Afterwards Mr. Brooks sued on Shultz's bond and recovered a judgment at law, and at Spring Term 1827, an order was made by consent for the sale of the premises, on the first Monday in June next, on a credit of six and twelve months—the titles to be signed but not delivered; and in case of failure of the purchaser, the sheriff to resell under the same levy. On the first Monday in June 1827 the sheriff sold, and Shultz became the purchaser at $55,000. He did not pay any money and on the 4th December, 1827, the sheriff by the directions of the plaintiff, exposed the premises to sale for cash, when John Williamson became the purchaser for $22,000. The purchase was made on the joint account of John Williamson, John Stoney, John Magrath, Paul Fitzsimons and C. Breighthaupt. The sheriff received the money, made him a deed for the land, and out of the money received from Williamson paid Mr. Brooks principal, interest and costs, and paid the judgment of Augustus Moore v. Henry Shultz. Williamson attempted to take possession—some of the tenants attorned to him, and others refused, against whom actions at law were commenced.

At October Term 1828, Henry Shultz was admitted to the benefit of the insolvent debtor's act, and assigned all his estate including his right in the 398 acres, to Thomas Harrison, who refused the trust.

In April 1830, one of Williamson's actions was tried at Edgefield and the plaintiff was nonsuited, on the ground that the sale by the Sheriff was irregular and void, and the Court of Appeals dismissed the motion to set aside the nonsuit.

Williamson died, and John Stoney and John Magrath proved his will.(a)

October 4th, 1830. Bill filed by John Stoney, John Magrath and W. E. Snowden, against Henry Shultz, Harrison and the purchasers of Hamburg lots, twenty-six in number, prays the appointment of a trustee in place of Thomas Harrison, and that Shultz may be restrained from suing the tenants of Williamson.—That an account may be taken of the amount of the incumbrances, and that the premises may be sold, and Snowden's mortgage paid.

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*October 8th, 1830. Bill filed by John Stoney, John Magrath, Paul Fitzsimons, and C. Breighthaupt, against Henry Shultz, Whitefield Brooks, and Thomas Harrison,

(a) Law Journal 184.

prays that they may have the benefit of Brooks' mortgage and of the judgment, to which the money paid by Williamson was applied.—That Thomas Harrison may execute his trust, or that another trustee be appointed.

4th December, 1830. An order was made restraining Shultz from suing Williamson's tenants; and appointing Ker Boyce and Thomas Harrison trustees for the insolvent estate of Henry Shultz, authorizing them to take possession of all the estates included in Shultz's schedule, saving to the purchasers from Shultz, their rights.

8th December, 1830. Plaintiffs amended the bills by making Boyce and Harrison parties, and praying that the estate of Shultz might be distributed, according to the insolvent debtor's act, and that the trustees may execute their trust.

1st February, 1831. The trustees advertised for all demands against Shultz to be rendered to them, which was continued for three months.

2d May, 1831. Bill filed by John Stoney and John Magrath, against the purchasers from Shultz—states that Shultz was indebted to insolvency, to a great number of persons who recovered judgments against him, prior to January 1825. That the lands in the hands of the purchasers are liable to those judgments, as well as the mortgages of Brooks and Snowden.—Prays for injunction and receiver.

June, 1831. A reference was ordered, and the Commissioner was ordered to ascertain the debts and assets of Henry Shultz.

20th July, 1831. A dispute having arisen between Mr. Whitner one of the defendants and his tenant, as to the order of December 1831, the Chancellor explained the order by declaring that Mr. Whitner had liberty to proceed against his tenant, who had attorned to Williamson.

1st October, 1831. Bill filed by John Stoney, John Magrath, Paul Fitzsimons and C. Breighthaupt, against B. F. Whitner, James Clark, B. M. Blocker, Maurice Johnson and James Cobb—sets forth the debts due by

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Shultz on mortgages *and judgments prior to January 1825—the assignment of the judgments to Paul Fitzsimons on the joint account of himself Williamson and the other complainants—Shultz's sale to the defendants—the sale by the sheriff, the purchase of Williamson and his entry. That the tenants of the defendants attorned to him—that since the Court have determined that Williamson did not acquire the fee simple, he must be considered as a mortgagee in possession, and accountable for the rents and profits, but the defendants have commenced actions against the tenants for the recovery of double rent, damages, &c.—that the defendants are bound to contribute to pay off the mortgages and judgments; and that the rents received by Williamson are a proper subject of account, between complainants and defendants. That the land is not sufficient to discharge the liens upon it.—That the defendants unconscientiously retain possession, though they have not such a title as will enable the assignees of Shultz to compel them to pay the purchase money, and run away with the rents, which ought to be applied to the payment of the creditors of Shultz, who have their liens on the land.

25th October, 1831. An injunction was granted, preventing the defendants named in the bill of 2d May, 1831, from suing the tenants of Williamson, or persons holding under him.

December 1831. Harrison and Boyce were appointed receivers for all the Hamburg lots. But a proviso was inserted that this order should not extend to purchasers from Shultz in actual possession: and the trustees of Mrs. Whitner were allowed to retain, on giving security. This order was further explained by an order of 28th January, 1832, to the same effect.

The answers of K. Boyce and T. Harrison, submit to perform the order of the Court. The answer of Mr. Brooks admits the sale and the receipt of the money due on the mortgage from Williamson—avers that he has paid it over without notice—that one-ninth part thereof was paid to the complainants, as assignees of Snowden—he has no objection to a decree, setting up the mortgage in favor of the plaintiffs, and insists he is improperly made a party.

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*B. F. Whitner claims three lots—insists that one is the lot excepted, in the mortgage to Snowden—that the other two were bought on the 18th January 1825—that the sale was advertised many weeks—that Shultz reserved part of the lots, for the payment of Brooks—that he owned one-ninth part of that mortgage himself. He understands that his purchase was secure from that mortgage. Shultz stated that he had given Snowden a mortgage, but it was not recorded in time, and would not affect the sale, and that Snowden, who was present, consented to the sale.—That Snowden himself was a purchaser, and there appeared the utmost privity between him and Shultz; half the purchase money was not to be paid, unless both parties agreed.—The defendant supposed Snowden was to be paid by his purchases, or out of the reserved property or the reserved payments.—That the lots sold high; two of them were bought by the defendant, for $1,600. He paid half the purchase money, and complied with the terms, by improving.—That he knew Snowden had stopped payment, but did not know he had assigned; and the first public notice by his assignees was on the 10th February 1825. He trusts that the Court will not suffer the assignment to avoid Snow-

den's consent to the sale, and operate so great a fraud to bona fide purchasers.

That he was in peaceable possession, and rented to Holmes, Gray and Tatom—that the plaintiffs prevailed on his tenants to withhold the possession and rents of the premises; that the defendant sued his tenants, and the case was delayed, first to await the trial of the action at law, and since by pretence of an injunction.—That one of his tenants has become insolvent, and the circumstances of the others are doubtful. He prays that the plaintiffs be decreed to pay his rents.

B. F. Whitner's answer to the bill of October 1831, states that B. F. Whitner & Co., about the 28th July 1825, bought lot No. 1, for $7,000, and paid for it money, goods, work, labor, &c., and in taking up a debt of Shultz to Weyman.—That in ——— they bought two unimproved lots, for $1,600, and paid $800.—That these lots were seized and sold, and

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*conveyed by the sheriff to Morgan P. Earle, and afterwards by him to J. N. Whitner, and this defendant, in trust for his family, insists his purchase was fair and bona fide.—That the trust estate is liable to pay the $800, and he has always been willing, provided his title is cleared up.—That Williamson and his agents claim to be the owners of the Leigh tract, under color of a title from Thurmond, sheriff of Edgefield, although they were notified, by Shultz, that the sale was illegal, and they have therefore no equitable right to set up the mortgage, because they bought with notice. That they colluded with his tenants to get possession, and prevented him from recovering, by postponing the trial. —That the rents were, for the front stories on No. 1, $500, and for the lower, a rent equal to $250. For the tavern on No. 1, and the stables on the other two lots, $600—in all $1,350, when the plaintiffs interfered.—That he claims double rent, viz. from Tatom, from the 4th December 1827 to the 1st August 1831, and from Holmes and Gray from the 1st October 1828, to the 1st August 1831.—That by the plaintiff's admission, they are liable for the tenants, and bound to account to the defendants for rents and double rents, amounting to $8,177.—That Tatom is dead—insolvent; Gray has also died, and is believed to be insolvent. He hopes to prove that the premises were restored to him by the consent of the plaintiffs, or their agent.

That the judgments which the plaintiffs claim, are founded on Bank bills, issued by the Augusta Bridge Company.—That in 1826 they filed a bill, alleging that they or many of them were fraudulent, or kept open by collusion, and an injunction was granted against them.—That the plaintiffs afterwards, in 1828, purchased up these judgments, on speculation, for 25 or 30 cents on the dollar, or thereabouts.—That the above bill was then dismissed, and another filed against the Bank of the State of Georgia, charging that these judgments constituted an equitable lien on the Augusta Bridge, and praying that a receiver of tolls might be appointed. That this bill was afterwards dismissed, in consequence of a compromise between the Bank and the plaintiffs, by which the Bank refunded to the plaintiffs the sum they had paid for the judg-

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*ments, it being agreed at the same time, that the judgments should be kept open to aid the plaintiffs in their speculations on Hamburg, if necessary.—That Shultz made a compromise with the Bank in 1829, in regard to his claims on the Augusta Bridge, which included these same judgments. So that if they ever constituted a lien on the property now in dispute, they have been long since satisfied, and are now kept open by connivance of the parties, for the purpose of fraud.

That the bill filed by the assignees of Snowden, does not make the plaintiffs parties, so as to make them account for mesne profits, and a very small part of these profits has accrued on the property embraced in the mortgage to Snowden, to which any pretence of claim can be set up. He prays that the plaintiffs may be decreed to pay the rents and profits they are wrongfully withholding from him.

The answers of the other defendants, Holloway, Marsh, Johnson, Covington, Blodgett, Clark, Knight, Hall and Ware, rely on the same grounds.

The answer of James Cobb relies on a lease of the 16th January 1824, from Shultz to Warham Cromwell, at $500 per annum; to pay a debt of $3,000, defendant took an assignment from Cromwell. He insists that this lot is excepted in Snowden's mortgage—that the rents from this lot, while Williamson had possession, were worth $970 per annum. He claims eighteen lots as purchaser, in January, 1825.

Mr. Terry, the Commissioner of the Court, by his report, dated ——— ——, found the sum due, on the account of the mortgage to Brooks, and a judgment of Augustus Moore, which was paid off by the money received from Mr. Williamson. He found the amount due on the judgments against Henry Shultz, assigned to Williamson, to be $8,720; and the amount on Bridge bill judgments, to be $33,774—and the amount due on Snowden's mortgage.

The report states that he had given notice by the newspapers, for all creditors to come in, and sets forth a schedule of all the debts which had been proved.

The report finds that the assets to pay

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these debts con*sist of the 398 acres, of which the principal value consists of the lots of Hamburg. That about forty of these lots are improved, and they are nearly all claimed

by purchasers from Shultz, in 1825 and 1826, a statement of which is annexed to the report.—That these purchasers had given evidence of the damages they had sustained, by Williamson's interference, and of Snowden's assent to the sale, in 1825.

The plaintiffs excepted, that the report contained a judgment of Otis & Lawrence, in the list of debts, which had not been proved; and set forth a list of the debts, in the order in which they should be paid, as the Commissioner had found, and ought to have reported them.

These several causes were heard as one, by Chancellor Johnston, at Edgefield, on the 19th June, 1832.

Evidence was given to invalidate the Bridge bill judgments, which were assigned in 1827, to Paul Fitzsimons, on account of himself, and the other plaintiffs. Payment of these judgments is resisted on the ground that they are partnership debts of John M'Kinnie and Henry Shultz, and should be paid out of the Augusta Bridge, as partnership property; and that the plaintiffs have released the Bridge, and thereby parted from their rights. This defence depends on the following case:

On the 1st of July 1816, John M'Kinnie and Henry Shultz formed a partnership, under the name of the Bridge Company, and issued paper money, called "Bridge Bills." The stock of the company consisted of the bridge, valued at $75,000, houses in Augusta, valued at $25,000, and lands in Carolina, valued at $5,000. On the 21st April 1818, Shultz, in consideration of $63,000, and a covenant to save him harmless from the partnership debts, conveyed all his interest in the Bridge Company to Barna M'Kinnie, and retired from the concern, which was announced on the 10th February, 1819. On the 12th March 1819, John & Barna M'Kinnie executed their bond to Shultz, in $500,000, conditioned to save him harmless from the Bridge bills. On the 10th June 1819, J. & B. M'Kinnie mortgaged the bridge, with other property, to the Bank of the State of Georgia, to secure $90,000. Under an execution

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against Barna M'Kinnie, *the bridge was sold, and bought by the Bank. In May 1821 the mortgage of J. & B. M'Kinnie was foreclosed, and the property advertised for sale. On the 9th May 1821, Henry Shultz and C. Breighthaupt filed their bill in the United States Court at Savannah, to enjoin the sale of the Bridge, insisting that it was partnership property and should be applied to pay Bridge Bills. C. Breighthaupt joined in the suits, as a holder of Bridge bills. The injunction was granted, and on the 28th December 1821, an order was made by consent, appointing F. Walker and C. Fitzsimons Commissioners, to take possession and sell the Bridge, and requiring all parties to join in a power of attorney to them. This was done, and they sold the bridge on the 28th November 1822, for $70,000, to the Bank of Georgia, who paid the money, which was deposited in their vaults, to abide the event of the suits. By another order $5,000 were directed to be paid to the plaintiffs, upon security to account for the same when required. The bill was afterwards dismissed for want of jurisdiction. Whereupon Shultz took possession of the Carolina part of the bridge; and John Williamson filed a bill against the Bank, Shultz and M'Kinnie claiming payment of the judgments assigned to Fitzsimons, on the same grounds taken by Shultz in the bill in the Federal Court. The Bank compromised with all the parties. On the 30th December, J. M'Kinnie, B. M'Kinnie and their wives released dowers and all demands. On the 8th May 1829, P. Fitzsimons, in consideration of $10,000, released all claims on the bridge, under the Bridge Bill judgments; and on the 15th September 1829, Henry Shultz, in consideration of the like sum, released all his demands. The following documentary evidence was produced by the defendants, viz. Paul Fitzsimons to the Bank of Georgia, 8th May 1829—release; Henry Shultz to the Bank of Georgia, 15th September 1829—release.

September 1829—Release of all demands on the Bridge.

J. Williamson v. the Bank of Georgia, John M'Kinnie and Henry Shultz. Bill filed 6th May 1828. Answer of the Bank, 10th May 1828.

Stoney & Magrath, assignees of Snowden, v. Andrew Lowe, Bill filed 25th May 1826.

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*The plaintiffs produced an office copy.—Henry Shultz to Barna M'Kinnie. Conveyance of the Bridge and Bridge Company Stock.

J. & B. M'Kinnie to the Bank of the State of Georgia. 10th June 1829. Mortgage of the Bridge.

William Lamkin to the Bank of the State of Georgia—19th December 1821. Deed for the Bridge.

The Bank of Georgia v. J. & B. M'Kinnie. Foreclosure of Mortgage—May 1821.

Mr. Hale was examined for the plaintiffs.

The Bank had large claims against the M'Kinnies, and took a mortgage dated 3d May 1819. There was a misnomer—and another mortgage was executed on the 10th June 1819. The mortgage was foreclosed, and the Bank received possession from the sheriff of Richmond, and kept the possession until the suit in the Federal Court.—After that suit was dismissed, the Court of Equity took possession of the Carolina end, and the Bank kept the Georgia part. A compromise was made with Paul Fitzsimons, 28th May 1829. The Bank claimed under their title.—They did not admit the right of Fitzsimons; but not knowing what the

issue of a suit might be, paid for a release of all demands—compromised with the M'Kinnies first—the dower of their wives was released, and they gave up the title deeds. Another compromise was made with Shultz, the 15th September 1829.

Shultz may have given up some Bridge bills, which he said he had bought, or which were delivered to him as agent for others. The M'Kinnies owe the Bank more than $90,000 in executions.

Cross examined. The profits of the bridge have been generally received by the Bank. The tolls have amounted to upwards of $100,000. The Bridge has been almost rebuilt. Last year, for the first time, something was carried from the Bridge to the profit of the Bank. Bridge bills have sold at 12½ cents on the dollar. The Bank claimed in their own right, under their mortgage and the sale of the sheriff of Richmond.

The transcript of the proceedings in the

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Federal Court, *was introduced, to shew on what grounds the Bridge was supposed to be liable to the Bridge bills, and how the claim was resisted.

The defendants called James Marsh. He stated that Snowden was at the sale in January 1825, and told him he and Shultz had come to an understanding, and he expected to buy the property himself. He did not tell witness he had made an assignment.

Robert M'Donald examined. Breighthaupt told him they bought up Bridge Bills—some at 37½, some at 50 cents—bought as low as they could, to protect Snowden's debt.

Henry Shultz was called as witness. His testimony was objected to, but received.

"It was known at the sale that Snowden and Brooks had mortgages, and that they were not paid. As to Brooks' mortgage, property was reserved, and if that was insufficient, I sold subject to the mortgage. As to Snowden, I said he is present and consents—he was five or six feet from me at the time. Snowden and I had made an arrangement.—He was to buy a square—I knew he had made an assignment, but I did not make it known. He brought me a letter from his assignee, saying he was authorised to settle the Hamburg business—I consider that this left him the same power he had before. That letter cannot be found. It was agreed that I should receive half the purchase money in my notes, the rest in 7 per cent. stock, which he was to take in payment of his mortgage, till it was satisfied. He bought one lot and paid the money." [Here were produced the original papers of the settlement between him and the M'Kinnies, and an entry respecting the bridge as part of the stock of the Bridge Company, liable to the payment of Bridge bills.]

He admitted the advertisement shewn him, and that he intended to sell, whether Snowden consented or not.—Thinks Snowden an honest man.—He never asked Snowden for a release, thought it unnecessary.

Mr. S. said he compromised with the Bank at $10,000; he bound himself not to induce the Bridge Bill holders to sue the Bank.

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*Defendants offered in evidence a receipt of C. Breighthaupt to George Glenn, for $5000, paid by order of the Federal Court in the case of Shultz and Breighthaupt v. the Bank of Georgia.

The Chancellor by his decree, declared the mortgage of Brooks and the judgment of Moore to be subsisting incumbrances for the benefit of Williamson—that the lands in the hands of the purchasers were liable as well to the Bridge Bill judgments as to the mortgage of Snowden; and that Williamson should account as a mortgagee in possession—but that a portion of the rents should be allowed to the purchasers for their improvements.

His Honor ordered the lands to be sold on a credit—the case to be referred again to the Commissioner to ascertain the debts of Shultz, and to take the accounts—and ordered Breighthaupt to account for the $5000, received from the Federal Court in May 1825.

The plaintiffs appealed from so much of this decree as declares that the rents received by Williamson, are liable to be apportioned between him and the purchasers who have improved. They also appeal from the order made by his Honor in the following particulars.

1. The sale of the premises on credit. They submit to the Court that they are entitled to be paid in money, and that if payment of a debt which is their due can only be obtained by a judicial sale on credit, the decree or order of the Court in such cases is to all intents and purposes as much a violation of the obligation of contracts, as an instalment, replevin or alleviation law.

2. The reference to the Commissioner.—They bring to the view of the Court that the trustees advertised for creditors three months, and that Mr. Boyce has set forth in his answer, the names of the creditors who have come in to prove their demands. That the Commissioner afterwards, by the order of the Court advertised three months for creditors, and has made his report of the creditors who have proved, and of the amount of their demands, and the order of reference is therefore superfluous—that it

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tends to delay and bur*then with additional expense, the complainants and all the creditors who have come in, and that it ought not to be made.

3. From the apportionment of the rents—they submit that Mr. Williamson is accountable, as a mortgagee in possession—that the amount of rents which came to his hands is to be deducted from his debt, and that he is

not answerable for those rents in any other way.

4. From the order requiring Mr. Breighthaupt to account for $5000, received from the register of the Federal Court, in May 1825. Mr. B. insists, that this transaction has no connection was the present suit—that if he is accountable to anybody it is to the Bank of Georgia, or the Federal Court, and he has accounted to both, and his bond has been given up—that he is certainly not accountable for the same in this suit, and that the reference ordered is neither proper in itself nor embraced in the pleadings.

Defendants appeal from the decree of the Chancellor:

1. Because he erred in setting up Brooks' mortgage in favour of the complainants and Moore's judgments.

2. Because if complainants are entitled to be subrogated to Brooks—it can only be to those rights which would have accrued if the sale had been good—they have no Equity to more than a valid sale would have given them.

3. Because the Chancellor erred in establishing the Bridge Bill judgements on the Hamburg lots.

4. Because the Chancellor erred in establishing the lien of the Bridge Bill judgements against the lot owners.

5. Because he erred in decreeing that the rents however obtained by Williamson and his representatives, should not be returned to the lot owners.

6. Because he erred in not decreeing that the lot owners should receive rents and double rents, for those lots from which they had been ejected.

7. Because he erred in not decreeing that the lots should be sold according to the dates of the deeds for them, beginning with the youngest.

The case was argued at May Term 1833.

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*Blanding, for the defendants. First—As to the rights of the executors of Williamson under Brooks' mortgage—He contended, 1st, that they have none; 2nd, that they have none against the lot holders.

The right of substitution or subrogation is derived from the civil law, 1 Poth. on Ob. 245. The security may reqnire a creditor to assign all securities. There are different classes of cases—one is subrogation, the others, substitution, 1 Poth. on Ob. 320. Where a security pays off a debt he must get an assignment, or demand it to entitle him to the rights of the creditor: but the Court will not make the substitution in favor of a stranger who voluntarily pays the debt and relieves the fund, 1 Domat, 360. He is entitled to the place of the creditor, 1st, where there is an assignment; 2d, where he pays under a judicial order; 3rd, where he pays with the assent of the debtor. But if any will be prejudiced there will be no substitution. 4 Eq. Rep. 74; Smith v. Cunningham, Harp. Eq. Rep. 91. And see 8 D. and E. 310, 614; 1 Ib. 21, as to the right at common law to pay money for another. Before the judgment of Brooks, Shultz had sold and put the lot holders in possession—at the sale to foreclose the mortgage he forbid it, and gave notice that it was void on the ground that the credit at the first sale had not expired. With a knowledge of these facts the sale was made, the money paid and the titles executed. The complainants did not then contend for the right of subrogation. There were two sureties liable before the lot holders—the unsold lots, and Shultz's personal property. But Shultz having sold and being out of possession when the mortgage was foreclosed, the order for the sale was void as against Shultz's purchasers in possession. Williamson bought therefore, only the unsold lots, and his subrogation can only extend to them. Moore's judgment must stand on the same footing. According to the proviso of

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the Act of 1791,(b) (1 *Faust 63) and the decision in Durand v. Isaacs, 4 M'C. 54, where the mortgagor is out of possession and his alienee in, the Court of law cannot order a foreclosure—the order was therefore void as against the alienee. But the ground of relief relied on appears to be mistake. There was no mistake of fact, and it is not a mistake in law in which both concur in mind.

[(b) In order that the argnments of counsel and the decision of the Court on the construction of this Act may be understood, by those unacquainted with our statute law, the preamble and the first and second sections, of the act, together with the explanatory act of 1797, are here inserted.]

"Whereas mortgages are generally meant merely as securities for debts, and no actual estate is intended to be conveyed by the mortgagor to the mortgagee; but the mortgaged es-

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tate is intended, and *ought to be considered only as a pledge for the payment of the principal and interest due on the debt meant to be secured. And whereas, the present mode of foreclosing mortgages of real estates is tedious and expensive, and the right of the mortgagor to his equity of redemption, is in the present mode of exercising that right, attended with inconvenience: Now for the easier and speedier advancement of justice, in obtaining the payment of debts secured by mortgage, and for ascertaining when the equity of redemption of the mortgagor shall be barred:

Be it enacted, &c., that on judgment being obtained in the court of common pleas on any bond, note or debt, secured by mortgage of real estate, it shall and may be lawful for the judges of the court of common pleas, in case of any judgment having been obtained subsequent to the property's being mortgaged, and prior to the obtaining judgment in the action hereby allowed to be commenced, to order the sale of the mortgaged property for the satisfaction of the monies secured by the said mortgage, and to give a reasonable extension of the time when the sale is to take place, not exceeding the term of six months from the judgment; and also to give a reasonable credit on the sale of the mortgaged premises, not exceeding the term of

It may be ignorance of the law in one, but this affords no ground of relief.

Secondly. What effect is Snowden's mortgage to have against the purchasers of January, 1825? One lot and two leases previously executed, held by Whitner and Cobb, were excepted from the mortgage. But the decree does not exempt them. The decree of the Chancellor supposes that nothing was sold but the equity of redemption, but it is contended that there was a sale of the absolute fee. Snowden was present, was him-

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self a purchaser, permitted the *sale, and the fee simple value was given, and it was stated that there was property reserved sufficient to pay the mortgage, which statement he did not contradict. His presence and acquiescence was a waiver of his lien. 1 Domat 363; 4 Ves. 389; or otherwise a fraud will have been practised on the purchasers.

Suppose, however, all the mortgages and judgments to be set up, still the defendants are entitled to rents and profits, and double rents. The Chancellor supposes the proviso to the act of 1791 to be a qualification to the whole act, and that therefore, as between the mortgagee and alienees of Shultz, the mortgagee is the legal owner. In this, however, it is submitted, he is mistaken. The first part of the proviso declares that it shall not defeat suits pending at its passage; the second merely qualifies the right of foreclosure, and restricts it to a particular case,

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and does not apply to *the second clause of the act, which denies the possessory action in toto. The equity of redemption, as it is called in the act, has been held to be a legal estate and the subject of levy and sale by the sheriff, as the property of the mortgagor; but if the Chancellor's construction be correct, there is no legal estate.

If this construction be correct, who is entitled to the rents and profits? The rule is correctly laid down in Green v. Biddle, 8 Wheat. 81, that the right to the rents and profits depends upon the fact who has the legal or equitable estate. It is admitted that in England, where there is an elder mortgage or judgment, a junior judgment or mortgage creditor may have an account for the rents and profits; but it is denied that a naked judgment creditor, or that a naked mortgagee, has that right. The reason assigned, is that he has a complete remedy at law; and the reason why it is allowable in the first case, is that the legal estate is in the mortgagee, and there is therefore no remedy: 3 Atk. 244, Meade v. Orreey; Powell on Mortgages, 232; Duke of St. Alban's case, 3 Ves. 25. The alienee of the mortgagor is the owner of the legal estate, subject to the incumbrance. An account for rents and profits cannot be taken until after condition broken. A mortgage in this State is on precisely the same footing. Snowden had no legal estate —his is merely an equitable interest, and his presence and assent to the sale, rebuts his equity, and precludes his right to an account for rents.

He contended that the lot holders were entitled to a decree for whatever they might have recovered from their tenants, at law; or that the injunctions be dissolved.

As to the right of the alienees to the value of their improvements.—Under our act the alienee is the legal owner of the estate. No such question can ensue between mortgagor and mortgagee; for all the mortgagor's property is liable to the payment of his debt, but the alienee is only subject to be divested of the mortgaged property. The act having refused jurisdiction in such case to the Courts of law, shews that the legislature supposed that the alienee might have equi-

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twelve months from the sale; and the mortgagor shall be for ever barred and foreclosed by such sale from his equity of redemption, in as complete a manner as if the same had been foreclosed in a court of chancery; any law, usage or custom to the contrary notwithstanding: Provided always, That if any time before such sale, the mortgagor shall tender to, or pay into the hands of the plaintiff, or his agent or attorney, or to the sheriff, all the principal money and interest meant to be secured by such mortgage, and also all the costs of the suit, the sale shall not take place, but the mortgagee shall enter satisfaction on the said mortgage, and the mortgaged premises shall be for ever exempt from the said mortgage.

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*And be it further enacted by the authority aforesaid, That no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by mortgage is elapsed, but the mortgagor shall be still deemed owner of the land, an dthe mortgagee as owner of the money lent or due, and shall be entitled to recover satisfaction for the same out of the land in the manner above set forth. Provided always, That nothing herein contained shall extend to any suit or action now pending, or when the mortgagor shall be out of possession, nor to contravene in any way, the ordinance, entitled, "An ordinance to encourage subjects of foreign states to lend money at interest on real estates within this State," nor to deprive any person or persons of any right which he she or they may have at the time of passing this act."

[The explanatory act of 1797, 2 Faust 157, is as follows:]

"Whereas under the act, entitled, 'An act for establishing an easier and cheaper mode of recovering money by mortgage on real estates, and barring the equity of redemption, and for abolishing the fictitious proceedings in the action of ejectment,' doubts have arisen, whether a mortgagee, taking a release of the equity of redemption from his mortgagor, can be considered as legally and fully seized of the premises mortgaged, inasmuch as that act declares, that the premises mortgaged are still to be deemed the estate of the mortgagor, and only a pledge in the hands of the mortgagee, who is not thereby vested with any legal estate, and therefore cannot be benefited by such a release:

Be it therefore enacted &c., That all releases of the equity of redemption made since the passing of the said act, or hereafter to be made, shall have the same force and effect in law as if the said act had not been passed."

ties which could not be set up at law. The

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civil *law allows for improvements in cases of hypothecation. 1 Poth. 335. In Green v. Biddle, 8 Wheat 81, the question is investigated, and the authority of Porter's case, 1 Co. 17, recognized. Pow. on mortgages, 1040. There will be no difficulty in allowing the value of the improvements out of the sale, should one be ordered. And this can be done by ascertaining the present value of the lots unimproved, or the value when sold, and subtract it from the amount of the sales. When Williamson comes in for subrogation, the Court will not allow it beyond the thing mortgaged; and Snowden's conduct should prevent him from asking or receiving any thing beyond that; for the terms of the sale in his presence were that the purchasers should improve, and his consent entirely precludes him from denying the purchasers' rights to rents on the improvements.

As to the Bridge Bill judgments. He contended from the facts that it appeared that the Bridge, having been partnership property, was previously liable to the payment of these judgments before the private property of Shultz should be subjected to them—the judgments being existing liens on the Bridge, and the complainants having after a course of litigation compromised their claims, and released their lien on the Bridge, operated as a release and discharge of the judgments, so far at least as the defendants the alienees of Shultz are concerned. Levy v. Hampton, 1 M'C. Ch. 116; 1 Eq. Rep. 321. 1 Poth. on Ob. 322, no. 521.

Pettigru, for the plaintiffs. 1. The mortgage of Brooks is still a subsisting debt. A security which has been cancelled or given up without satisfaction, may be the subject of equitable jurisdiction. Burrows v. M'Wham, 1 De Saus. 409. Even at law a satisfaction has been vacated in favour of an assignee, Wardell v. Eden, 1 Johns. Rep. 531 note. S. C. 2 Johns. Cas. 121. If Thurmond had no right to sell, he had no right to receive payment. The money received from Williamson therefore is as money received to Williamson's use by Brooks and Moore. When the sale was declared void, everything which depended on the sale, the right of the purchaser to the land—the right of the creditor to the price paid, the right of Shultz to the application of the money to the

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sa*tisfaction of the judgment and mortgage, are all discharged. Barton v. Petits, 7 Cr. 288. If the money was still in Mr. Brooks' hands there could be no doubt that he ought to pay it back; and if Williamson has a right to a return of his money, the acknowledgment of that right is equivalent to an admission that some one has a right to enforce the mortgage. But it is said that the mortgage, though it might avail the vendors, cannot be set up in favour of Williamson—that the Leighs are satisfied, and of course the mortgage is extinct.—But Williamson is not satisfied, and the mortgagees are bound to make good his loss, so far as they can by allowing him to stand in their place, and to operate his relief through their equity. This is called substitution, and the rules by which it is governed must be sought in the English Chancery, not in the civil law—subrogation is not a word known to our law. The limitation of this Equity, which the learned counsel would deduce from the civil law, to the exclusion of a person who has voluntarily paid, is not well founded. King v. Baldwin, 2 Johns. Ch. Rep. 554. Hayes v. Ward, 4 Johns. C. C. 123. Green v. Hart, 1 Johns. Ch. Rep. 580. The idea that no one can be allowed to stand in the place of a creditor whom he has paid off, unless that payment was made under legal compulsion, is directly contrary to Harris v. Lee, 1 P. Wms. 483. Marlow v. Pitfield, Ibid 569. Henshaw v. Wilson, (MS.) Charleston 1828, in this Court. He that voluntarily pays the debt of another without request cannot recover as for money paid to the use of the other; and Equity does not aid a mere intermeddler. But there was nothing officious in Mr. Williamson's conduct. The mortgagees who advertised the land and invited bidders cannot make him suffer for their blunder, by calling him a volunteer.

2. The mortgage of Snowden. It is not pretended that this is paid—but it is said that Snowden was present consenting to a sale, and therefore against purchasers his mortgage is void. If the purchasers had been ignorant of Snowden's mortgage, and he had seen them buying without giving notice, they would had have had a defence against him on the ground of concealment. But notice was publicly given of his mortgage, and the title

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deeds recite a story which amounts *to this: that Shultz and the purchasers, finding that Snowden has concealed his mortgage from them, have thought proper to contract for the purchase and sale of the mortgaged premises, in order to prevent this concealed mortgage from being set up against them. It is unnecessary to discuss seriously the question whether a verbal assent would be enough from a mortgagee. For it is apparent that no consent was asked or given—and the sale was evidently a mere juggle.—Snowden was brought there as part of the contrivance, and the deeds of conveyance are nothing but a trick.

3. As to the judgments against Henry Schultz and John M'Kinnie.—It is denied by the defendants that the money due on these judgments can be levied of Henry Shultz's land—and the reason given is, that they are judgements for the partnership debt of Henry Shultz and John M'Kinnie trading under

the name of the Bridge Company—and that the complainants in consideration of $10,000 have released all their claim in the Augusta Bridge. To refute this objection it is necessary to consider how partnership property stands in relation to creditors, at law, in equity, and in bankruptcy. At law the partnership creditor can take either the joint or separate effects of either partner. The separate creditor can take the joint effects only sub modo. Moody v. Payne, 2 Johns. Ch. Rep. 584. The King v. Sanderson, —— 50. Thus at law there is no difficulty in the joint creditor seizing the separate effect—the difficulty regards the separate creditor only. The rule in equity has reference only to the rights of partners as between one another. They are joint tenants not only of the goods of which the stock is first constituted, but of the effects acquired in the course of trade; and nothing is to be considered as the absolute property of a partner, but the residue or balance due him after an account has been taken and all the debts have been paid. West v. Skip, 1 Ves. 242.

In bankruptcy, the same principle which governs in equity, viz. that the share of the partner is only the residue or balance of the account, is made the foundation for a rule of distribution between creditors. Partnership creditors take the joint effects—and separate

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creditors take the separate ef*fects. But let it be observed that this is strictly a rule in bankruptcy, and that where there is no bankrupt laws there is no room for the introduction of it. There is nothing but the bankrupt law, which can prevent a judgment creditor of the partnership from extending the land of one of the partners. Equity cannot enjoin him. Moody v. Payne, 2 Johns. Ch. Rep. 584. If John M'Kinnie and Henry Shultz were actually carrying on business as partners, and were jointly possessed of the Augusta Bridge, and Shultz seized in severalty of the town of Hamburg, there is nothing to prevent a judgement creditor of the two, from taking the land of one of them in execution. Suppose the case of an English partnership. As long as there is no commission of bankruptcy, there would be no authority to interfere with the creditor in the choice of his remedies. But when a commission issues, the joint creditors acquire an interest in the joint effects, and the separate creditors in the separate effects. Unless the Court has the power of making a distribution of the separate effects, it cannot interfere with the equal right of an execution creditor. If one partner were to file a bill against another, the Court of Chancery would get jurisdiction of the partnership effects, and cause them to be applied to partnership debts; but Chancery jurisdiction stops here. It cannot prevent the joint creditor from his legal execution against the separate effects, because it has no right to distribute the separate effects of the partner among his separate creditors. The notion therefore that separate effects are to be applied to the payment of the separate creditors, to the exclusion of joint creditors, arises from a misconception of the different powers that belong to the Chancellor in a Court of Chancery and sitting under the authority of a statute of bankruptcy. In the latter jurisdiction he has the power of doing complete justice; he distributes both the joint and separate estate; Chancery can distribute the joint estate only. The separate is governed entirely by the rules of the common law, as long as there is no statute of bankruptcy. The bankrupt law cuts down all creditors to a level, but where there is no bankrupt law there is no authority to divest a judgement creditor of the lien of his judgement.

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*There is nothing then to prevent partnership creditors from extending the land of one of the partners. To the other objection, viz., that they have released the bridge, the answer is, that the Augusta Bridge never was liable to these judgments at all, and the money paid by the Bank of Georgia was purely the price of peace. An examination of the dates will show that Mr. Shultz parted from all his interest in the bridge, long before these judgments were obtained. The defendants contend that the sale made by Mr. Shultz does not prevent the bridge from being assets to pay the creditors of Henry Shultz and John M'Kinnie. But even under the bankrupt law, creditors have no lien before a commission issues on the partnership effects. And if one partner bona fide disposes of his interest in the partnership effects to the other, they become separate effects—if to a third person, taking his place in the partnership, they become the effects of the new firm. This is precisely the case of Ex parte Ruffin, 6 Ves. 119. The notion that the effects can be followed after a bona fide alienation, is without any authority, and all the litigation in the Courts of this State and Georgia, and the United States, was founded on a total misconception of the case. Ex parte Williams, 11 Ves. 3; Ex parte Fell, 10 Ves. 347; Ex parte Rowlandson, 2 Ves. & B. 174; Duff v. E. I. Co. 15 Ves. 215.

4. The next ground relates to the right of Mr. Williamson as a mortgagee, to recoup the rents received from the Hamburg lots, in the amount of his mortgage.

We contend that he is a mortgagee in possession.—The notion that a mortgagee can in no case enter, depends on the construction of the act of 1791; but it seems impossible to deny that the proviso in that act, saves and exempts all cases where the mortgagor is out of possession, from its operation. It is said that it is unreasonable that the mortgagee should be debarred from entering upon the mortgagor himself, but allowed to enter on his assignee. There is nothing unreasonable

in it, however, and it is in strict accordance with the idea of the Legislature, which was to regard the equitable rights of the mortga-

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gor and *mortgagee. As between them, it is the money which is due, and the mortgagee should sue on his bond. But when a stranger has got into possession there is no equitable consideration at all between him and the mortgagee. Lord Mansfield would not allow a tenant to set up a title in trustees, when the plaintiff's action was not meant to disturb the possession of those trustees. Bristow v. Pegge, 4 Cow. 309; 1 John. Rep. 758, note. Though the Court of King's Bench has since discountenanced these cases, it must be confessed that they rendered the action of ejectment more useful, and subserved the ends of justice better than the old rules which the judges have re-established. At all events there is no reason why the legislature should not give the preference to the more liberal form of procedure; and by confining the mortgagee to his bond when the question is between him and the mortgagor, and leaving him to his right of entry, according to the terms of the mortgage deed, when the controversy is between him and a stranger—they have followed Lord Mansfield's leading, and made the legal action conform to the equitable right.

But that Mr. Williamson was entitled to the rents, is proved by this, that the case disclosed by his bill was sufficient to ground an order for a Receiver. If the act of 1791 does not prevent him from entering, he is a mortgagee in possession.—If it does, then he is like a second mortgagee, who is entitled to a Receiver, simply because he has no right of entry. Berney v. Shell, 1 Jac. & Walk. 647. "If the person in possession of real estate, which is assets, has, in his answer, stated the circumstances to be such that the Court cannot help seeing that it must become responsible to the demand, the Court will, in the first instance, put a Receiver in the estate," 8 Ves. 71; Angel v. Smith, 1 Ves. 338. It is often granted on the filing of the bill, and is obtained at the suit of creditors, 1 Cox. 422. Jones v. Claughton, Jacob, 573. In favor of a tenant in common against his companion, Street v. Anderton, 4 Bro. C. C. 414. In the case of partners, Peacock v. Peacock, 16 Ves. 49.—And against the legal title, Lloyd v. Passingham, 16 Ves. 59. And in the

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case of a second mortgagee, Berney v. *Shell, 1 Jac. & Walk. 647. When a receiver is appointed, if the land is in the possession of tenants, they must pay their rents to him upon being served with the order. When the owner is in possession himself, the course is to apply to the Court, that the owner may deliver possession to the receiver—Griffith v. Griffith, 2 Ves. 401; Wilkinson v. Colley, 5 Bur. 2694.

Preston, for the defendants, in reply. 1. Can Brooks' mortgage be set up in favor of the plaintiffs? In the discussion of this question, all those incidentally connected with it will be considered.

It is not matter of common right, that one, by paying the debt of another, can become his creditor. His substitution in the place of the creditor is an exception to the ordinary rules of the law; and even where one is compelled to pay another's debt, he may not be remitted to the creditor's rights.—As where the goods of a stranger have been distrained on the premises for rent in arrear, and he pays the rent in order to release his goods, he may maintain an action against the tenant for money paid, which is a mere personal demand; but can he be remitted to the rights of the creditor—the right of distress?—The broad proposition, then, that one may pay the debt of another, and thus make him a debtor, is too monstrous to be sustained. But it is contended that the payment being made by mistake, entitles the plaintiffs to the benefit of the mortgage. The rule laid down in Sugden, 181, is that generally mistakes in a deed or other contract in writing will be relieved against, as between the contracting parties. It does not declare that the party paying shall be remitted to the rights of the creditor; and none of the cases cited sustain the position, that the mere mistake of one of the parties will confer that right—the mistake must be mutual—unless there be privity in law or fact between the parties. The case cited from 1 John. Ch. 607, was that of a guardianship bond payable to the People, when it should have been to the infant; and that in 2 Atk. 203, was the case of a mistake in drawing a deed contrary

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to the in*tention of the parties. These are cases of mistake in form. Hunt v. Rousemanier, 8 Wheat. 211, does not decide the question of mistake in law—it is expressly reserved. The case of Campbell & Chambers v. Rochelle, 1 M'C. Ch. 53, was that of a mere mistake of a ministerial officer charged with the execution of process. There is a difference between ignorance and mistake. The first implies a want of information, which is accessible to the party, and which, by industry, he might have obtained; and the latter implies false information communicated to him. But here there is neither. Shultz forbid the sale, and informed them that the title was not good. But to entitle a party to relief on the grounds of mistake in law, the mistake must be mutual—this was not the case here, for the sheriff was the agent of both parties, and he was fully notified of both the law and fact; and Schultz having forbid the sale, cannot be bound by it. In Lowndes v. Chisholme, 2 M'C. Ch. 455, there was a mutuality of mistake, and there was privity between the parties: the surety there was compelled to pay in consequence

of his obligation. 2 John. Ch. 554, 4 John. Ch. 123, 4 John. Ch. 550, and 1 Eq. Rep. 409, were cases of payments by securities, and they were held to be entitled to be remitted to the rights of the creditor; and in the case from 1 John. Ch. 580, the question was whether the delivery of a mortgage was an assignment, and it was held to be so. In all those cases where the parties claimed and were allowed subrogation, they were under legal obligations to pay the debts—there was no such obligation here.—Williamson was under no obligation to pay for the purchase, for there was no authority to sell. He has paid the money on this sale without any legal obligation to do so.—He was a mere volunteer, acting with full notice, wilfully trusting to his own judgment, and should abide by the consequences of his own folly.

From the views here presented, the plaintiffs are not entitled to be subrogated or substituted to a right of action, or lien, as against Shultz; and a fortiori, they cannot be against the lot holders. But concede Shultz's liability, and that the liens may be set up as against him, the question is dif-

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*ferent as to his purchasers. Brooks received the money and made an entry of satisfaction on the mortgage, and after this some of the tenants purchased. If Brooks came by the money in mistake, the entry of satisfaction was no mistake. It is an abrogation of the security of the lien, and the Court will not set it up as against bona fide purchasers. But should the Court remit the plaintiff to Brook's rights, they will be made to account for all losses sustained by Williamson's interference. If his conduct has operated to their prejudice and reduced their rents, or if he has been the means of their losing their rents, he should redress them: for the Court in setting up an equity will take care that equity shall be done by the party in whose favor it is set up.

At sheriff sales there is no warranty. A purchaser is not bound to look into the regularity of the sale; but he must, at his peril, see that the sheriff has authority to sell, and if he fail to do so, and there is a want of such authority, he must abide the consequences. Where a purchaser at sheriff sale fails to recover, for want of authority in the sheriff to sell, has he the right to set up the judgment or execution? There are many such cases, but none can be found where the purchaser has been remitted to the rights of the creditor—at most he can only maintain an action to recover it back. Is not a sale under a mortgage and order of foreclosure, subject to the same rules?

It is admitted, that according to the authority of Durand v. Isaacs, 4 M'C. Rep. 51, the Court of Law had no right to foreclose, except as regards the lots of which Schultz was in possession. The mistake was in the order, and the plaintiffs have no right to go beyond the sale, and to obtain relief on the ground that the Court of Law exceeded its jurisdiction, for this would be to affect the rights of third persons, which the Court will take care to guard against in making substitution. If then the sale should be made good, it can only extend to the unsold lots, and the mistake can only be corrected that far; for otherwise, Williamson, by making a purchase at a sale which is void, acquires more rights than if the sale had been good.

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*But it is contended for the complainant that Williamson was the assignee of the mortgagee in possession. Equity will regard as done what ought to have been done—but can Equity make that assignment in such way as to operate nunc pro tunc? If however that is done the complainants are not entitled to rents and profits. In England lands are not liable to sale on execution, they may be extended, and there all mortgagees and judgment creditors are entitled to the rents and profits. And a receiver has been appointed when by descent the title was cast on an infant, 1 Cox. Ch. 433. But the reason being different here a different doctrine must prevail. By the decision in Durand v. Isaacs, the words of the proviso in the act of 1791 must be applied to the first clause, and when so applied the same meaning must be preserved in its modification of all the other clauses. The words "out of possession" mean a want of actual possession. The intention of the act was to declare the rights of the parties—that the mortgagor was still the owner of the land, and the mortgagee of the money lent; and this is still more manifest by the explanatory of 1797, (2 Faust 157.)

As regards the appointment of a receiver. This is in a great measure discretionary with the Court, but the Court will be cautious of interfering with the rights of prior claimants, Jeremy. Eq. 248. The purchasers are in possession claiming the legal title, and under the circumstances the Court would not undertake to decide the legal right, and appoint a receiver.

As to Snowden's mortgage. It is conceded that most of the cases of standing by and permitting another to purchase, are cases of concealment. But the principle is applicable to this case.—The fraud practised on the purchaser is the ground of the rule. Sugd. 522. Tarrant v. Terry, 1 Bay, 239. If one stand by and permit another to buy, or build upon, his land, he will be concluded from asserting his right: and if he encourage the purchaser, his expressions are stronger than his silence. Snowden was present, an arrangement to satisfy his mortgage was announced in his presence, the purchasers were required to build, and they paid the fee simple value—under these circumstances his

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lien should be re*garded as lost or waived, or

otherwise the Court will assist in practicing a fraud on the purchasers.

As to the Bridge Bill judgments. Let it be conceded that at law the plaintiffs would have the right to sell any of the property of either of the parties. Still it is insisted that the fund primarily liable to the payment of the partnership debts has been released. One of the considerations set out in the deed is the liability which B. M'Kinnie was under to pay the debts of the concern: this was a pledge of the property for the payment of the partnership debts. The Bridge was ordered to be sold for foreclosure by the decree of the Georgia Court—no sale was made—and the subsequent settlement is a satisfaction of the mortgage. But the complainants paid only 50 cents on the dollar for their incumbrances: if they are set up, will they be allowed beyond the amount paid for them?

As regards the improvements they should be allowed for—when ascertained they can be deducted from the amount of rents and profits. The alienees having the legal title could have removed their buildings before foreclosure, and no action could have been maintained against them, but if they have permitted them to remain, those benefited should account for their value.

Pettigru, in reply. Relief will be extended to those who pay money voluntarily, 1st, when one lends money to a wife to pay for necessaries, he is put in the place of the seller. 1 P. W. 483; 2nd, in the case of infants, 1 P. W. 569; 3d, where money is lent to a trustee who expends it for the benefit of the trust estate.

Brooks put up for sale all that was mortgaged to him, and Williamson became the purchaser of that interest, whatever it was. He is therefore the assignee of Brooks' interest, and is not to be remitted merely to the unsold lots—the mere purlieus of Hamburg.

Chancery will grant an injunction to prevent judgment creditors from selling mortgaged lands, 2 Johns. Ch. 125.—The Court will interfere whenever it is clear that the estate is liable as assets for the payment of debts, 16 Ves. 59. See also, 3 Atk. 530. ——.

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As regards Snowden's consent to the *sale it is within the Statute of Frauds. See Pasley v. Freeman, 3 T. R. 51.

Blanding. There is no case in which a receiver has been appointed where there is a mere lien which can be satisfied by a sale of the estate.

The cause was postponed for consideration, and at this Term the Court delivered the following decree.

JOHNSON, J. Both parties have appealed from the decree of the Circuit Court, and the grounds stated open for consideration most of the leading points in the cause. I propose to consider them in the order in which they are put down in the brief, beginning with those of the defendants, as going more directly to the merits.

The first and second may be resolved into the general question, whether the mortgage to Brooks and Moore's judgment can be set up as a lien on the Leigh tract of land generally, and more particularly, whether the mortgage can be set up in opposition to the rights of those who purchased lots from Shultz before the mortgage was ordered to be foreclosed. 1. The very able argument of the Chancellor in support of his views of this question, vindicates, very satisfactorily, his order setting up those liens. I will notice, however, some of the arguments which have been urged by the counsel in support of this ground of the motion with great apparent confidence. The most prominent are, first, that Williamson having purchased with notice that the sale was premature and irregular, is not entitled to relief: Secondly, That all that Williamson can claim is to be put in the same situation that he would have been if the sale had been regular and valid, and that according to this rule, he would only be entitled to have the mortgage set up against the unsold lands, because the law Court had no authority to order the foreclosure as to the lots which had been sold.

1. The general rule very clearly is, that there is no implied warranty in sales made by a sheriff or other ministerial officer in his official capacity, but that applies exclusively to the quality and property of the thing sold.

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Thus *in a sale made by a sheriff of goods taken in execution, there is no implied warranty, on the part of the sheriff, that the goods are intrinsically worth any thing, or that the defendant has any property in them. He only undertakes to sell the interest which the defendant may happen to have in the goods, in the condition in which they are. But the principle does not apply to cases where the sheriff or other officer assumes an authority where none is given by law. It will hardly be questioned, that if a sheriff induce persons to purchase at his sales, by pretending that he has the authority of law for the sale, when in truth he has not, the purchaser must be without remedy. It is a fraud for which he would be responsible, and the principle equally applies when he acts upon a void authority. In any case the sheriff is bound to shew that he is legally authorized to do that which he assumes to do virtute officii. The case in hand does not entirely depend even on that rule. In his deed to Williamson, the sheriff recites the order of foreclosure of Spring Term, 1827, the sale on the first Monday in June, thereafter, and the failure of the purchaser to pay the purchase money according to the terms of the sale, the advertisement of the subsequent sale, and the sale to Williamson—and in pursuance thereof he undertakes to convey. Here there is an express declaration on the part of the sheriff

of his authority to sell, and although it is stated by way of recital, he is as effectually estopped as if it had been in the form of an express covenant. Com. Dig. Estoppel, B. 5. Buller N. P. 298. In effect it is a covenant on the part of the sheriff that he has authority to sell, and the same thing is implied in every sale he makes. Conceding then, Williamson had notice of the circumstances from which the want of authority to sell has been deduced in the case of Williamson v. Farrow, [1 Bailey, 611, 21 Am. Dec. 492,] here is the guaranty of the sheriff against the consequences. One of two persons who are equally confident of their title to the same article of property, undertakes to sell it to a third who knows all the circumstances, and covenants to warrant the title—did any one ever yet suppose that he would not be bound by that warranty. In principle this is that case.

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The sheriff, sup*ported by Brooks the mortgagee, undertook to sell the land; Shultz denied their authority, on the ground that the time for the payment of the money had not passed. Was Williamson obliged to sit in judgment on this controversy, and decide at his peril? Might not the sheriff covenant for his authority to sell? And is he not bound?

2. The authority of the Law Court to order the foreclosure of mortgages on lands is derived from the act of 1791, and in that act there is an express proviso, that nothing therein contained shall extend to any suit or action then pending, "or where the mortgagor shall be out of possession." But this I regard as wholly unimportant to this branch of the case. The complainants do not ask to have Williamson's purchase carried into effect. That was adjudged against him in Williamson v. Farrow—he took nothing by the purchase. But upon the principle before laid down, they have the right to ask to be re-imbursed the sum which Williamson paid. It is money paid on a consideration which has wholly failed, and upon the plainest principles of common sense and common honesty, they are entitled to recover it back. Primarily the sheriff is liable, because it was he who received the money and guaranteed his authority to sell.—Upon the same principle Brooks too is liable, for the sheriff acted under his authority and for his benefit, and paid the amount of the mortgage to him. It seems also that Brooks received it in the capacity of Commissioner in Equity, and in his answer he states that he had paid it over to the persons entitled, and against them he has an unquestionable remedy. The same thing may be said of the amount paid on Moore's judgement, and the object of this bill is not as the argument supposes—a claim on the part of the complainants to be subrogated to the rights of the mortgagee and the judgement creditor, but that the multiplicity and circuity of action which would be necessary in a Court of law may be avoided and justice done to all the parties at once, that the lands may now be sold to satisfy the mortgage and judgement, in relief of the mortgage and judgement creditor—and it may be asked what wrong is done to the de-

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fendants by this mode *of proceeding? In the end the money due on the mortgage and judgment must be paid, and that is all that is claimed now.

The third and fourth grounds of the defendants' motion call in question the legality of the order of the Circuit Court setting up the judgements on the Bridge Bank Bills assigned to the plaintiffs, particularly in opposition to the rights of the lot owners who purchased from Shultz.

The argument in support of these grounds assumes that these judgments were a lien on the Bridge at the time the defendants (the lot owners) purchased from Shultz, and that the release of it by Paul Fitzsimons, operated as a fraud on them, as it operated to exempt a fund primarily liable, and threw the burthen on the individual property of Shultz.

If this assumption was supported by the facts I should be inclined to think with the defendants' counsel, that the judgement creditors ought to be left to their remedy against that fund, or having released it, they are without remedy. The judgments were for partnership debts. The Bridge according to this allegation was partnership property and liable to the judgments. The defendants the purchasers of lots from Shultz claim that the judgment creditors may exhaust that remedy before they resort to the property purchased by them. I need not resort to authority to show that a judgement creditor will be compelled to resort to the property of the debtor to satisfy his judgement in relief of property purchased from him by a stranger; and this as I understand it, is the case made by the facts assumed. They are not however supported by the proof.

The property in the Bridge was in John and Barna M'Kinnie, who constituted at that time the Bridge Company. They mortgaged the Bridge to the Bank of Georgia, on the 10th June, 1819, to secure the payment of $98,000; and on a bill filed in the Federal Court at Savannah, to which the judgement creditors and Shultz, the Bank of Georgia and John & Barna M'Kinnie, were parties —an order was obtained by consent that the Bridge should be sold and the money brought into Court. On the 28th Nov. 1822, it was accordingly sold and purchased by the

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Bank at $70,000, being $28,000 less *than the amount of their mortgage, and the proceeds were, by the order of the Court, deposited in the Bank. That bill was afterwards dismissed for want of jurisdiction, but if the

Bridge Company had at that time any property in the Bridge, it was divested by the sale. If we are referred to the fund in Bank arising from the sales of the Bridge, that is swallowed up by the prior lien of the mortgage.

An entry made in the books of the Bridge Bank, pledging the Bridge amongst other things for the redemption of the bills issued by the Bank and on which these judgements are founded, is set up by the defendants as a lien on the Bridge, as paramount to the mortgage, being anterior in point of time.—This is well answered in the Circuit Court decree. There was no evidence that the Bank of Georgia had any notice of this entry. In itself there was nothing to divest the Bridge Company of the property in the Bridge. Conceding that it possessed all the requisites of a legal and binding contract, from the nature of it, the right and power of the disposition of the Bridge must have been reserved to the Bridge Company; for that was the only mode in which they could make it available in the payment of the bills, and they alone are responsible for the disposition they made of the proceeds. The sums paid to Shultz and Fitzsimons cannot be otherwise regarded than as the price of peace. The sum received by Fitzsimons was properly ordered to be credited on the judgements. It was paid on that account, and although by a stranger, supposing it even voluntary, it is pro tanto a satisfaction.

The fifth and sixth grounds of the defendants' appeal, object to the amount and disposition of the rents made in the Circuit Court decree, and may be conveniently considered in the same general view.

At the common law there is no question that as mortgagee, Brooks was entitled to the possession of the land after the condition of the mortgage was broken, or that he might have maintained a possessory action against the mortgagor or any one else in possession, and was entitled to enter upon a vacant possession; and if a mortgagee give notice to the tenant in possession, that

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the money secured by the mortgage has *not been paid, the tenant is bound to account with him not only for the accruing rents but for the rent in arrear; and the mortgagee may resort to the summary remedy by distress, and in Moss v. Gallimore, Doug. 270, Lord Mansfield says, that he considers "this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor." Thus stood the common law, and according to this rule there is no question about Brooks' right to receive the rents after notice to the tenants that the money due on the mortgage was unpaid.

We are next to inquire whether the Act of Assembly of 1791, has made any change in the common law in this respect. That act seems to have been intended principally to give jurisdiction to the Law Courts, to enable them in a particular case, (the case where a judgement had been obtained against the mortgagor by a third person,) to foreclose the mortgage and bar the equity of redemption. But it goes on to declare, that "the mortgagee shall not be entitled to maintain any possessory action for the real estate mortgaged, even after the time allowed for the payment of the money secured by the mortgage is elapsed, but the mortgagor shall be deemed the owner of the land, and the mortgagee of the money lent or due"; and then follows a proviso that nothing therein "contained shall extend to any suit or action then pending, or when the mortgagor shall be out of possession." A doubt has been thrown out, whether this proviso extends to the declaration, that "the mortgagor shall be deemed the owner of the land," and hence it was intended to be concluded, that the mortgagee could in no instance and under no circumstances maintain a possessory action, and could not therefore be entitled to rents and profits. The proviso follows the declaration in the same clause, and I cannot conceive of language more appropriate than that used to express the idea that not only that declaration but the whole act should be inoperative when the mortgagor was out of possession. And it has received that construction in the case of Durand v. Isaacks, 4 M'C. 54, in which it was ruled that the Law Court had no jurisdiction in cases of mortgages when the mortgagor was out of possession; and Judge Nott, in delivering the judgement of

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the Court in that *case, has given the most satisfactory reasons why the exception ought to have been made. I take it therefore as clear, that Shultz the mortgagor being out of possession, the rights and powers of Brooks as mortgagee, in respect to the purchasers of lots in possession under Shultz, must be determined according to the rule of the common law, and according to that he had a right to receive and retain the rents, having given notice of the mortgage to the tenants in possession.

The question then arises whether Williamson and the plaintiffs, his representatives, are entitled to the same rights and immunities.

According to the preceding view, as between Brooks the mortgagee, and the assignees of Shultz, tenants in possession, the legal estate was in Brooks, subject to the equity of redemption.(a) He had therefore a right to

(a) But see the opinion of the Court delivered by JOHNSON, J., in Smith & Cuttino v. Osborne & others, ante. 342, where the reason given why the Stat. of Lim. should not bar a mortgage lien, is that the legal estate is not in the mortgagee, even where (as in that case) the mortgagor was "out of possession."

convey the land itself, subject to this equity, or he might have assigned the mortgage, with or without having entered upon and taken possession of the premises.—Matthews v. Wallyn, 4 Ves. 118; Clute v. Robison, 2 John. Rep. 612. The sheriff, under the authority and by the direction of Brooks, did make a deed, by which he undertook to convey the fee in these lands to Williamson unconditionally; and although that was a greater interest than Brooks had in the land, the minor interest, whether of the legal estate subject to the equity of redemption, or the right to assign the mortgage whereby the legal estate would pass, was necessarily covered by it. In this view the sheriff must be regarded as the private agent of Brooks, and not as acting in his official capacity; and if it be objected that his authority from Brooks was by parol, and void under the Statute of Frauds, it is an answer, that the facts are admitted by Brooks in his answer to this bill—a confirmation of the act. Williamson was therefore entitled to all the rights of Brooks, and necessarily to the rents.

The seventh and last ground of appeal on

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the part of *the defendants, complains of error in the decree of the Circuit Court, in not directing the sale of the lots in the order in which they were conveyed by Shultz, beginning with the last, and proceeding according to the order of the dates, to the first.

The counsel for the complainants have consented to a modification of the decree, according to this suggestion. I do not regard it however as depending entirely on the concession of counsel. As between the complainants and defendants the whole is equally liable, but amongst the defendants themselves, there is an equity which ought to be kept in view. Knowing of the mortgage and judgments, the first purchasers must necessarily have looked to the residue of the land as a security for the satisfaction of them. Every subsequent purchase diminished the amount of this security, and operated as a fraud upon the first purchasers.

I shall now proceed to notice the grounds of appeal taken, on the part of the complainants.

1. The order that the land shall be sold on a credit of twelve months, as to three-fourths of the purchase money, is complained of as a violation of the obligation of contracts.

This order is in conformity with the practice of the Court of Chancery, both in this country and England. In the act of 1791, before referred to, authority is expressly given to the Law Courts to give time for the payment of the money due on the mortgage, and a credit on the sales. It is founded, as I understand it, upon the principle of Equity, that the mortgagor has a right to redeem, at any time, until he is bound by the presumption arising from lapse of time, according to the construction of the contract, he has the right to redeem at an indefinite period, and it follows necessarily, that a sale on a limited credit is no violation of the obligation of that contract. I think also that it might be justified on the footing of a lex fori, for its use is universal, and coexistent with the Courts of Chancery over mortgages.

2. Notice to the creditors of Shultz to come in and prove their demands has been already twice given—once according to the answer of

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Boyce, by the Commissioners appoint*ed under the order of the Court, and once under the order of the Court, and I have heard no suggestion that there are any yet to come in; and I presume that the order for the publication of further notice, and allowing time for them to come in, was made through abundant caution, and without the knowledge of the fact that notice had already been given. If there are other creditors, it is their own fault that they have not come in and proved their debts.—They are not therefore entitled to the indulgence of the Court, nor ought the complainants to be longer delayed on that account—in this respect therefore the decree must be reformed.

3. The decree of the Circuit Court directs that the rents of the lots which have been sold by Shultz and improved by the purchasers, should be so apportioned that Williamson's executors should take only the ground rent; and by the complainants' third ground, it is understood that they claim to be entitled to the rents, as increased by the improvements.

There is apparently much equity in this order, and I am disposed to think it may be vindicated upon principle. There was no obligation on the part of Shultz to improve the lots, nor were the purchasers from him bound to do it. The mortgagee was, by the contract entitled to the land and the rents accruing from it, in the condition it then was, and no more. The improvements made did not diminish, but increased the value of the rents, regarding them merely as ground rents, and according to the principle of the order, the executors of Williamson are allowed this increased value. In doing justice to the lot owners, even more than strict justice is meeted out to Williamson's executors.

4. The fourth and last ground is conceded by the counsel for the defendants—so much of the decree therefore as directs that Breighthaupt shall account for the $5,000 which he received under the order of the Federal Court, must be reversed.

It is therefore hereby Ordered and decreed, that so much of the decree of the Circuit Court as directs that the Commissioner shall advertise in the gazettes, for all creditors who have not done so, to render in their demands by a day fixed by him—and so much

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thereof as directs a reference to as*certain whether Breighthaupt received the sum ordered to be paid to him by the Federal Court, and what disposition he made of it, and what proportion of it should have gone to the credit of those judgments; be, and the same is hereby set aside and reversed.

And it is further Ordered and decreed, that in exeenting the order for the sale of the Leigh tract of land, the Commissioner do first sell the lots and lands whereof Henry Shultz was seized at the time he was admitted to the benefit of the "Act for the relief of insolvent debtors," the lots separately, and the lands not divided into lots, either in a body or in parcels as he may judge most beneficial to all concerned; and next lots in the hands of purchasers, or so many thereof as may be necessary for the payment of all the liens established by this decree—reserving to Shultz's alienees the right of priority amongst themselves according to their deeds—the lots held by subsequent deeds to be sold before those held by prior deeds, and when two or more deeds have the same date, the Commissioner shall himself determine the order in which the lots shall be sold, reserving to the owners of the lots sold, the right of contribntion from the owners of lots that it may be unnecessary to sell, if such should be the case. And to enable the Commissioner to carry this order into effect without delay, he is hereby authorized to require the owners of all lots to exhibit their title deeds or other muniments before him, at such time as he shall appoint—and if any difficulty should arise as to the order of the dates of the deeds, he will report the same to the Circuit Court.

And lastly, it is Ordered and decreed, that the decree of the Circuit Court, as far as the same is not inconsistent with this decree, be, and the same is hereby affirmed.

O'NEALL and HARPER, J., concurred.

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[End of Volume 1 Hill, Eq.]

REPORTS

OF

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURTS OF APPEALS OF SOUTH CAROLINA

FROM MARCH 1834 TO MAY 1837
BOTH INCLUSIVE

BY W. R. HILL
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JUDGES OF THE COURTS OF APPEAL, AND CHANCELLORS

DURING THE TIME OF THIS VOLUME

JUDGES OF THE COURT OF APPEALS BEFORE DEC. 1835

Hon. DAVID JOHNSON, President.

Hon. J. B. O'NEALL. Hon. WILLIAM HARPER.

CHANCELLORS BEFORE DECEMBER 1835

Hon. HENRY W. DE SAUSSURE.
Hon. JOB JOHNSTON.

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Constituting a Court of Appeals in Law and Equity, from Dec. 1835 to Dec. 1836

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Hon. HENRY W. DE SAUSSURE, President.

Hon. DAVID JOHNSON. Hon. WILLIAM HARPER.
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CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT CHARLESTON, IN MARCH AND APRIL, 1834.

JUDGES PRESENT.

HON. DAVID JOHNSON, President.
" J. B. O'NEALL.
" WM. HARPER.

2 Hill, Eq. *1

*JOEL W. GREEN, Ex'or of Benj. J. Allen, v. GEORGE RUMPH and Others, His Creditors.

(Charleston. March, 1834.)

[*Husband and Wife* ⟸29.]

Contracts in consideration of marriage, are greatly favour'd in Chancery, & as between the parties themselves, and others falling within the express objects of the contract, they will be enforced according to the obvious intent, however informally or irregularly they may have been executed; and that, although they may have been rendered inoperative at law by the intermarriage of the parties.(*a*)

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 158–168, 205, 882; Dec. Dig. ⟸29.]

[*Husband and Wife* ⟸29.]

In contemplation of marriage, defendant executed a deed, in which, after reciting the intended marriage, he conveyed, directly and without the intervention of a trustee, to his intended wife, "all the estate which she was entitled to of her first husband," consisting of slaves and other personalty, to her, "her heirs, administrators and assigns." The marriage was afterwards solemnized, and defendant and his wife went into possession of the property. After the death of the wife without issue of that marriage, on a bill filed by a son of the wife's first marriage, it was held, that in Equity, the deed will be regarded as a marriage settlement in trust for the wife and her heirs at law, that the marital rights of the husband would not attach, and consequently that he took only his distributive share as heir at law.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 163; Dec. Dig. ⟸29.]

[*Husband and Wife* ⟸29.]

The Act of 1792, 1 Faust, 209, requires all marriage contracts, &c. &c. to particularize the property intended to be settled, or to have a schedule of the same annexed: a description of the property in a marriage settlement as that to which the wife "is entitled under the will of her husband J. A. or to which she may be entitled independent of the will," is not a compliance with the act, and the settlement is void as to the creditors of the husband subsequent to the marriage.

[Ed. Note.—Cited in Rivers v. Thayer, 7 Rich. Eq. 163.

For other cases, see Husband and Wife, Cent. Dig. § 160; Dec. Dig. ⟸29.]

Josiah Allen died about 1796, having before made and executed his last will and testament, by which he bequeathed his whole estate, consisting of slaves and other personalty, to be equally divided between his wife, Janet Allen, and his two sons, Benj. J. Allen and Wm. W. Allen. William died some time after in his infancy and consequently without issue, and intestate, so that his portion of the estate, which then remained undivided, descended to his mother, Janet, and his brother Benjamin, the whole of which remained in the possession of Janet, the mother.

In 1804, and subsequently to the events above referred to, Janet Allen entered into a treaty of marriage with the defendant, Geo. Rumph, and in contemplation of the marriage, they joined in the execution of a deed, which was duly recorded in the office of Secretary of State. In this deed is recited

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an agreement, "that *previous to the performance of the said intended marriage, the said George Rumph should assign and make over all and singular the property or possession that the said Janet Allen is or may be entitled unto by virtue of the said will of the

(*a*) Smith v. Maxwell, Ex'or.—1 Hill Eq. 101.

said Josiah Allen, likewise all and singular the property and possession which she now has, or is entitled unto, independent of the said will, with the increase of slaves, stock, &c., to the said Janet Allen, her heirs, executors and assigns." And reciting the intended marriage, and a nominal sum paid as the consideration, the deed proceeds thus: "The said George Rumph hath bargained, sold, and by these presents doth bargain, sell and set over to the said Janet Allen, her heirs, executors, administrators and assigns, all the said legacy, so bequeathed by the said Josiah Allen, and all and singular any other species of property belonging to the estate of the said Josiah Allen, or which she, the said Janet Allen, is or may be entitled unto, with all the increase of slaves, stock, &c."

The marriage was solemnized in 1805, the year following the execution of this deed, and the parties lived together in the joint possession and use of the entire estate of Josiah Allen, (for it was yet undivided,) until 1816 or 1817, when they separated, and Rumph, the husband, went abroad and engaged in the business of overseeing,—and shortly after (about 1818) the estate was divided between Janet, the wife, and her son Benjamin; and she, with her portion, went to live with a relation. Janet died in 1828, but before that time the defendant had possessed himself of some of the slaves, and after her death, administration of her estate was granted to him, and he took possession of the others. As a circumstance, going to shew that the defendant regarded this estate as the separate property of his wife, it is stated that he was arrested for debt in 1814, and intending to apply for the benefit of the insolvent debtor's act, he made a schedule of his effects and estate on oath, in which no part of this estate was included, and it is conceded that he is now insolvent.

After the defendant had possessed himself of all the negroes, they were taken in execution by the sheriff, to satisfy judgments against him to a large amount, and the original bill in the case was filed by the plaintiff's testator, who survived his mother, to enjoin the creditors from selling the negroes, and to have their possession restored; but in the bill of revivor, filed by the plaintiff, it is stated that they have been since sold by

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agreement, *and the proceeds deposited with the attorney of the judgment creditors, subject to the final decree of the Court, without detriment to the rights of any of the parties.

The plaintiff claimed the fund for his testator, as sole heir of his deceased mother. Rumph, the defendant, claimed it in virtue of his marital rights. If his claim is valid, his creditors are of course entitled; but whether it is or not, it is insisted for them, that the deed is void as to creditors, because it contains no particular description of the property intended to be settled, either in itself or by a schedule attached, as required by the act of 1792.

The case was heard before Chancellor Johnston, at Walterborough, January 1834, who held, that the deed executed by Rumph previous to his marriage, interposed no barrier against the operation of the marital rights upon his subsequent marriage and obtaining possession of the property, and decreed accordingly.—From this decree the plaintiff appealed, on the ground: That the deed, executed by Rumph, divested him of his marital rights, and vested an absolute separate estate in his intended wife.

JOHNSON, J. It will not be questioned that the legal estate in the property of the wife vested in the husband on the marriage. At the time of the execution of this deed, the property which it professes to convey to her was her own, consequently the defendant, Rumph, had no interest, and could convey none, so that, in a legal point of view, the deed was a mere nullity. The result would have been the same if the property had been in the defendant, Rumph, and by him conveyed to his intended wife; all the personal goods of the wife, from whatever source the title may be derived, vest absolutely in the husband on the marriage. But contracts in consideration of marriage are greatly favoured in Chancery, and as between the parties themselves, and other persons falling within the express objects of the contract, they will be enforced according to the obvious intent, however informally or irregularly they may have been executed; and that, although they may, as in this case, have been rendered inoperative at law by the intermarriage of the parties,—and Equity will regard that as already done which ought to have been done, to give full and legal effect to the intention of the parties.

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*These rules were sanctioned by this Court in Colclough & Wife, v. Colclough, administrator of Carolan, decided at Columbia, at May Term, 1831, which in most of its features bears a striking analogy to the case in hand. Philip Carolan and Mary Davis, in contemplation of marriage, entered into an informal agreement, by which it was provided that the property of the intended wife should be settled to the use of the children of the marriage, and in default of children, to the use of the wife for life, and at her death, to such person as she might devise it, without providing for the case of her dying intestate, and she was declared by the deed to be the sole trustee of the property. The marriage was had, and the wife Mary died without any issue of the marriage and intestate. The husband survived the wife and retained possession of the property until his death, which occurred some time after. He left neither wife or any other known re-

lation, and died intestate. The question was, whether the property was distributable amongst the heirs of the wife, or vested in the husband and escheated for the want of heirs, and it was held that the heirs of the wife were entitled to take by descent. And my brother Harper, who then presided in the Court of Chancery, after laying down the rule that marriage articles will be carried into effect in Chancery by pursuing the intention of the parties so far as the rules of law will permit, remarks, "that if the parties themselves had executed that agreement by conveying to trustees to hold to the separate use of the wife for life, remainder to the children of the marriage, remainder in default of children, to such person as the wife might appoint, without any further disposition, the undisposed-of equitable remainder must have continued in the wife herself," and would, in effect, have operated as a limitation to her right heirs and legal representatives, in the event of her failing to make the appointment.

Informal and inartificial as the deed under consideration certainly is, there is no question about the intention of these parties. Janet Allen was possessed of slaves and other personalty bequeathed to her by her deceased husband, and was about to enter into matrimony with the defendant, Rumph.

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He, reciting the intended *marriage, undertakes to convey this property to her, and regarding the terms, her heirs, executors, administrators and assigns, as only expressive of the quantity of the estate intended to be conveyed, and not as a limitation over, it covers the entire, the absolute estate. To give effect to this contract at law, the conveyance ought to have been to some third person as trustee, for these uses, but equity presumes that done, which ought to have been done, and in adjusting the rights of the parties in this Court, we must suppose that the intended husband and wife, George Rumph and Janet Allen, had joined in a deed conveying this property to some third person, in "trust for the said Janet, her heirs, executors, administrators and assigns." In that case, it is obvious that the marital rights of the husband could not attach, because the property was in another, and not in the wife. It could not attach after the death of the wife, because the bond which united them, and conferred on the husband a right of property in her goods, unless as an heir, was dissolved on the instant of her death. It is true, as in the case of Colclough & Wife v. Colclough, administrator, the heirs of the wife, as between themselves and the husband, are entitled to have distribution of the estate, and under the Act of 1791, the defendant, the husband, is entitled to one-third, and the plaintiff's testator, her surviving son, to the remaining two-thirds.

According to this view of the case, the creditors of the defendants would only be entitled to his one-third part of the fund. But the Act of 1792, (1 Faust, 209,) declares that all marriage contracts, deeds or settlements, shall specify and particularize the property intended to be settled, or shall have a schedule thereunto annexed, containing a particular description of it, and in default of such schedule, they are declared to be fraudulent, null and void, with respect to and against creditors, and bona fide purchasers and mortgagees; with a proviso, that the settlement should be good notwithstanding, as to debts contracted by the husband before marriage. In this deed, the property is described as that "to which Janet Allen is entitled to, under the will of her husband Josiah Allen, or to which she may be entitled, independent of the will;" certainly not corresponding with the particularity intended by the act, nor is there any schedule connected with it, containing a more certain description. It is therefore void as to creditors.

The creditors claiming are, according to a list of judgments, which has been brought up here, all for debts contracted subsequent to the marriage. It is therefore Ordered and

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decreed, that *one-third of the fund in the hands of the attorney for the creditors, be applied to the payment of the debts, according to their legal priority, and if that should satisfy all the debts, that the remaining two-thirds be paid over to the plaintiff; but if the one-third shall be insufficient to pay the debts, the remaining two-thirds or so much thereof as may be necessary, be applied to the payment of the remaining debts according to their legal priority, and the balance, if any, be paid to the plaintiff.

HARPER, J., concurred.

Elmore & Edwards, for the appellant.
Memminger & King, contra.

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2 Hill, Eq. 6

Ex'ors of ALEXANDER GRAY, dec'd, v. GEORGE RUMPH.

(Charleston, March, 1834.)

[*Bonds* ⇐8; *Reformation of Instruments* ⇐11.]

A paper with blanks as for a penal bond, the condition only filled up with the sum but not the name of the obligee, dated, and signed by the defendant, under the circumstances of the case, perfected and set up as a bond, and payment decreed.

[Ed. Note.—Cited in Lamar's Ex'rs v. Simpson, 1 Rich. Eq. 77, 42 Am. Dec. 345; Glenn v. Caldwell, 4 Rich. Eq. 192.

For other cases, see Bonds, Cent. Dig. § 27; Dec. Dig. ⇐8; Reformation of Instruments, Cent. Dig. § 26; Dec. Dig. ⇐11.]

Colleton, January Term, 1834.—Before Chancellor Johnston.

The object of this bill was to perfect and set up the following paper as a bond, and to compel the payment thereof.

State of South-Carolina.

Know all men by these presents, that held and firmly bound unto in the full and just sum of certain attorney, executors, administrators or assigns. To which payment well and truly to be made and done, I bind myself, and each and every of my heirs, executors and administrators, firmly by these presents, sealed with my seal, and dated the twenty-fourth day of June, A. D. one thousand eight hundred and twenty, and in the forty-fourth year of American Independence.

The condition of the above obligation is such, that if the above bound heirs, executors or administrators, shall and do well and truly pay or cause to be paid unto the above-named certain attorney, executors, administrators or assigns, the full and just sum of ten hundred and thirty-one dollars, twenty-four cents, with interest from the date, on or before the first day of January, which will be in the year of our Lord

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one thousand eight*hundred and twenty-one, without fraud or further delay, then the above obligation to be void and of none effect, or else to remain in full force and virtue.

George Rumph, (L. S.)

Signed, Sealed and Delivered in presence of

The bill states, that as appears by the books of the plaintiffs' testator, who was a merchant, the defendant was indebted to him $1031.24, which sum, according to an entry in the books, is credited in full, by bond of the date of the foregoing. That the practice of the testator was to take such bonds for debts due to him, which were afterwards filled up; and that this paper, corresponding in amount and date with the books, was intended by the parties as a bond, and to be in settlement of that account.

The answer of the defendant admits that he signed the paper, but denies that it was intended or considered as a bond, but that he signed it at the request of Gray, merely, as he said, to close the books, and that they would come to a settlement at some future day. That he had demands against Gray, by which he considered the book account fully paid. That the paper in question wants the legal requisites of a bond, and to establish it as such would operate as a fraud on him; and if it is not so established, the statute of limitations is a bar to the demands against him.

It was admitted that there was an entry on Gray's books against the defendant for $1031.24, and that he is there credited as stated in the bill. And the plaintiffs further showed, that in 1808, the defendant confessed a judgment to Gray, on a paper purporting to be a bond and so described in the declaration, filled up in the same manner and with the same omissions as that now in question.

The Chancellor held, that according to the decisions of our Courts, such a paper as that now attempted to be set up is void at law; and that the equity to set it up is sworn off by the answer, there being no sufficient proof to the contrary. He accordingly dismissed the bill.

The plaintiffs appealed on the ground, that ground, that under the circumstances of the case, the Chancellor should have established the instrument as a bond and decreed payment thereof.

Memminger, for the appellants, contended, that the books of the plaintiffs' testator proved the existence of the debt, which should

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*be disproved by other evidence than the answer; that the signature to the paper being admitted, it was manifest, notwithstanding the answer, that the parties regarded it as a bond; and it is the province of a Court of Equity to supply accidental omissions or mistakes in form, in the execution of writings. Finch v. Finch, 1 Ves. 545; Gillespie v. Moon, 2 John. Ch. 585; 5 Ves. 557; 3 Br. C. C. 229; 2 Eq. Rep. 115; 3 Ib. 84; 1 Day's Ca. Er. 139.

Elmore & Edwards, contra.

O'NEALL, J. In any point of view in which we consider this case, it seems to me that the plaintiffs are entitled to relief.

The defendant signs and seals a paper with blanks for a penal bond, dated 24th June, 1820. Underneath is a condition to pay to the sum of $1031.24, with interest from the date, on or before the 1st January, 1821. Can there be a doubt that he intended it as a bond? The intrinsic evidence of the thing itself, shows that it was so intended; a delivery is to be presumed from the fact that it is found in the possession of the testator; indeed the defendant's answer does not deny that it was delivered. If the condition had contained the name of the obligee, I should have thought it a perfect single bond. As it is, it can have no legal effect. The only question is, whether Equity will perfect it? The defendant's intention to execute it as a penal bond with a money condition underwritten, is, as I have already shown, apparent. That the plaintiffs' testator received it in the same character is manifest, from the entry of credit in his books of the same date and for a like sum. Put the case therefore upon the footing of either mistake or agreement, and the plaintiffs would have the right to have the blanks filled up, and the bond thus perfected as a legal instrument. It is said, however, that this cannot be done, inasmuch as the defendant in his answer denies that it was intended or considered as

a bond. This is fully contradicted by the paper itself and the testator's books, and cannot be allowed to prevail against them.

But concede that the case must be judged of by the defendant's answer. He has admitted that he signed the paper exhibited, and that it was intended by Gray and himself to stand merely as a memorandum of a sum assumed to be due, so that the books

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might *be closed, and that the amount really due was to be settled at a future day. In this point of view, he has admitted enough to entitle the plaintiffs to recover. The admission of the signature carries with it an admission of the seal, unless the latter had been denied. The defendant in his statement impliedly admits a delivery to the testator, Gray; so, that, by specialty, he admits that the sum of $1031.24 is due to the testator, unless it should be reduced by the proposed future settlement. This makes the paper when the intention of the parties is carried out, a bond for $1031.24.

There is, in this view of the case, no pretence upon which the plea of the statute of limitations can be supported.

It is Ordered and decreed, that the Chancellor's decree be reversed—that it be referred to the commissioner to ascertain and report whether any and what sums are due to the defendant by the plaintiffs' testator, and that such sums, at the day when due, be deducted from the amount admitted to be due by the paper of the 24th June, 1820, which is hereby set up as the bond of the defendant; and to report whatever balance may still be due to the plaintiffs by the defendant, on account of interest as well as principal due on the said bond, which balance, together with the costs of this suit, the defendant is hereby decreed to pay.

JOHNSON and HARPER, JJ., concurred.

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2 Hill, Eq. 9

JOHN W. MONK, Administrator of Judy, v. ELIZABETH M. JENKINS, Executrix of John Cato Fields, and JOHN S. FIELDS.

(Charleston. March, 1834.)

[*Slaves* ⇐22.]

When a statute authorizes a proceeding not before allowed by law, and prescribes the mode in which it shall be done, the mode pointed out must be strictly pursued or the proceeding will be void: but when a proceeding is permitted by the general law, and a statute directs a particular form in which it shall thereafter be conducted, it will depend on the terms of the statute whether it is merely directory, subjecting the parties to some disability if it be not complied with, or shall render the proceeding void.

[Ed. Note.—Cited in Walker v. Crosland, 3 Rich. Eq. 32; National Exchange Bank v. Holman, 31 S. C. 166, 169, 9 S. E. 824.

For other cases, see Slaves, Cent. Dig. § 95; Dec. Dig. ⇐22.]

[*Slaves* ⇐22.]

Before the Act of 1800, emancipation was permitted in any way in which the master might signify his intention.—That statute does not render any act of emancipation which does not conform to its provisions void, but merely subjects the slave so illegally emancipated to seizure; and until seizure, the slave emancipated will be regarded as free.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 95; Dec. Dig. ⇐22.]

[*Slaves* ⇐22.]

The delivery of a deed of emancipation, after long lapse of time, and the enjoyment of rights under it may be presumed; but the only delivery contemplated by the Act of 1800, is the lodging it with the clerk to be recorded, and it is the duty of the master to lodge it.

[Ed. Note.—Cited in State v. Hill, 2 Speers, 151, 160.

For other cases, see Slaves, Cent. Dig. §§ 104, 105; Dec. Dig. ⇐22.]

[*Slaves* ⇐23.]

Lodging a deed of emancipation with the clerk, is a sufficient recording; and with respect to any person seizing the slave, if the deed was in the office at the time of seizure, the presumption would be that it was lodged in due time.

[Ed. Note.—Cited in State v. Hill, 2 Speers, 151, 160; Lamar v. Raysor, 7 Rich. 515; Rumph v. Waring, 8 Rich. Eq. 141.

For other cases, see Slaves, Cent. Dig. § 112; Dec. Dig. ⇐23.]

Colleton, January 1834.—Before Chancellor Johnston.

This bill was filed by the plaintiff, as the administrator of Judy, a woman of colour, formerly the slave of John Cato Fields, dec'd. It states that the said John Cato Fields, being the lawful owner of Judy, on the 14th April, 1806, executed a deed of manumission, by which Judy was emancipated and set free. A copy of the deed, with the examination before a justice, and the certificate prescribed by the Act of Assembly, were filed as exhibits to the bill. That John Cato Fields died in 1817, leaving a will, in which he bequeathed certain slaves and other property to

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Judy, *and appointed one Hughes her trustee, and that after the death of the testator, his executors put Judy in the possession of the legacy. Shortly after the death of Fields, both Judy and Hughes, her trustee, died, and the defendant, Elizabeth M. Jenkins, who is now the executrix, and John S. Fields, who intermarried with the residuary legatee, are now in possession of the property, and refuse to deliver it up. The bill prays an account for rents and profits, and the delivery of the property. The defendants pleaded: 1. That John Cato Fields never executed such deed as is required by the Act of 1800, prescribing the form of emancipation. 2. That no such deed has been recorded within the time prescribed by the Act.

On the hearing of the case, the Clerk of the Court was examined as a witness, and testified that he found the deed among the papers of the office, labelled, and an endorsement in the handwriting of a former clerk,

specifying its contents, but not indicating the time it was delivered to him. There was no evidence given that the deed was delivered within the six months prescribed by law.

The Chancellor dismissed the bill for want of jurisdiction, inasmuch as it made a proper case for relief at law; but he overruled both pleas. The defendants appealed from the decision of the Chancellor on the pleas, and make the further ground: That the plaintiff has no civil status, and cannot therefore maintain his bill.

Memminger, for the appellants, insisted that, by the law of this State, (P. L. 163,) every person of colour is presumed to be a slave, and the onus of proving freedom is thrown on the plaintiff, and this can only be done by showing a strict compliance with the Act of 1800, (2 Faust. 355,) prescribing the form of emancipation. One requisite of the Act is, that it must be by deed, and to constitute a deed there must be a delivery. Shep. Touch. 57. Delivery to the slave would not be sufficient, for there must be a party capable of being contracted with, and accepting the deed. Shep. Touch. 55.—Co. Lit. 35, b. And a slave is not a person in law, but a mere chattel. The Act requires a copy of the deed to be delivered to the emancipated slave, and this may be regarded as equivalent to delivery at common law; but there is no evidence that a copy was so delivered. Delivery of some sort is essentially requisite to perfect the act of emancipation. The deed

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must be *recorded with a prescribed time; but there is no probate on the deed, without which it could not be recorded, and if the lodgement with the clerk be regarded as a sufficient recording, nevertheless it should appear that the lodging was within the prescribed time. Cited 2 Con. Rep. 12; 1 Bail. 421; 2 Hen. & Munf. 467.

R. B. Smith, contra. The deed is now twenty-eight years old. J. C. F. lived eleven years after its execution, and so far from calling it in question, he recognized it in his will. The person for whose benefit it was made, in her life-time exercised rights under it. She is now dead, and her children and grand-children are now interested. Under these circumstances, the Court will presume a delivery of the deed, if that be necessary—that it was legally recorded or delivered to the clerk, within the prescribed time—in short, everything which may be necessary to give it effect. The Act requires an attested copy to be furnished to the slave, and it would seem, by implication, to be the duty of the clerk to retain the original, and recording will be presumed. 3 Harris & M'H. 102. Delivering a deed to the recording officer is regarded as recording. Marbury v. Madison, 1 Cranch, 161; Kirby, 72; 1 Marshall, 306. Under the Act, it is made the duty of J. C. F. to have the deed recorded, and a copy delivered. He, or those claiming under him, cannot be permitted to take advantage of his wrongful neglect of duty, in order to avoid his own deed. If the heir prevent the due execution of a will, equity will relieve. So also if the executor prevent the execution. There are numerous cases in which equity will relieve against neglect to conform to a statute, especially when there is no blame in the party to be benefited. 2 East, 399; 11 East, 630; 1 D. & E. 734; 6 Ves. 743; 11 Ves. 623, 645.

Grimke, in reply, argued that emancipation is now an act of sovereignty, which the Legislature have taken into their own hands: it fixes the status of the person emancipated, and gives him a new relation to the community. This is then a question of public policy, and not one merely of meum and tuum; and it behoves the Court to see that the forms of law have been complied with, otherwise, persons may exercise civil privileges who are not entitled to them. The presumption of law is, that Judy was a slave. A. A. 1740; 2 Bibb. 238; 3 Am. Dig. 484. And to rebut this presumption, it must be shown on her part that the Act of 1800, which prescribes the forms of emancipation,

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has been *strictly followed. The Act requires it to be done by deed, and without delivery there can be no deed. It may not be necessary that the delivery should be to Judy. Perhaps the magistrate might accept it. But no delivery is proved. As to the recording, whose duty was it to have the deed recorded? By the delivery, the master parts with the possession of the deed, and it cannot therefore be his duty to have a paper recorded which is not in his possession. Those who are interested are bound to have it recorded. The attested copy is to serve between the master and slave; the recording is a matter between the slave and the public, and is essential to the validity of the act. Is the delivery to the clerk tantamount to recording? It may be so, if the deed be ready for registration, and be delivered in proper time; but to authorize recording, there must have been a probate, (1 Brev. Dig. 316,) which there was not. If lodging it with the clerk be recording, it should be shown to have been done within the legal time; for if it was delivered to him within the time, he was bound to enter it, otherwise he was not. The presumption is against the slave, and applies to every doubtful fact. Cited 1 Pennington, 10; 3 Am. Dig. 477-8, 485; 19 John. Rep. 53.

HARPER, J. The appeal is only from so much of the decision of the Chancellor as over-rules the pleas of the defendant. In this respect we agree with the Chancellor. He reports that the woman, Judy, had the uninterrupted enjoyment of freedom from the date of the deed to her death, and was rec-

ognized as a free person by the will of her former owner, John Cato Fields. Under these circumstances, I am of opinion that neither John Cato Fields, nor any person claiming as a volunteer under him, could dispute the validity of the emancipation, even if there had been no deed.

When a statute is passed authorizing a proceeding, which was not allowed by the general law before, and directing a mode in which the act shall be done, here the mode pointed out must be strictly pursued. It is a condition on which alone a party can entitle himself to the benefit of the statute, that its directions shall be strictly complied with; otherwise the proceeding will be void. But when a proceeding is permitted by the gen-

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eral law, and an *act of the Legislature directs a particular form and manner in which it shall be conducted, then it will depend on the terms of the Act itself, whether it shall be considered merely directory, subjecting the parties to some disability if it be not complied with, or whether it shall render the proceeding void. If no emancipation were permitted, (as the law is at present,) and an act of the Legislature should permit owners of slaves to emancipate them in some prescribed form, if the form were not complied with, the act would be void. But the several acts of the British Parliament directing that public officers shall not enter on the duties of their office until they shall have taken the oaths to government, have been construed not to render their official acts void if they will take upon themselves to act, but to render the officer personally responsible for a violation of law. There are a great number of instances of the same sort.

It is to be recollected that before the Act of 1800, which is now in question, emancipation was permitted in any manner by which the master might signify his intention to emancipate. The Act prescribes that after its passage "it shall not be lawful for any person or persons to emancipate his, her or their slave or slaves, except according to the forms and regulations hereinafter prescribed," &c. If the Act had stopped here there might be ground to contend that the act of emancipation would be void, if not done in the manner prescribed. But the Act itself goes on to say what the consequences shall be if the forms and regulations directed by it are not pursued. A subsequent clause provides, that "in case any slave shall hereafter be emancipated or set free, otherwise than according to this act, it shall and may be lawful for any person whatsoever to seize and convert to his or her own use, and to keep as his or her own property, the said slave, so illegally emancipated or set free." Here is a plain recognition by the Act itself, that slaves may be emancipated or set free, otherwise than according to its directions. On this view was founded the decisions of the Court, in Linam v. Johnson, 2 Bail. 137. Where the master had emancipated the slave in an irregular manner, it was held that, however the slave might be liable to seizure under the terms of the Act, the master's property was divested, so that he could not maintain an action to recover the slave. There can be no slave without a master, and it follows, that after such irregular emancipation, until seizure is actually made, the

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emancipated slave must stand on the *footing of any other free negro. In the case before us, the woman was never seized, and being now dead, never can be. Her legal representative has the same standing in Court that the representative of any other free negro would have. It is true that the presumption of our law is against a negro's freedom, and that this is a question which concerns the public. But the security of the public was provided for by subjecting the irregularly emancipated slave to seizure. As between the slave and the master, or those claiming under him, it is merely a question of individual right.

The view which I have taken might, for the purposes of the present case, dispense with the necessity of considering the topics which were urged in argument with respect to the validity of the deed itself. I shall, however, advert to them very briefly.

First, as to the delivery. I concur with the Chancellor, that if it were necessary to rest upon presumption, there is enough to presume a delivery of the deed. There is nothing in the Act to render a trustee or guardian necessary. Before the Act, the very fact of executing the deed would have rendered the slave capable to accept it. But from the terms of the whole Act, I am satisfied that the only delivery contemplated was the lodging of the deed with the clerk to be recorded. It is not to be supposed that the maker of the deed, against whom it is evidence, shall be the person to retain it. The emancipated slave is not to have it, for he is to be furnished with a copy attested by the clerk, and it is made the duty of the master, under a penalty, to deliver to him such copy, and consequently, to deliver the deed to the clerk, who is to furnish and attest such copy.

It would be useless to enquire, whether the provision of the Act, that the deed shall be void unless recorded within six months, was intended merely for the benefit of creditors and purchasers, or applies to the master himself; as from the view I have taken, the master is bound by his act of emancipation, independently of the deed.

Then supposing the deed to have been lodged within the time prescribed by law, I am of opinion that this was a sufficient recording within the meaning of the Act. The clerk is a public officer, directed to record such deeds when lodged with him, and his neglect or omission would not be permit-

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ted to work a prejudice to *third persons who were in no default. But, as was said in argument, recording does not merely mean transcribing in a book. The rolls of court are records, though not transcribed. The original furnishes at least as authentic evidence as a copy, and if that be lodged in the office, there to remain as a public document for the information of all who may enquire, this is a sufficient recording, however proper and convenient it may be, that the clerk should make a transcript in a book kept for that purpose.

Then the deed being found in the clerk's office, without any evidence of the time when it was lodged, are we to presume that it was lodged within the time prescribed by law, or the contrary? Without entering to reasoning on the subject, I incline to the opinion that with respect to any person who should seize the slave, provided it appeared that the deed was actually in the office at the time the seizure was made, the presumption would be, that it was lodged in due time. With respect to creditors and purchasers, I give no opinion.

The motion to reverse the Chancellor's decision, is refused.

JOHNSON and O'NEALL, JJ., concurred.

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2 Hill, Eq. 15

JOHN C. PATTERSON v. S. W. LEITH, Executor of William Patterson.

(Charleston. March, 1834.)

[*Wills* ⟸488.]

Parol evidence is inadmissible to explain a will except in a case of latent ambiguity.

[Ed. Note.—Cited in Jennings v. Talbert, 77 S. C. 457, 58 S. E. 420.

For other cases, see Wills, Cent. Dig. § 1033; Dec. Dig. ⟸488.]

[*Wills* ⟸619.]

A bequest in these words, "it is my will that the sum of one hundred and fifty dollars, be paid out of the profits or monies arising out of my estate, to my son J. C. as a maintenance for him, for and during his natural life and no longer," *held* to be an annuity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1437; Dec. Dig. ⟸619.]

Colleton.—Before Chancellor Johnston, who delivered the following decree:

The bill in this case is filed to establish as an annuity, a legacy left by the defendant's testator to the plaintiff, the bequest of which is in these words: "It is my will, that the sum of one hundred and fifty dollars be paid out of the profits or monies arising out of my estate, to my son John C. as a maintenance for him, for and during his natural life, and no longer."

The answer admits the bequest, but denies that it was intended as an annuity, and contends that it is a mere pecuniary legacy for that gross sum.

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*Upon the trial, the defendant's counsel offered as a witness the defendant, S. W. Leith, to prove that he drew the will, and to testify as to the intention of the testator. He was objected to by the counsel for the plaintiff, and the Court sustained the objection, because such testimony was considered as inadmissible as mere parol introduced to explain the intent of a will, and because the witness was a party to this suit and the only defendant on the record.

The defendant's counsel then offered Malachi Ford as a witness, to show the circumstances of the plaintiff at the time of the testator's death, with a view to ascertain the intention of the testator. He was excluded for the reason first above stated.

The cause was then argued on the bill and answer, and submitted to the judgment of the Court. Upon examination of the clause of the will, under which the plaintiff claims, it will be observed that the sum of one hundred and fifty dollars is to be paid from "profits or monies," arising from the estate. The counsel has cited a number of cases, in which it has been decided that the natural sense of these words is "annual profits;" and I think such a construction of the present bequest is much strengthened by the other words used in it. For the testator not only bequeaths this sum as a maintenance for his son, but he declares that it is to be for his natural life and no longer. Now, maintenance would seem to imply that it is to be furnished from time to time as occasion would call for it—the maintenance of the son could not be accomplished by a single payment, it necessarily required a new payment so often as each year of his existence exhausted that which had been applied the preceding year. Besides, why declare that it should be for his natural life and no longer? Are not these words "no longer," a clear expression of what was in the testator's mind, and is it not obvious that he must have contemplated a series of payments which were only to be interrupted by the death of his son. These considerations lead me to conclude that the bequest is an annual sum for maintenance.

It is therefore Ordered and decreed, that it be referred to the commissioner to ascertain the amount due to the plaintiff, for any arrears in the payment of the said sum of one hundred and fifty dollars annually, to the plaintiff, allowing interest thereon from the end of every year during which the same was in arrear, and that so much of the amount so found due be paid with the costs

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of suit to *the plaintiff's solicitors by the defendant, as the Commissioner shall report sufficient to pay their costs and fees, and the remainder be paid to the plaintiff; and that the defendant be allowed the same from the

estate of his testator. It is further Ordered and decreed that the sum of one hundred and fifty dollars be hereafter paid annually by the said executor into the proper hands of the said plaintiff, to be applied by him towards his maintenance and support.

The defendant appealed from this decree on the grounds:

1. That Dr. S. W. Leith, who is a mere naked trustee, and admitted to have no interest in the event of the suit, was rejected as a witness.

2. That defendant was not allowed to examine Mr. Ford and other witnesses to prove that the testator's bounty must have failed because of his insolvency, had he intended to give the plaintiff an annuity.

3. That the will only gives the plaintiff the sum of one hundred and fifty dollars, and not an annuity of that amount.

Elmore, for the appellant, cited 2 John. Ch. 550, 625-6; 3 Ib. 566, 5 Ib. 95; 2 Fonb. 464, 457.

Memminger, contra, on the two first grounds, cited 4 M'C. 24; Phil. Ev. 474; Westbrook v. Harbison, 2 M'C. Ch. 112. On the last ground he cited, 2 P. W. 19; 1 P. W. 219; 2 Ves. jr. 481, note; 2 Ves. & B. 65.

O'NEALL, J. The two first grounds of the motion may be considered together; for notwithstanding the first ground presents a distinct question whether Dr. Leith, as the defendant in the cause, was competent, yet it will not be necessary to decide that question, if we should be of opinion that, even if he was a competent witness, still that his testimony, as well as that of the other witnesses mentioned in the second ground, is inadmissible.

It certainly is too late to be now disputed that parol evidence is inadmissible to explain a will, except in the single case where there is a latent ambiguity. In such a case, the ambiguity is always created by parol, and may be removed by parol. There is no ambiguity in the clause of the will under consideration; the testator's words must declare his intention. They are to be construed by

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*the Court, and if there is any doubt as to the construction, it must be decided and removed by legal rules, and not by parol evidence. The testimony proposed to be given by Dr. Leith and the other witnesses, was clearly inadmissible, and was properly rejected by the Chancellor.

On the third ground, involving a construction of the clause of the testator's will, under which the plaintiff claims, I agree with the Chancellor, that the plaintiff is entitled to an annuity of one hundred and fifty dollars. The reasons of the Chancellor are perfectly satisfactory to my mind, and I will add to them a single authority with a few additional remarks. In Ivy v. Gilbert, 2 Pr. Wms. 19, the Lord Chancellor said "the natural meaning of raising a portion by rents, issues and profits, is by the yearly profits." If this be so, does not the same meaning most clearly apply to the words used in the will under consideration, "the profits or monies arising out of my estate." They seem naturally to imply a fund which would not break on the capital, such as annual rents or interest. For they must "arise out of," spring from, or be produced by it. The sum bequeathed is for maintenance. The legal import of maintenance, is support from time to time, and in the case of minors, whose maintenance is provided by trustees, the rule is well settled, that the interest on money at interest, or the annual profits of an estate is the proper fund out of which it is to be allowed. Construing the testator's will, in reference to these known rules of law, and supposing him to have employed his words intending that they should be explained and understood according to their legal meaning, there can be no difficulty in concluding that he intended to give to his son, the plaintiff, an annuity of one hundred and fifty dollars. In the absence of every thing in the will to show that the testator used words having a fixed legal meaning, in a different sense, we are compelled to conclude, that he used them in their proper legal sense.

It is therefore Ordered and decreed, that the Chancellor's decree be affirmed.

JOHNSON and HARPER, JJ., concurred.

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2 Hill, Eq. *19

*GEORGE KINLOCH, Executor of Thomas Allen, Dec'd, v. SAMUEL HAMLIN.

(Charleston. March, 1834.)

[*Partnership* ⇐=300.]

It is a rule as well of Equity, as law, that a party claiming under a contract with mutual stipulations, must show either that he has performed his part or some legal excuse for not performing: And therefore *held*, that a partner who contributed his proportion according to the articles, for only three years of the ten for which the partnership was to continue, the other partner conducting the business afterwards on his own means, was not entitled to an account for the profits, except for the three years.

[Ed. Note.—Cited in Prothro v. Smith, 6 Rich. Eq. 334.

For other cases, see Partnership, Cent. Dig. § 692; Dec. Dig. ⇐=300.]

[*Partnership* ⇐=105.]

Partners may sue each other at law for the breach of any distinct engagement in the partnership agreement, and generally, adequate relief may, in such cases, be thus obtained; and where this can be done, Equity will not entertain a bill solely for the breach of such an engagement.

[Ed. Note.—Cited in Price v. Middleton & Ravenel, 75 S. C. 112, 55 S. E. 156.

For other cases, see Partnership, Cent. Dig. § 168; Dec. Dig. ⇐=105.]

Before Chancellor De Saussure.

Bill for account. The plaintiff's testator and the defendant entered into written articles of partnership for the making and selling brick. They accordingly established a brick yard on the premises of Allen, using his soil and timber, and conducted the business together for three years, each party contributing according to the agreement. The partnership was to continue for ten years, but after the third year, Allen withdrew his quota of labor, and bestowed no further attention to it. Hamlin, however, insisted to go on and continued the business until the end of the term, using largely of the timber and soil. Allen dying, his executor filed this bill for an account of the partnership profits, in which he claims, that after making due allowance to Hamlin for his extra labor and attention, the wood and clay and use of the premises constituted such a contribution, as entitled Allen to share in the profits during the whole ten years, or in any event that he is entitled to compensation for the use and occupation of the premises, and for the wood consumed in burning the bricks.

The Chancellor held, that the plaintiff could not maintain his bill except for the three years, and refused to allow an account for the remainder of the term, or any compensation for the use of the premises, or the wood consumed. From this decree, the plaintiff appealed.

EARLE, J. (sitting for HARPER, J.) Whenever a party comes into a Court of Law, to claim damages for the breach of an executory agreement, containing mutual and dependent stipulations, he must show that he has performed his part; or that he has been ready and willing to perform, and has been prevented by the other party, or some other sufficient legal excuse for not performing. I apprehend a different rule cannot prevail in Equity. It is a rule of common sense and common justice, and therefore a rule of both Law and Equity. For the

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three years, during which the plaintiff's *testator contributed his proportion of the labor, and otherwise performed his portion of the agreement, he is entitled to an account, as the Chancellor has decreed. But in relation to the other seven years, as he has well remarked, "the claim for an account is an awkward one." He comes into Equity, with an ill grace, to claim compensation on a contract which he utterly renounced and repudiated, to claim an account of the profits of a concern which he forthwith abandoned when he supposed it would be a losing business. It may, however, have turned out otherwise; and he has no right to withdraw from the partnership. It is true, he had no right to dissolve the partnership, so far as the rights of the defendant were concerned, nor could he exonerate himself from his liability to others by any act of his own. But surely it was competent for him to abandon his interest in the concern, to forfeit his share of the profits; and I think he has done this, by refusing to perform, after the three first years, every stipulation contained in the agreement, by withdrawing every portion of the capital he was to contribute, except the wood and the use of the soil; thus depriving the defendant of all the benefit he might have derived from the use of that capital, and to that extent diminishing his profits. To allow him or his representative, the plaintiff, to claim an account and participation of the profits, would be, as the Chancellor expresses it, "to pay a premium for breaking a contract."

By this bill, however, compensation is further claimed, for the use and occupation of the land, and for the wood consumed in burning the bricks. And first in relation to the land merely, or the use of the soil consumed and occupied in the business.

[His Honor here goes into an argument, which it is unnecessary to state, showing that according to the contract, the plaintiff is not entitled to compensation for the mere occupation of the premises, or the use of the soil; and then proceeds.]

Under the agreement, therefore, the plaintiff can claim no other compensation than that agreed upon, to wit: "fifty cents per cord for one half of the wood consumed," which Hamlin was to pay, and for this it is contended, that he is entitled to maintain this bill for an account and relief. I think not. It is not every agreement that constitutes a partnership, which, when broken, entitles the party injured to compensation

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or relief in Equity. It is only for *an account or settlement on dissolution, that the aid of that Court is necessary; and this, not merely on the ground that they are partners, but because of the trust and confidence reposed, and the necessity of a discovery. But a Court of Law is generally competent to give adequate relief in cases of the breach of particular stipulations; it cannot enforce specifically, but can compensate in damages. Partners may sue each other at law for the breach of any distinct and positive engagement contained in their agreement, as to account annually, or to adjust and to make a final settlement of the joint concerns on dissolution: then, a breach by one will vest a right of action which may be enforced at law upon the covenant, and adequate damages recovered. Gow on Part. 106, 107. 2 T. R. 483, and in note, "and the same rule applies to every other species of lawful covenant, by which partners reciprocally and severally bind themselves, inter se, to the performance of any particular act or thing." Where A agreed to supply B

with the manuscript of a work to be printed by the latter, the profits of which were to be equally divided between them, it was held that B might maintain an action against A for refusing to supply manuscript after part of the work had been printed. Gow. 108; 2 B. & P. 131; Gow. 109; 2 Stark. N. P. C. 107; 3 Johns. Ch. Ca. 362. Under the agreement in question, the plaintiff's testator was entitled to maintain an action at law for the value of the wood consumed, at the rate agreed on, supposing the partnership to have continued; and there could have been no occasion to go into Equity, if the defendant had accounted for the profits. It is a separate and distinct engagement, independent of the general liability to account, arising from the relation of partner. On a bill to account, if the partnership had continued, it is true that item or claim might have been brought in, on final settlement of the claims of each. But the question is, can the plaintiff's testator, after having forfeited his claim to the profits, and his right to an account, maintain a bill for compensation under any part of the agreement? And for which, if entitled to any, he has plain and adequate remedy at law? According to the view already taken, he cannot maintain this bill to account, except for the three years: and if he cannot maintain this bill to account, on the ground of partnership, he cannot maintain it on the ground of contract under the articles. The Court cannot, after the three years, allow him the aid of Equity, to enforce one of the covenants or

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stipulations of an agreement, *which he has renounced, and refused to comply with. He cannot renounce and enforce at the same time. It would be contrary to all principle and all precedent. But setting aside the agreement, it is contended that he is entitled to be paid for the wood consumed, and although he might recover at law, if he knew the quantity, yet, as he does not, and the defendant does, he may maintain this bill. I think not. That would be a very pliable principle of Equity jurisdiction. Without the agreement, he is entitled to the aid of Equity in this, as in other cases where discovery is necessary in aid of the jurisdiction of the Court of Law. But this case does not stand upon that footing; nor can it be maintained now, for that purpose. This Court will not now decide, that the plaintiff cannot recover at law, for that question is not necessarily before us. If the plaintiff thinks that his testator was entitled to compensation, under or without the agreement, for the wood consumed, let him bring his action at law on the express contract, or on a quantum valebat, and afford the defendant an opportunity to discount the damages he may have sustained in consequence of the testator's breach of all the covenants to be performed on his part.

JOHNSON and O'NEALL, concurred.

Hunt, for the appellant.

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2 Hill, Eq. 22

EDW'D C. WALKER, Adm'r of Robt. May, v. JOHN MAY and Others.

(Charleston. March, 1834.)

[*Executors and Administrators* ⊂⊃543.]

The grant of administration has relation to the death of the intestate, and legalizes the intermediate acts of the administrator; and a judgment against an executor de son tort, will be valid against him after he has regularly administered, and binds the estate, unless fraud or collusion be shown. The administrator in such case will be estopped from denying his former executorship.

[Ed. Note.—Cited in Fraser & Dill v. City Council of Charleston, 19 S. C. 403; Cook v. Cook, 24 S. C. 207.

For other cases, see Executors and Administrators, Cent. Dig. § 2593; Dec. Dig. ⊂⊃543.]

The plaintiff in this case, as the administrator of Robert May, filed his bill in the Court of Chancery for Colleton district, against the defendant, to set aside the sale of certain negroes, and for an account of their hire. At January Term, 1831, Chancellor De Saussure decreed the sale to be illegal and void, and ordered the negroes to be sold by the Commissioner, and that it be referred to him to examine and report the debts against Robert May. In pursuance of this order, the Commissioner sold the negroes, for an amount which, with the account for their hire, exceeded the debts. On the reference to ascertain the debts, a debt was claimed in favor of John King. To establish the debt, the record of a case in the Court of Common Pleas was produced, from which

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it appeared *that, in 1825, King brought suit against Margaret May, (the widow of Robert May,) and Edward C. Walker, (the present plaintiff,) as executrix and executor de son tort, on a promissory note for $200, payable on demand, and dated in 1817, and judgment was obtained and execution issued in 1827. Margaret May afterwards died, and in 1829, Edw'd C. Walker took out letters of administration on the estate of Robt. May, and it is admitted he is now insolvent. The Commissioner rejected the demand, on the ground that the note was barred by the statute of limitations in the life-time of Robt. May, and the judgment against his executors de son tort, he held was not valid, so as to re-establish it.

The creditor, King, claimed to have his debt paid out of the assets in the hands of the Court, and excepted to the Commissioners report, alleging error in his decision. At January Term 1834, Chancellor Johnston

over-ruled the exceptions, and confirmed the report, and from his decree an appeal was taken.

Dunkin, for the appellant, argued that the subsequent administration of Walker had relation back to the death of his intestate and legalized all his previous acts; and that he was estopped from denying the validity of the judgment. He cited and relied on 1 Com. Dig. 466, tit. Ex'ors & Adm'rs; 1 Esp. Dig. pt. 2, p. 91; 2 St. 1106, Vaughn v. Brown; 2 Vent. 180; 1 Com. Dig. 503; 8 John. 127; 1 Saund. 265, note 2.

Elmore, contra, cited Anderson v. Belcher, 1 Hill, 246. M'Neil v. Jones, Ib. 84.

HARPER, J. It appears to me that the only material question in the case is, whether the judgment obtained by John King against Margaret May and Edward C. Walker, as executors de son tort of Robert May, is valid as against Edward C. Walker, now adm'r. of Robert May, and binds the estate in his hands. It is agreed that Margaret May is dead, so that, in any point of view, Edward C. Walker, as survivor, is alone subject to be sued. If it be a valid judgment against the administrator, there can be no question respecting the statute of limitations.

I think the authorities referred to on the part of the appellant, sufficiently establish that it must be regarded as valid. The doc-

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*trine inferred from the case of Vaughan v. Brown (Str. 1105) is, that the grant of administration has relation back to the death of the intestate, and legalizes the intermediate acts of the administrator. In that case the defendant was sued as executor, and claimed to retain for a judgment from the deceased in his life-time to himself. It was replied that he was executor de son tort, and he rejoined administration granted to himself puis darrien continuance. So, in 1 Saund. 262, n. 2, it is said that a subsequent administration legalizes acts which were tortious at the time. The same doctrine is recognized in the case of Rattoon v. Overacker, 8 Johns. 97, and by this Court in Witt v. Elmore, 2 Bail. 595. In the latter case, it is said the effect of the rule is to legalize the acts done as executor de son tort, both for and against him. Suppose an action of debt to have been brought on the judgment against Edward C. Walker, as survivor, a recovery must have been had. Supposing it necessary to describe as executor, in conformity to the former judgment, he would have been estopped by the record to deny himself executor; and then suppose an execution issued on the last judgment and enforced the effects of the testator in his hands, how could the enforcement of that execution have been restrained? The administrator himself would have been estopped. He represents all creditors and distributees, and they are bound by his acts, unless in cases of fraud or collusion. The effects, in the present instance, are not in the hands of the administrator; but he is entitled to all funds of the estate until all debts are paid, nor until then can the distributees be entitled to anything. It is said, an executor is not bound to plead the statute of limitations. Toll. Law of Ex'rs. 343–429; Exparte Dewdney, 15 Ves. 498. However this may be, (and perhaps in some instances it may be questionable,) in this case he has not pleaded it; there is a judgment against him which binds him and the estate. If he has been guilty of a neglect of duty in this matter, the remedy of those interested in the estate must be against him on his official bond. The motion is therefore granted, and the exceptions sustained.

JOHNSON and O'NEALL, JJ., concurred.

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2 Hill, Eq. *25

*THE BANK v. the Executors of W. W. TRAPIER, and Others.

(Charleston. March, 1834.)

[*Judicial Sales* ⟸7.]

The Commissioner may under the order of the Court, make sales of land lying in another district.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 20; Dec. Dig. ⟸7.]

W. W. Trapier lived and died a resident of Georgetown district. His executor and some of his creditors and legatees are residents of that district; some of his creditors and legatees are resident in Charleston district. W. W. Trapier having mortgaged his plantation, the bill in this case was filed, and the proceedings were submitted to Chancellor De Saussure, by consent of parties, in May Term of the Court in Charleston, and an order was entered, also by consent of parties, that the mortgage should be foreclosed, and the mortgaged premises, sold in Georgetown in January, by James W. Gray, Esq. Commissioner in Equity for Charleston district.

A motion was made at the instance of Mr. Heriot, the Commissioner in Equity for Georgetown, before Chancellor De Saussure, to modify this order and direct the sale to be made by the Commissioner in Equity for Georgetown district, which motion was refused.

An appeal was taken from this decision, on the ground that the Act of Assembly of 1791 prescribes that the Commissioners of the several districts shall make the sales within those districts, and the consent of the suitors should not divest the relator of a privilege given him by law.

Dunkin, for the appellant.
Grimke, contra.

JOHNSON, J. There does not appear to me to be any reasonable foundation for this motion. By the Act of 1791, (1 Brev. Dig. Tit. Com. of Equity, sec. 41,) the Commissioners in Equity for the several districts are required to attend the sittings of the Courts, and to take and enter down the decrees, orders and minutes thereof, &c. "and shall make all sales under the decree of the said Court." It contains no reference to the place where the property is situated or found, and I can see nothing in the nature of the service which would restrict the authority of the Commissioner to that which is found or situate in his own district. On the contrary, there are many reasons why the sales should be made by the Commissioner of the Court in which the decree is entered. The returns of the sales and the accounts must

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be made there, and to that *Court its Commissioner is directly responsible for the manner in which he has discharged his duty.

The usage of the Court, spoken of by the Chancellor, is an irresistible argument in favour of this construction; and besides that, the consent of the parties is in itself conclusive. If they, themselves, thought proper to make a private agent to sell the property, the Court could not control them in it. They, at least, would be bound by his acts, and no one else is interested, whether he acts well or ill.

The motion is therefore dismissed.

O'NEALL and HARPER, JJ., concurred.

2 Hill, Eq. 26

MARY and A. M. SHERMAN v. JUSTUS ANGEL, Executor.

(Charleston, March, 1834.)

[*Executors and Administrators* ⇐487.]

On a bill against an executor to account for his administration, he will not be allowed a credit in making up the accounts, for a counsel fee paid by him in the case for litigating questions in which he was individually interested and which were decided against him; nor does it vary the case that some of the credits claimed by him, were contested and adjudged in his favor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2262; Dec. Dig. ⇐487.]

Bill for account. On the reference before the Master to make up the accounts, the defendant claimed a credit of two hundred dollars, as a counsel fee paid by him for litigating the question made in this case. The Master refused to allow it. Exception being taken to the report, Chancellor De Saussure sustained the exception, and an appeal was taken from his decision.

JOHNSON, J. There is certainly much good feeling in the view which the Chancellor has taken of this case, and if it was a case in which the Court could exercise any discretion, the defendant should have the benefit of it; but the rights of the parties appear to me to depend on a rule of right, over which the Court has no control. The defendant, by neglecting to make regular returns of his administration to the Ordinary, and to account with the plaintiffs, has rendered this suit necessary—the plaintiffs had no other means of coming at their rights. The principal litigation in the cause arose out of his claim to be paid for the board and lodging of the plaintiffs, and to be let into a distribution of the estate limited over to the children of his wife's mother, and both these claims were decided against him, and he now asks to be reimbursed money paid to counsel for vindicating these claims—and surely the Court would not be justified in

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compelling the plaintiffs to pay mo*ney which he has voluntarily given to another, to their prejudice rather than their advantage.

It is said that some litigation grew out of one of the credits claimed by the defendant in the account which was objected to by the plaintiffs, and which was adjudged for the defendant, and this is claimed as a ground on which the defendant ought to be reimbursed his expenses. The bill was for an account from the defendant, and it was not only his duty to render a correct account, but the right of the plaintiffs to contest every item, and insist on its being proved and substantiated according to the forms of law. They have not, therefore, been guilty of any wrong, and ought not to be charged with the errors or misfortunes of the defendant.

It is therefore Ordered that the decree of the Circuit Court be reversed, and that the report of the Master be affirmed and made the judgment of the Court.

HARPER, J. concurred.

Grimke, for the appellants.
Petigru, contra.

2 Hill, Eq. 27

UNION BANK v. A. V. TOOMER.

(Charleston, April, 1834.)

[*Fraudulent Conveyances* ⇐1.]

General rules for determining whether conveyances be fraudulent, and the cases on that subject considered.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[*Fraudulent Conveyances* ⇐162.]

When a consideration is paid in order to avoid the conveyance, the Court must be satisfied of an actual fraudulent intention, and the preponderance of authority seems to be, that the purchaser must be a party to the fraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 504, 505; Dec. Dig. ⇐162.]

[*Fraudulent Conveyances* ⟸155.]

S. H., being infirm and unable to manage her business, conveyed her land and most of her slaves to the defendant, he paying certain debts, (which after enquiry, were believed to be all she owed,) and an annuity for her life equal to the appraised value of the property deducting the debts: after the death of S. H. judgment was obtained against her executors on a bond executed by her as surety, and which existed before the conveyance: on a bill by the judgment creditor to set aside the conveyance on the ground of inadequacy of price & charging that it was fraudulent as to creditors: there being no evidence that the defendant knew of this debt, or that fraud was intended, it was held that the conveyance was valid.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 493; Dec. Dig. ⟸ 155.]

[*Fraudulent Conveyances* ⟸165.]

[Cited in Ryan v. Bull, 3 Strob. Eq. 93, to the point that, where the grantee has shown good faith, the validity of the conveyance is not affected by the fraudulent intent of the grantor.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 518; Dec. Dig. ⟸ 165.]

Charleston, May Term, 1833.—Before Chancellor De Saussure, who pronounced the following decree:

The object of the bill in this case is to have the benefit of a judgement at law, on a bond of the late Mrs. Sabina Hall, and for that purpose to set aside certain sales and conveyances of lands and negroes, made and executed by said Mrs. Hall, to Dr. Toomer, the defendant, prior to said judgment, on the ground of fraud and inadequacy of price. There were two distinct questions made at the argument of the cause, for the consideration of the Court. 1. It was insisted that the bond executed by Mrs. Hall to C. B. Cochran (on which the judgment has been obtained) and by him assigned to the Union Bank, as a security for a bond given by Jacint Laval to C. B. Cochran, and assigned to

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the Bank, *was obtained from her by imposition and practices on her weakness and confidence in Laval, and is not sustainable in a Court of Equity. 2. That if the bond and judgment thereon could be sustained, it would not affect the purchase made by Dr. Toomer, the defendant, from Mrs. Hall, which was bona fide, for valuable consideration, and without notice of the bond of Mrs. Hall.

Evidence to a great extent was given at the hearing of the cause, applicable to both branches of the case. [The Chancellor here went into an examination of the first question, and after remarking on the evidence, concludes that although the bond is not entirely free from the suspicion of being unfairly obtained, yet, as a judgment at law has been obtained on it, and the executors of Mrs. Hall are not parties to this case seeking to set aside the judgment, he was bound to regard it as valid.—and then proceeds:]

The second question is, whether the Court will set aside the conveyances of real and personal estate, made by Mrs. Hall to Dr. Toomer, the defendant, to let in the plaintiff and subject that property to the payment of the bond of Mrs. Hall. The plaintiff does not pretend that there was any lien on the property conveyed to Toomer: no judgment was obtained on the bond until some time after the sale and conveyance to Toomer. There is no proof that the purchase was made by Toomer to aid Mrs. Hall in protecting the property in question against her liability on this bond in particular; it does not appear that he knew of the existence of this bond. The question then is—Was this such a conveyance by Mrs. Hall to Toomer, as was fraudulent and void as to creditors? The circumstances of the case were these: Mrs. Hall, a widow lady, advanced in life, of infirm health, not skilled in the management of property, being desirous of paying some debts and having a certain regular income, applied to Dr. Toomer to be the purchaser of her lands, and the greater part of her slaves, (reserving twenty.) He was the son of her first husband by his first wife: part of the estate was derived from his kindness to her. —Dr. T. had behaved so properly, respectfully and usefully to her, that she had great regard for him, and she confided in his kind treatment of the slaves she was about to sell, about which she was solicitous. Undoubtedly, though a transaction in which she wish[illegible] to get a fair value for the property, there w[illegible] a feeling of kindness towards Dr. Toomer, mingling itself in the transaction; but it was considered a business transaction, in which

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fair dealing *was to be observed. Dr. Toomer hesitated and came into the measure slowly and apparently with reluctance. When he acquiesced, appraisers of the property were named: forty-eight negroes and the land (the latter, it seemed, was thrown in at a nominal price) were appraised about $19,000. On the basis of their estimate a contract was made. Respectable counsel were employed on the part of Mrs. Hall to attend to her interests, and indeed everything was done which caution and a determination that the transaction should be well considered and fairly conducted, required. There is no doubt of the fairness of the transaction, and Mrs. Hall, though infirm and weak, was more competent, with the aid of counsel and good appraisers, to form a sound opinion on a subject proposed by herself without solicitation of Dr. Toomer, and the papers deliberately read to her, in a case where she was to get a valuable consideration, than she was to bind herself without consideration, as a surety for a large debt, without the advice or presence of any friends, (who were carefully avoided,) and for which her estate has been held to be bound. Hav-

ing ascertained that the business of the sale to Toomer was conducted fairly and deliberately, and with full knowledge on the part of Mrs. Hall, the only question which remains for consideration is, whether the price was fair and adequate.

On this question the decided cases have made or sustained certain clear principles. The absolute right of an owner of property is such, that he may give it away, without any valuable consideration, if he choose to do so, without prejudice to the rights of creditors, and so he may choose to sell it for a price short of its real value, and no person has authority to question his acts and dispositions. The adequacy or inadequacy of price is a question for his own decision, and he may at his pleasure permit considerations of favor and kindness to mingle in the transaction. In a sale, this power of an owner is so complete that inadequacy of price alone is not considered sufficient to set aside a sale, unless the inadequacy be so enormous as to shock the common sense and the common feeling of right among men, when it then raises the presumption of fraud; or unless the transaction itself be accompanied by such circumstances as show great imbecility or ignorance on the one side, and contrivance and fraud on the other. In the case before us, there are no such circumstances to lead the mind even to suspect fraud or imposition. As to the price, it seems to be fair. The

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*payment of considerable debts, by a schedule furnished by Mrs. Hall, after diligent enquiry by herself and her friends, to the amount of upwards of $4,000, and the stipulation to pay her an annuity of $1,060 during her life, actually placed her in a more eligible situation that she was before, and made her more easy and comfortable.

The annuity was paid during her life, which lasted six years, and made an amount which, with the debts of Mrs. H. assumed and paid by Dr. T., made it a fair price and reasonable bargain. It was true, as was urged on the argument, that Mrs. H. might have died within a year, or a shorter time after the contract, when little or nothing had been paid on the annuity, and then the price of the estate sold would have been very low. But it is equally true, that Mrs. H. might have lived twenty years, and then the price paid would have been very high. Both parties ran this risk, and it formed part of their contract. There is, then, no ground to impeach the fairness of the sale to Toomer, and as his purchase was made and completed before any lien had been obtained by C. B. Cochran or the Union Bank, by judgment on her bond, it is not subject to the subsequent judgment. It is therefore Ordered and decreed, that the bill of the plaintiff be dismissed with costs of suit.

An appeal was taken from this decree, on the grounds:

1. That the conveyance of the property by Mrs. Hall to Dr. Toomer, for a life annuity, was not a sale for a valuable consideration, as against a bond creditor existing at the time of the conveyance.

2. That such a deed is void by the Stat. 13 Eliz., made for the relief and protection of creditors.

3. That Mrs. Hall, taking back an annuity to the annual value of the estate, with security on the property itself for its payment annually, was tantamount to a continuance in possession, a circumstance which entitles creditors to relief in Chancery.

Dunkin, for the appellant.
Petigru, contra.

HARPER, J. We do not think it necessary to investigate the first general question made in the Chancellor's decree respecting the validity of the bond executed by the deceased Mrs. Hall to Cochrau for the security of

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Laval's debt, on which the plaintiffs *have obtained judgment. Admitting it to be valid, we do not think that the conveyance by Mrs. Hall to the defendant can be impeached.

The general rules of law on the subject cannot be questioned. Under the Stat. 13 Eliz. C. 5., as well as at common law, a conveyance made by a person indebted, with intent to defraud his creditors, is void. With respect to the circumstances, however, which shall be sufficient evidence of the fraudulent intention, there is a diversity. If a conveyance merely voluntary be made by a person indebted, this has generally been held sufficient of itself, to establish the fraudulent character of the conveyance. But, if it be upon consideration, and even upon full and adequate consideration, as in Lowry v. Pinson, 2 Bail. 324, [23 Am. Dec. 140,] still, if it appear that it was with the actual fraudulent intention to defeat creditors, it will still be void. If it was upon very inadequate consideration, this will be one of the circumstances from which the actual fraudulent intention may be inferred. But, however inadequate the consideration, if the transaction be bona fide, it cannot be impeached. This seems to be the sum of the authorities on the subject.

This would appear from the proviso in the Stat. 13 Eliz., that nothing therein contained shall extend to any conveyance made "upon good consideration and bona fide," to any persons "not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin fraud or collusion, as is aforesaid." In the case of Basset v. Nosworthy, Finch. Ch. R. 182, which was determined on the plea of bona fide purchaser for valuable consideration without notice, it appeared that the purchase was made at a very inadequate price.

Lord Nottingham said, the question is not whether the consideration be adequate, but whether it is valuable. This is not inconsistent with Russell v. Hammond, 1 Atk. 15. Three deeds were executed in one day. For one of them a consideration of two hundred pounds was shown; for the second, a consideration of one hundred pounds; for the last, no consideration appeared. Lord Hardwicke thought the last voluntary, though it was urged that all formed one transaction, and that it was inartificial to split them. He thought, however, the fact that the donor had reserved an annuity equal to the probable income for his own life, palpable evidence of fraud. This showed the transaction to be merely colourable, the donor being much indebted at the time. In Doe v.

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Routledge, Cowper, 705, a person *not indebted, had made a voluntary conveyance. Desiring afterwards to defeat this, he made a nominal sale of the same premises at about one tenth of the value. It appeared that the last grantee knew of the former conveyance. Lord Mansfield held the first conveyance good, and of the last, said that it should be a bona fide transaction, and a fair purchase in the understanding of mankind; but it was manifestly a mere contrivance, and therefore void. In Stephens v. Olive, 2 Br. C. C. 90, the trustees of the wife having covenanted to indemnify the husband against the wife's debts, this was held a sufficient consideration for the settlement on her. And so in Nunn v. Wilsmore, 8 T. R. 521, where it is said the Court is not particular as to consideration, if it be bona fide. The whole subject is very fully considered in Copes v. Middleton, 2 Mad. Ch. R. 556, and the cases reviewed. In that case, an uncle, insolvent in his circumstances, shortly before his death conveyed to his nephew an estate, for a consideration which, according to the testimony, appeared to be about half its value. This was sustained, as from the circumstances it did not appear but that the transaction was bona fide; though the uncle's kindness to his nephew might be supposed to have had an influence in inducing him to sell at a lower price. It is said a conveyance cannot be invalidated under the statute 13 Eliz., if the defendant be a bona fide purchaser. Was it known to vendor and vendee, that the estate was worth more than it was sold for? It did not appear that the nephew knew the uncle to be indebted. In Sands v. Hildeith, 14 Johns. 493, the opinion of Chief Justice Spencer was expressed, that where there is a consideration, though the intention of the vendor may have been fraudulent, yet, under the statute of Elizabeth, the conveyance is not void unless the purchaser were a party to the fraud; contrary to an intimation of opinion in the same case given by Chancellor Kent, who afterwards (3 Johns. C. C. 378) assented to the suggestion of Justice Spencer.

The cases show sufficiently, that where a consideration is paid, in order to avoid the conveyance, the Court must be satisfied of an actual fraudulent intention to defeat creditors, and in general the preponderance of authority seems to be that the purchaser must be a party to the fraud, notwithstanding what is said by Lord Northington in Patridge v. Gopp, Amb. 596, that it is the motive

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of the *giver, and not the knowledge of the acceptor, that is to weigh. Now, it is not even contended in the present case that the defendant was a partaker of any actual fraudulent intention, and indeed hardly urged that Mrs. Hall had any such intent. The Court can see no reason to impute such intention to either.

It is urged, however, that this, though in form a sale, made upon consideration, was in fact merely a gift. But this is the very question that has been considered throughout. It was in form a sale; money was paid: Was it such substantially and bona fide, or only a contrivance to provide for the defendant at the expense of creditors? The transaction was this: Forty-eight slaves, appraised at about nineteen thousand dollars, and some land of the value of which we have no very distinct evidence (a consideration of five thousand dollars, is stated in the deed,) were conveyed by Mrs. Hall to the defendant. He, in return, gave her his bond, conditioned to pay off her debts specified in a schedule to the amount of upwards of four thousand dollars, and the grant of an annuity for life of one thousand and sixty dollars. This annuity is equal to the legal interest on the estimated value of the slaves, deducting the amount of the debts. It is urged that it is merely a gift under colour of a sale, as if Mrs. Hall had conveyed the property to him in trust, first to pay off certain of her debts, next to pay the rents and profits to herself during life, with remainder to himself after her death; or, as if she had conveyed to him charged with the payment of part of her debts and an annuity of one thousand and sixty dollars, for her life. But by this method of reasoning, every sale of property at an undervalue might be construed a gift of the surplus. There is nothing to forbid a sale for an annuity, any more than for money in hand. The distinction between the cases supposed, and the present, is this: In those cases there is not even a colourable consideration moving from the grantor to the grantee. If the estate should not be sufficient to pay the debts, or, if after payment of the debts, the income should not produce the annuity, the grantee would incur no personal liability. He would lose nothing in any event. If it should be more than sufficient for these purposes, the surplus would be a mere gratuity to him. But in the case before us, if the estate by any

unexpected casualty had perished, the defendant would have been personally liable for the debts, and must have paid the annuity, though the estate had not produced a cent of income. The payment of the debts

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and the annuity were *plainly regarded as the consideration both for the slaves and the land, and they formed one transaction. No doubt such a transaction might be merely colourable and fraudulent, as in the case of Russell v. Hammond, where Lord Hardwicke, upon the defendant's proof of the consideration of two of the deeds, held the third, executed on the same day, to be voluntary, and the reserving of an annuity to the annual value of the estate to be a badge of fraud. But in every case, the enquiry is, whether it be actually so. In general, I should say, that if a person greatly indebted and knowing himself to be so, should convey his whole property on a greatly inadequate consideration, perhaps such a one as the present, with no ostensible motive but to provide for his family, to one who might be inferred to have knowledge of the circumstances, this would be regarded as colourable and void. But what are the circumstances of the present case? The defendant took the utmost pains to be informed of all the debts of Mrs. Hall and provided for their payment, and he seems to have been unaffectedly reluctant to enter into the transaction at all. But, as I have said, no actual fraud is imputed to him. Then with regard to Mrs. Hall, she had the most urgent and substantial motives to make this arrangement, arising from her infirmity and imbecility to manage her property so as to make it produce her a support, and was prompted and urged to it by her confidential friends. There is great reason to doubt whether at the time she knew or recollected the existence of this debt. She retained twenty slaves, which, if estimated at the prices at which the others were appraised, would have been sufficient to pay the debt; and if they had proved insufficient, her annuity might have been made liable, subjecting her to the most cruel embarrassment. Some of the slaves retained were favorite ones, whom she desired to emancipate, and which, of all her property, it should seem, she would have been most unwilling to render liable to be taken and sold for her debts. She was anxious for the comfort of her slaves, and had confidence in the defendant's kind treatment of them. Under these circumstances, it seems to me that it would be extravagant to impute her conduct to the fraudulent motive of defeating the payment of this debt. We must regard the defendant as a bona fide purchaser for valuable consideration.

The decree is affirmed.

JOHNSON, J., concurred.

2 Hill, Eq. *35

*ELIZABETH PARKER, Executrix of Isaac Parker, v. The Creditors of ISAAC PARKER.

[In the matter of Col. DRAYTON.]

(Charleston. April, 1834.)

[*Garnishment* ⟸175, 187.]

The garnishee dying pending the proceedings, a judgment entered up against him after his death is irregular, and may be set aside at law: and if the executors appeared and consented to the trial, at most it could only be regarded as a judgment against them, and not rank as a judgment against the garnishee, so as to give priority over other creditors who had not obtained judgment in his lifetime.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 315, 359; Dec. Dig. ⟸175, 187.]

[*Garnishment* ⟸106.]

By the Attachment Act things capable of being identified, such as specific chattels and evidences of debts, are bound by the levy so that the garnishee cannot after service deliver them to the owner, or any one else, without being liable for their value; and in this sense, the attachment is said to have a lien from the time of its being levied: but, in the case of a debt due by the garnishee to the absent debtor, it is incapable of being identified specifically as his estate, the service of the attachment creates no general lien on the estate of the garnishee; and the only way the money so due can be bound is, that by the service of the attachment the garnishee is, to the extent of his debt, made the debtor of the plaintiff, but no lien exists against him until judgment is actually entered against him.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 215; Dec. Dig. ⟸106.]

De Saussure, Chancellor. In this case, the Master has made a report, which states the questions clearly, to which the solicitors on the part of the creditors of Isaac Parker have filed exceptions.

The following is the report of the Master: "That in the distribution of the funds in this case, a question arises as to a claim on the part of Col. Drayton, under the following circumstances: On the 1st September, 1808, Col. Drayton became the surety of John Parker, in a bond to John King, conditioned for the payment of $750. On the 20th October, 1808, John King assigned the bond to Jacob Martin. As a counter-security to Col. Drayton, the said John Parker deposited with him the bond of his brother, Isaac Parker, for $2,586, dated 17th May, 1811. About ——— Jacob Martin, assignee of John King, sued out a writ of attachment against John Parker, a copy of which was served on Isaac Parker, for the purpose of attaching in his hands the amount supposed to be due on his bond to John Parker. Isaac Parker made his return as garnishee, stating that he had no monies of John Parker in his hands, and that the bond in which he was bound to him was paid. On this return an issue was made up, which was not tried in the life-time of Isaac Parker. Testimony had been taken, however, and when judgement was entered up against John Par-

ker, the absent debtor, a verdict was also taken against Isaac Parker, and judgement entered against him on the 19th June, 1824, which was subsequent to his death. Colonel Drayton having paid the bond held by Martin, as assignee of King, claims the benefit of Martin's proceedings against Isaac Parker, which have been duly assigned to him. It is objected to this claim, that the judgement entered upon the verdict taken after the death of Isaac Parker, is irregular, and that this claim cannot rank as a judgement debt against the estate; and urged in its behalf that the attaching creditors obtained a lien on the funds of the absent debtor, in the hands of the garnishee, which is not defeated by the death of the latter.

"It appears to me, however, (says the report,) that the claim in this case cannot rank as a judgement so far as the question de-

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*pends on the Act of 1744, called the Attachment Act. The object of that Act is not to operate on the estate of the garnishee, but on that of the absent debtor. The effect of it, is not to give the attaching creditor a lien on the estate of the garnishee for the amount of funds which he may have in his hands belonging to the absent debtor, but only to take such funds from under the control of the absent debtor, and entitle the creditor to payment ont of them, and in preference to the other creditors. The death of the garnishee may not affect this right or preference obtained by the issuing of the writ of attachment, so far as the absent debtor or his creditors are concerned; but, as respects the garnishee and his estate, it appears to me that the proceedings are arrested by his death, and that it would be necessary to bring his representative into Court, by proper process, before any further proceedings could be had, intended to operate on the interests of the estate of the garnishee. It seems such proceedings were not had in this case, and therefore, when this judgement was entered, Mr. Parker being dead, there was no party in Court against whom it could be rendered.

"The executrix now contends that there is nothing due from the estate of Isaac Parker, on his bond to John Parker: but I have not entered into an investigation of that. The above view is altogether independent of the question, whether a court of law will set aside this judgment, which is actually of record."

To this report the following exceptions were filed: 1. Because the Master has rejected the proof of the judgement of Jacob Martin v. Isaac Parker, whereas it is submitted, that as the proceedings against John Parker did not abate by the death of Isaac Parker, the judgement was properly entered up after his decease. 2. That the lien of the attachment was not lost by the death of Isaac Parker, and that the judgement of Jacob Martin, though it cannot by relation defeat purchasers or intervening judgements, is good against the executors and general creditors of the said Isaac Parker.

The questions which arose in this able report were argued, and I am now to decide on them. It was admitted, that the death of the garnishee in attachment does not abate the suit by attachment, nor the death of the absent debtor. This, I apprehend, must be on the ground that the proceedings in attachment are in the nature of proceedings in rem, and therefore not abateable by the

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death of *the absent debtor or garnishee. The counsel, however, made a distinction, by which he endeavored to weaken the force of the admission, insisting that, though the death of the garnishee will not abate the suit by attachment against the absent debtor, it will stop proceedings against the estate of the garnishee. The remedy by attachment, given by statute to the creditor, is so anomalous and so different from the course of proceedings under the common law, that scarcely any light can be derived from the rules of the latter; and it would seem, that when the statute gives such a remedy, all that is necessary to give it complete effect, follows in its train. I am not, however, decided in any opinion on this question. I lean very much to the opinion of the Master in his report; but will sustain the first exception to the report, with a view to its being carried up to the Appeal Court.

The second exception I also sustain, for the reasons, and with the qualification stated therein; to which should be added, that the application to set aside the judgment in question should have been in the Court of law, there being no pretence of fraud in obtaining it, on which this Court could have interfered.

It is therefore Ordered that the exceptions be sustained, and the report of the Master modified accordingly.

From this decree an appeal was taken on the following grounds:

1. Because a proceeding in attachment is not a proceeding in rem, but a proceeding in personam, the quasi in rem being in the nature of a distringas to compel an appearance.

2. That although the death of Isaac Parker, the garnishee, did not abate the proceedings as against John Parker, the absent debtor, yet that his death did abate all proceedings as against him, just as much as if John Parker had brought suit against him on the bond, alleging it to be unpaid, and Isaac Parker having pleaded payment, had died before verdict pending the cause for trial.

3. That this is not a case in which one

Court is prohibited from examining collaterally the judgement of another independent tribunal, but is a case in which, on the face of the record, the absolute nullity thereof is apparent, and is therefore a clear case of a palpable defect of jurisdiction.

4. That the issue on the verdict upon which judgement was entered against Isaac Parker, was a mere collateral issue to try the question, under a feigned issue, whether Isaac Parker had in his hands funds of the absent debtor; that, upon the finding no

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*judgement could regularly be entered: that the effect merely was, that Isaac Parker was compellable to amend his return and deliver up the bond: that the proceeding was not in the nature of a debt on bond: that no judgement for the debt could be entered on the finding: that the bond did not pass in rem judicatam, but was to be delivered to the attaching creditor to be sued in due form.

Grimke, for the appellant.
Petigru, contra.

HARPER, J. So far as the claim to rank as a judgment creditor of the estate of Isaac Parker, depends on the judgment entered up against Isaac Parker after his death, regarding it in the light of any other judgment entered in like manner against a deceased defendant, we think it cannot avail the claimant. The brief merely states the fact, that the judgement was entered after the death of Isaac Parker. If so, undoubtedly it was erroneous, and might be set aside at law. Though the death of a garnishee does not abate the proceeding in attachment, yet undoubtedly the plaintiff, when an issue is depending, ought not to proceed to trial and judgement without bringing in the executors. The proper method of doing this, I suppose, would be by a scire facias. In the present case, it was stated in argument that the executors had appeared and consented to the trial, and from this it seemed to be inferred that the executors would be estopped from any proceeding to set aside the judgement. No other person than the executors would proceed at law for that purpose. Standing as a judgement against the deceased himself, it would have priority against all creditors who had not obtained judgement in his life time, and if this preference were obtained by the act and laches of the executors, they would be liable to the other creditors as for a devastavit. But I cannot take this view of the matter. The voluntary appearance of the executors amounted to no more than if they had appeared upon a scire facias. They consented to go to trial, and I must suppose that the proper judgement should be entered. If an improper judgement was entered, I see nothing to estop the executors from setting it aside at law. A judgement against the executors would entitle the plaintiff to no priority, and this, at all events in Equity and in a contest between creditors, cannot be regarded as anything more. I do not understand it to be contended that the executors ought to be made personally liable.

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*But even regarding it merely as a judgment against the executors, it is contended that it must have relation to the serving of the attachment on the garnishee, and bind his estate from that time. The Attachment Act, after providing for the issuing of the writ "to attach monies, goods, chattels, debts and books of accompt, belonging to the absent debtor, in the hands of any person or persons whatsoever," adds "and the attaching any part thereof in the name of the whole that is in such person's hands, power or possession, shall secure and make the whole liable in law, to answer any judgement that shall be recovered and awarded upon that process." The attaching of "monies" in the hands of the garnishee, has always been held to refer to a debt due by the garnishee to the absent debtor, and without this construction there is no provision in the Act for attaching such debt. But how are these monies to be secured and made liable to answer the judgment? If there were in the hands of the garnishee any specific chattels of the absent debtor, such as a horse or a slave, or the evidences of debts due to him, such as bonds, notes or books of account, they would be so bound that the garnishee could not, after service of the attachment, deliver them to the owner or to any one else without making himself liable for the value. Or, perhaps the plaintiff might follow them in the hands of any one into whose possession they might afterwards come. If the garnishee should die, and these chattels should come into the possession of his executors, they would be compelled by the Court to deliver them up to the plaintiff in attachment who should afterwards recover a judgment. It is in this sense that the attachment is said to have a lien from the time of its being levied. But these are things which are capable of being identified and distinguished. They constitute no part of the deceased garnishee's estate, nor are liable to his creditors. But this creates no lien on the general estate of the garnishee, nor is the plaintiff in attachment ranked as a creditor of his, though he might become a creditor if the articles attached should not be forthcoming. But in the case of monies in the garnishee's hands, in consequence of a debt due by him to the absent debtor, how are these to be secured and made liable? They are not capable of being identified. There is no specific money which you can direct the executors to pay over to the plaintiff. There is no general lien on the garnishee's estate. I can

conceive no other way in which these can be said to be bound, but this: that after the at-

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tachment *levied, the garnishee is not at liberty to pay the debt to his creditor, or to any one authorized by him to receive it, and if he does so, he will still be liable to the plaintiff in attachment who shall afterwards recover a judgment. By the serving of the attachment, the garnishee who owes the absent debtor, is made the debtor of the plaintiff who shall afterwards recover judgment, but he is not the judgment debtor, until judgment is actually entered against him.

It is ordered and decreed that the decree of the Chancellor be reversed, and the Master's report confirmed.

JOHNSON, J., concurred.

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA, IN MAY AND JUNE 1834.

JUDGES PRESENT.

HON. DAVID JOHNSON, President.
" J. B. O'NEALL.
" WM. HARPER.

*JOHN CONNER, Administrator, and Others, v. ROB'T JOHNSON, Administrator, and Others.

(Columbia. May, 1834.)

[*Wills* ⇐525.]

Devise to several ascertained individuals, and to a class of individuals to be ascertained on some future event, that class will take a share equal to that of each of the ascertained individuals, and no more.

[Ed. Note.—Cited in Archer v. Munday, 17 S. C. 90; Lott v. Thompson, 36 S. C. 45, 15 S. E. 278; Tindal v. Neal, 59 S. C. 16, 36 S. E. 1004; Logan v. Cassidy, 71 S. C. 205, 50 S. E. 794.

For other cases, see Wills, Cent. Dig. §§ 1129–1139; Dec. Dig. ⇐525.]

[*Wills* ⇐524, 531.]

Testator devised that "after the death of his wife," his estate should be given to seven persons by name, and to the children of E. C.—*Held*, that the persons named took each, one eighth part of the estate, and the children of E. C. living at the death of the tenant for life, the remaining eighth—and that no estate vested in any of the children of E. C. who died before the period of distribution (the death of the tenant for life,) so as to be transmissible to their personal representatives.

[Ed. Note.—Cited in Archer v. Munday, 17 S. C. 90; Gourdin v. Deas, 27 S. C. 486, 487, 4 S. E. 64; Lott v. Thompson, 36 S. C. 45, 15 S. E. 278; Brown v. McCall, 44 S. C. 514, 515, 22 S. E. 823; Tindal v. Neal, 59 S. C. 16, 36 S. E. 1004; Logan v. Cassidy, 71 S. C. 205, 50 S. E. 794; Tindal v. Richbourg, 91 S. C. 410, 74 S. E. 932.

For other cases, see Wills, Cent. Dig. §§ 1122, 1150; Dec. Dig. ⇐524, 531.]

[*Wills* ⇐529.]

[Cited in Perdrian v. Wells, 5 Rich. Eq. 27; Dupont v. Hutchinson, 10 Rich. Eq. 2; Rogers v. Morrell, 82 S. C. 404, 64 S. E. 113, 129 Am. St. Rep. 899, to the point that in a devise to one designated by name and to others designated as a class all individuals take equally and per capita.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1142; Dec. Dig. ⇐529.]

[*Wills* ⇐622.]

[A testator devised property to his wife for life, then to be divided between seven persons, naming them, "and the children of E. C." *Held*, that the children of E. C. did not, in respect to each other, take a fund devised in remainder.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1440; Dec. Dig. ⇐622.]

Orangeburgh, January, 1831.—Before Chancellor De Saussure.

This bill was filed by John Conner, as administrator de bonis non and with the will annexed, of Jacob Whiteman, and as pro. ami of Clarissa and Joel Rhode, William, Mildred and Jefferson Conner, infant children of Elizabeth Conner, formerly Elizabeth Carn, and called by that name in the will of Jacob Whiteman. The bill originally embraced many objects and several defendants, but all the points in controversy have been finally adjusted except one, which arises under the following state of facts: Jacob Whiteman died in 1810, leaving a will, by which he devised his whole estate. To his widow Elizabeth, the bulk of it was given for life. After disposing of various portions of

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it, the last clause, under which arises *the question now made for this Court, is presented in the following words: "Item—and my will is, that after the death of my wife, the tract of land on Indian Camp, and all the rest of my estate not otherwise disposed of, shall be equally divided between David Rees and Daniel and Jacob Utesey, sons of Jacob Utesey, and David and Isaac and Ann Utesey, children of George Utesey, and Jacob Carn

and the children of Elizabeth Carn, (afterwards Elizabeth Rhode and now Elizabeth Conner,) children and grand children of Frederick Carn; and whereas I have made four different parts of families my heirs, my will and desire is, that if any of them should die with (meaning without) issue, then and in that case, his or her share shall be equally divided between my adopted heirs of the same family."

Of one of these families, Daniel Utesey died after the testator and before the tenant for life, leaving no issue. Of another family, Jacob Carn died without issue, after the testator and before the tenant for life. And Elizabeth Carn, named in the will, was his sister, and was then married to one Christian Rhode. She had then alive one child named Daniel G. Rhode, who afterwards died an infant and before the tenant for life. She also had alive at the death of Mrs. Whiteman, the tenant for life, five other children; two by the first husband, named Clarissa and Joel Rhode, and three by the plaintiff, John Conner, named William, Mildred and Jefferson Conner. The bill claimed for these five children, each, one equal share of the estate, and also two other shares, one in right of their uncle Jacob Carn, and one in right of their brother, Daniel G. Rhode: and also submitted that Jacob Utesey having survived his brother Daniel, is entitled to two distributive shares. For the defendants it was contended, that these families took each one fourth of the residue, and not per capita. Or, to make the distinction more palpable, the plaintiffs contend that this portion of the estate shall be divided into thirteen shares, and claim, as the children of Elizabeth Carn, seven thirteenths. The defendants contend that it is to be divided into four shares, and the plaintiffs receive only one fourth. In deciding this part of the case, Chancellor De Saussure says: "Some of the remainder men died without leaving issue. A question was raised, who were entitled under the will to their shares." And after copying the clause, as set out above, proceeds: "It is a very obscurely drawn will, yet I think that the intention is

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plain enough in this case. He meant *that each of those four parts of (distinct) families, as he calls them, should take the share of any one of the members of each family dying without issue. Thus, as Daniel Utesey and Jacob Utesey formed one of these stocks, on the death of Daniel without issue, Jacob is to take his share. So as Jacob Carn was one of these four stocks, when he died without issue, the other members of that stock became entitled to his share."

From this part of the decree the plaintiffs appeal, on the grounds: That the remainder men took per capita and that the children of Elizabeth Carn (now Conner) are entitled to seven thirteenths of the estate instead of one fourth, to wit: to five thirteenths in their own immediate right—to one thirteenth through their uncle, Jacob Carn, and one other thirteenth through their deceased brother, Daniel G. Rhode.

Elmore, for the appellant, cited 3 Br. Ch. C. 367; 1 P. W. 340; 2 P. W. 383; 2 Vern. 705; Forrest 251; 1 Br. C. C. 31; 3 Br. C. C. 64.

HARPER, J. I shall first consider the case on the words of the will, which follow: "Item, and my will is, that after the death of my wife, the tract of land on Indian Camp, and all the rest of my estate not otherwise disposed of, shall be equally divided between David Rees, and Daniel and Jacob Utesey, sons of Jacob Utesey, and David and Isaac and Ann Utesey, children of George Utesey, and Jacob Carn, and the children of Elizabeth Carn, (afterwards Elizabeth Rhode and now Elizabeth Conner,) children and grand children of Frederick Carn."

I consider it to be very well settled, that if there be a devise to an individual designated by name, and to other individuals designated as a class, as to A and the children of B; or if it be to the children of A and the children of B, all the individuals take equally, and per capita. So, if the devise be to next of kin, they will take per capita, and not per stirpes. Blackler v. Webb, 2 Pr. Wms. 383; Northey v. Strange, 1 Pr. Wms. 340; Green v. Howard, 1 Br. C. C. 31; Phipps v. Garth, 3 Br. C. C. 64; Butler v. Stratton, 3 Br. C. C. 369. But in the case of Cole v. Creyon, (1 Hill Ch. 311,) decided by this Court, after a good deal of consideration, in May 1833, it was held that an exception must be made, and that "if there be a bequest to an ascertained individual, and

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to a class of unascertained indi*viduals, (to be ascertained at any future time after the death of the testator,) it vests one half in the said individual, and the other half in the individuals of the class collectively, when they are ascertained." It follows from the principles of that decision, that if there be a devise to several ascertained individuals and a class of unascertained individuals, to be ascertained on a future event, that class will take a share equal to that of each of the ascertained individuals and no more; they taking the residue jointly. It depends on this, that the different interests must vest at different times. The shares of the ascertained individuals must vest at the death of the testator; that of the unascertained individuals, cannot vest until the event happens by which they are to be determined, and upon any other construction it would be impossible to determine what interest did vest at the testator's death. That case like the present, was a devise to the testator's wife for life, and after her death to be divided between Alexander Creyon, and the children of Elizabeth Cole, who was still living. In Justice Windham's case, (5 Rep. 8,)

It is said that joint words shall be taken severally "sometimes in respect that the grant cannot take effect but at several times, as 24. E. 3. 29. a. a remainder limited to the right heirs of J. S. and J. N. (J. S. and J. N. being alive,) in which case the words are joint, and yet the heirs shall take severally." This is on the ground of the property's vesting at different times. The heirs of J. S. and J. N. cannot be ascertained till their deaths, for nemo hæres viventis, and it is not to be supposed that they will die at the same time. Mr. Preston, in his treatise on Estates, (2 vol. p. 20,) refers to this case, and as an inference from that and other cases mentioned, says: (p. 22.) "A grant may be given to the right heirs of three persons, of whom two are dead and one is living: No determination which occurs has settled the quality of the estates which shall pass by a gift under these circumstances. From principle it should seem, that the right heirs of the person who is living would have one third part separately to themselves, and that the heirs of the two deceased persons would be joint tenants of the remaining two third parts."

In the case before us, there were at the death of the testator seven persons designated and certain, to whom the estate was given

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*after the death of his wife, and whose interests necessarily vested, and a class of persons who could not be ascertained till the death of the tenant for life, nor their interests vest till then. It is clear that all the children of Elizabeth Carn, born before the period of distribution would be entitled to take; and in the same case of Cole and Creyon, we have held that the property did not so vest in any of the children of Elizabeth Carn, who died in the life time of the tenant for life, as to be transmissible to their personal representatives. Their interest was contingent until the death of the tenant for life. It results from these principles, that at the testator's death, the seven designated persons, David Rees, Daniel Utesey, Jacob Utesey, David Utesey, Isaac Utesey, Ann Utesey and Jacob Carn, took under the words of the will which I have quoted, seven eighths of the estate as joint tenants, and one eighth remained for the children of Elizabeth Carn who should be living at the death of the tenant for life.

Nor do I think the words of the will which follow, can produce any different effect: "And whereas I have made four different parts of families my heirs, my will and desire is, that if any of them die without issue, then and in that case, his or her share shall be equally divided between my adopted heirs of the same family." There is nothing inconsistent in the devisees' taking in the manner which I have indicated, and the limitation of the interest of each to the survivors of the same family.

The will speaks of four families. I suppose that David Rees, though of a different name, was of the same family with Daniel Utesey and Jacob Utesey, as Jacob Carn is clearly pointed out to be of the same family with the children of Elizabeth Carn. If so, upon the death of Daniel Utesey, his share accrued to David Rees and Jacob Utesey. If they were not in any manner of the same family, then to Jacob Utesey alone. The fact may be inquired of by the Commissioner.

It follows from what I have said, that the plaintiffs, children of Elizabeth Carn, are entitled to one eighth of the estate under the devise to them, and one eighth in right of their uncle Jacob Carn. And it is Ordered and decreed, that the decree of the Chancellor be modified accordingly.

JOHNSON and O'NEAL, JJ., concurred.

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2 Hill, Eq. *46

*JESSE GORDON, Administrator, v. SARAH W. STEVENS.

(Columbia. May, 1834.)

[*Wills* ⇐782.]

To exclude the right of dower, the intent must appear by express words, or by clear and manifest implication.

[Ed. Note.—Cited in Wilson v. Hayne, Cheves, Eq. 40; Brown v. Caldwell, Speers, Eq. 325; Shelton v. Shelton, 20 S. C. 565, 566; Hair v. Goldsmith, 22 S. C. 573; Bannister v. Bannister, 37 S. C. 531, 16 S. E. 612; Otts v. Otts, 80 S. C. 20, 61 S. E. 109; Scott v. Vaughn, 83 S. C. 365, 366, 65 S. E. 269.

For other cases, see Wills, Cent. Dig. §§ 2018–2033; Dec. Dig. ⇐782.]

[*Wills* ⇐782.]

A devise of lands to trustees to sell, or with directions to executors to sell, passes the estate subject to dower:—and where the testator bequeathed to his wife all the property which he obtained by her in marriage, and directs that his estate be sold to pay his debts and provide for his children:—*Held*, that the wife was entitled to dower, notwithstanding she accepted the legacy, and that the sale of the land must be subject to that right.

[Ed. Note.—Cited in Brown v. Caldwell, Speers, Eq. 325; Sumerel v. Sumerel, 34 S. C. 89, 12 S. E. 932; Otts v. Otts, 80 S. C. 20, 61 S. E. 109; Scott v. Vaughn, 83 S. C. 365, 366, 65 S. E. 269.

For other cases, see Wills, Cent. Dig. § 2020; Dec. Dig. ⇐782.]

Heard before Chancellor De Saussure, at Union, June 1833.

The bill states, that Edward Stevens died in 1832, leaving a will, by which he disposed of his property in the following clauses, to wit:—

"1st. It is my will and desire, that my loving wife, Sarah W. Stevens, do have all the property which come by her in marriage; and in place of the horses which I have traded, I give her my horses, Billy and Hector; and that she do pay off the debt she owes to Thomas Pratt, of Newberry Village, out of the above specified property."

"2ndly. It is my will and desire, that all my estate be sold, and my just and lawful debts be paid, and that the balance of the money, arising from the sale thereof, be equally divided between my three children, Elizabeth D., James Henry, and Jesse Warren Stevens."

That the plaintiff has taken out letters of administration with the will annexed. That the testator died, seized of a valuable plantation, an which the defendant (his widow) has resided since his death, and in which she claims dower, although she has accepted the legacy under the will, and that this land is directed to be sold and divided between his children after the payment of the debts; and it is submitted that she has made her election by taking under the will, and thus barred her right of dower—That after the payment of the debts out of the property bequeathed to the children, the provision made by the will for the defendant will be about equal with that for the children. The bill prays the decree of the Court on the right of the defendant to dower; and if she has not already elected, that she be required to elect, either to take under the will and abandon her dower, or taking dower, to abandon the legacy; and an account for rents and profits.

The Chancellor decreed in favor of the defendant, allowing her dower, notwithstanding the acceptance of the legacy; and the plaintiff appealed on the grounds:

1. That the claim of dower is incompatible with the provisions of the will; the testator clearly intending to bar the widow's right of dower, as otherwise the will operates unequally and unjustly on his minor children.

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*2. That the defendant having elected to take under the will, she cannot claim against it; and if she has not elected, she should be put to her election.

Herndon, for the appellant, on the first ground, cited 4 Eq. Rep. 294, Amb. 682; 2 M'C. Ch. 300; and on the second ground, 7 Bacon Ab. Election, 300; 2 Sch. and L. 449; 1 Ves. 230.

JOHNSON, J. The leading question, and that to which the grounds of this motion are principally directed, is whether the defendant is entitled to dower in the lands of her late husband, the plaintiff's testator.

The widow's right of dower is one with which the law invests her, and over which the husband has no control. He can neither dispose of it by contract in his lifetime, nor direct the disposition of it after his death by will or otherwise. She can only be deprived of it by her own act or voluntary consent. The husband has, however, the unquestionable right to annex to the dispositions of his other property, by will, any condition he may think proper, which is not in itself against the law. He may therefore make it the condition of a legacy to his wife, that she shall renounce her dower or declare that it shall be in lieu or bar of her dower, and if she accept it, must necessarily so operate. It seems to be universally agreed, too, that although no such condition or declaration is expressed in the will, she will not be entitled to both the legacy and the dower, if retaining her dower would be inconsistent with the provisions of the will, and defeat the intention of the testator. But there has been much difficulty in establishing a rule of construction by which to ascertain the intention.

In Lawrence v. Lawrence, 2 Vern. 365, the testator gave to his wife a part of his personal estate and a part of his real estate, during her widowhood, and devised the residue of his estate to trustees for the payment of his debts and other legacies, remainder to his god-son—and Lord Somers was of opinion that here was a plain intention that the legacy should be in lieu and satisfaction of dower, because the testator had devised all his other real estate to other uses, and decreed that the widow should make her election to take the legacy or her dower. But this judgment was afterwards reversed by Lord Keeper Wright, whose opinion was supported on an appeal to the House of Lords.

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*In Villa Real v. Lord Galway, Ambler, 682, the testator devised to his wife an annuity of two hundred pounds, and the bulk of his estate, real and personal, to trustees in trust; amongst other things to pay this annuity; and it was held by Lord Camden, that the widow was not entitled to both the legacy and her dower, but must elect—1st. Because to allow the claim of dower would disappoint the will. It puts the widow in possession, instead of the trustees who are to hold the whole and in trust for the widow as as annuitant. 2ndly. Because the dower and annuity are inconsistent with each other.

The same rule is laid down in Arnold v. Kempstead, Ambler, 466; and Jones v. Collier, Ibid. 730, in both of which the estate in which dower was claimed, was charged with an annuity for the wife.

These cases would seem to have established the rule that an annuity for the wife, charged upon the land in which she claimed to be endowed, was inconsistent with the right of dower, and that she could not have both; but in Pearson v. Pearson, 1 Bro. Ch. C. 292, Ld. Loughborough was of opinion, that this was not conclusive, and that if the estate was sufficient to satisfy both the annuity and the dower, they could not be regarded as inconsistent, and Lord Thurlow expressed the same opinion in Foster v. Cook, 3 Bro. Ch. C. 347.

The same question is discussed by Lord Alvanly, in French v. Davies, 2 Ves. Jun. 572, and Strahan v. Sutton, 3 Ves. 249, and although the judgment was not upon the

point, there is an evident leaning in favor of the rule in Pearson v. Pearson, and the case of Greatorex v. Carey, 6 Ves. 615, was decided by Sir William Grant on the authority of Foster and Cook. The subject came under the review of Lord Redesdale in Birmingham v. Kerwan, 2 Sch. & Lef. 444, and the rule which he deduces from all the cases is, that the intent to exclude the right of dower by a voluntary gift, must be demonstrated by express words, or by clear and manifest implication, and this implication must arise from some provision in the will inconsistent with the assertion of the claim. I refer also to the case of Adsit v. Adsit, 2 Johns. Ch. Rep. 448, where all the cases are collated by Chancellor Kent with his accustomed ability—and after all, it may be well doubted, whether there is in England anything like a settled rule upon the subject, or whether indeed it can be reduced to certain rule. It is a question of intention and

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*that may manifest itself in such variety of form, that there would be great difficulty in laying down any rule which would meet every case that may arise. The prosecution of the enquiry is, however, unnecessary to the present case; for, as remarked by Chancellor Kent, in Adsit v. Adsit, all the cases, however irreconcilable in other respects, agree in this, that a devise of lands to trustees to sell, or with directions to the executor to sell, is understood to pass the real estate subject to dower, and that is precisely this case.

A legacy, according to the language of some of the cases, implies a consideration in itself, an adequate motive for the gift, and it will not be intended that the testator expected that the legatee should renounce any right in consideration of the legacy, unless it is so expressed either in direct terms, or by necessary implication. In this case, the testator gives to his wife, the defendant, all the property which came by her in marriage, and directs that his estate should be sold to pay debts and to provide for his children. He will be presumed to have known that the wife would be entitled to be endowed of his lands, and as he has not thought proper to annex to the legacy to her, the condition that she should renounce her dower, it is a fair and reasonable conclusion, that they should be sold subject to that right, and in this way the provisions of the will are rendered perfectly consistent.

It is stated in the brief, that the defendant has been in the exclusive possession of the lands from the time of the death of the testator, and the bill prays an account for rents and profits, but no order of reference is made in the decree, nor does the decree make any order for the admeasurement of the defendant's dower; both these orders are rendered necessary by the result, and were omitted, I presume, from inadvertence. The executor asks the instruction of the Court also in relation to his power to sell the lands under the direction contained in the will, and of this also, there can be no doubt.

It is therefore Ordered and decreed, that the cause be referred back to the Circuit Court, and that it be referred to the Commissioner, to ascertain whether the defendant is liable for rents and profits, and to what amount; and that a writ for the admeasurement of the defendant's dower in the lands whereof the plaintiff's testator died seized, do issue.

O'NEALL and HARPER, JJ., concurred.

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2 Hill, Eq. *50

*JAMES M. NASH v. ANTHONY SAVAGE and WM. NASH, Ex'ors. of Edward Nash, and Others.

(Columbia. May, 1834.)

[*Wills* ⇐564.]

The plantation on which the testator resided consisted of two adjoining tracts, on one of which his mills were situated: In a devise of the plantation to his wife for life, it was held, that the mills passed under the general term "plantation." This construction is supported by another clause of the will directing his houses, mills, and all his lands, to be equally divided among his sons.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1228; Dec. Dig. ⇐564.]

Heard before Chancellor De Sanssure, at Greenville, July 1833.

This bill was filed by one of the legatees of Edward Nash, against his executor and devisee, claiming an account of the personal estate, and partition of the real. The demand for partition was resisted on the ground, that all the testator's land, with a mill situated on one of the tracts, passed under his will to the widow for life: And the Chancellor so ruled. From his decree the plaintiff appealed.

The clauses of the will relating to this question, and the facts connected with it, are stated in the following opinion of this Court.

O'NEALL, J. The important enquiry in the case, is whether the testator's mills, and the land on which they are erected, passed to Mrs. Nash for life, under the following clause:—"I give and bequeath to my well beloved wife, Mrs. Nash, my dwelling house and furniture, one negro man named David, one negro woman, named Phillis, with the benefit of my plantation and utensils belonging to the same, a good horse and saddle, with other necessary stock; these I allow her, to render her comfortable during her natural life." The question is, what passes under the devise of the testator's plantation? For it is conceded that the clause just cited, is a good devise of the plantation on

which the testator resided. According to the proof noticed in the decree, he regarded the two parcels of land on which he lived and on which his mills are erected, "as one plantation." The term "plantation," as well as "tract," is used as merely descriptive of a body of land. In common parlance they are used as convertible terms, and we speak of "our plantation," or "our tract of land," intending to be understood as speaking of the same body of land. A plantation may consist of several tracts or parcels of land—indeed, it is most commonly the case that it does. It must therefore be understood, in construing the testator's will, in that sense, in which he was in the habit of using and understanding it, when he spoke of the two parcels of land on which he lived and

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on which his mills were *erected. The case of Cain v. Maples, 1 Hill's Reports, 304 [26 Am. Dec. 184] sustains this view. In that case it was held, that the description, "the tract of land whereon the defendant lives," included two adjoining parcels of land belonging to defendant, on one of which his house stood, but both had been enclosed and cultivated as one tract.

In this case, the will itself shows that the testator intended that the mills should pass with the land. For in the eighth clause, appointing the ultimate division, he directs his "houses, mills," and all his lands, to be equally divided between his sons. Recur to the first clause, and it is clear that he has in terms devised his dwelling house, and in effect the plantation on which he lived, to his wife for life. He could not have intended, therefore, in the eighth clause, to have subjected his dwelling house and plantation to division until his wife's death. He makes no distinction as to the time of division between the mills, and the houses and lands: he did not intend that there should be two divisions of the property, mentioned in the eighth clause: all was to be divided at once: and I think it tolerably clear, that he looked to the period of his wife's death, as the time at which this division should take place. From these views, I am satisfied that the mills and land on which they are erected, do pass under the first clause of the testator's will herein before set forth, to his widow for life.

JOHNSON and HARPER, JJ., concurred.

Waddy Thompson, for the appellant.

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2 Hill, Eq. 51

HENRIETTA C. EDGERTON and Others, v. GEORGE W. MUSE and ELIZABETH, His Wife.

(Columbia. May, 1834.)

[*Equity* ⊂⊃429.]

The Court will exercise the right of correcting errors in its decrees in ex parte cases and cases by consent, so long as they remain unexecuted: And where on a bill for partition, an order of sale was granted by consent of parties, in which by mistake, a slave belonging to one of the parties and not to the estate, was included in the property to be partitioned—before the sale was made, the Court on a petition for that purpose, corrected the error.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1028; Dec. Dig. ⊂⊃429.]

The bill in this case was filed for partition of the estate of Otis Edgerton, between the plaintiffs and defendants, his heirs at law. By consent of parties, a writ had issued for the partition of the estate, including a slave, named Frank. The commissioners finding it impracticable to divide the estate, recommended a sale; and their return being confirmed, the Commissioner accordingly sold the whole estate except Frank, as to whom the

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order was, on the *suggestion of the defendants, suspended. The defendants then filed a petition, setting forth that the slave, Frank, was originally the property of the petitioner, Elizabeth, before her intermarriage with Otis Edgerton: That, during their coverture, a bill had been filed in their joint names for the recovery of the said slave, and a decree obtained in their favor, ordering him to be delivered up: but that Otis Edgerton dying shortly afterwards, the decree was not enforced in his life-time by the delivery of the slave: That after her marriage with the defendant, her present husband, Frank was delivered to them under the decree; and that they, in ignorance of their rights, had consented that he should be partitioned: That as the slave was not reduced into possession by the intestate, he constitutes no part of his estate, and their consent being given under a mistake as to their rights, they pray that the proceedings in partition be amended, by striking out the name of the slave Frank.

On the hearing of the petition before Chancellor Johnston, at Barnwell, February 1834, he held that the petitioners were precluded by the former judgment of the Court, which he had no power to alter. On appeal from his decision, the following decree was pronounced by—

O'NEALL, J. In this case, it seems to me that the only question which we are called upon to decide, is whether the decree of confirmation of the return of the Commissioners in partition precluded the defendants from rectifying the mistake in fact, as to the slave Frank.

I think that there is a material difference between decrees by consent and of course, and those which are pronounced in invitum. The latter, it has been held in this State, are not the subject of re-hearing, and can only be reviewed upon new matter discovered since

the decree, and of which, the party applying for the review could not have the benefit in the first instance, and which newly discovered matter makes a new case, and one proper for Equity jurisdiction. Perkins v. Lang, 1 M'C. Eq. 30, note.

In the case of Jenkins ads. Harrison, and Price v. Nesbit, 1 Hill, Eq. 445, it has been held, that as long as any thing remained to be done by the Court in a cause, that the previous decrees of the Court were not final, and that an appeal from the last decree closing the case, would open all previous decrees,

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and bring up the whole case for *adjudication. I should be inclined to think, under this rule, that if this were a decree in invitum, that it is possible its errors might now be corrected. For the slave (the subject of the dispute) has not been sold; but the decree of sale has been suspended by the Court. Be this, however, as it may, I think the Court must exercise the right of correcting its decrees in ex parte cases and cases by consent, so long as they remain unexecuted. For although they purport to be the act of the Court, and as such, have legal effect, yet, in point of fact, they are the mere act of the parties.—Neither the facts nor the law can be said to be judicially ascertained in such a proceeding. The only restriction upon the exercise of this power ought to be the execution of the decree. It is then that the decree ought to be regarded as final, and to be an estoppel between all parties and privies. It then has the force of a judgment, by either vesting or divesting rights; and also by operating as authority to officers of the Court acting under it, and as title to purchasers who may buy under it. This restriction guards the power against all possible abuse. The power of correcting errors in such decrees, so long as they remain unexecuted, can prejudice no one: it does not require a new examination of testimony, for in such cases, most generally, no testimony is originally heard; there can, therefore, be no danger of perjury in this respect—it does not re-examine and defeat any established title, for the consent of the parties to the decree is all the evidence of title to which the Court has looked; and the parties are placed in no worse situation by it, for the consent must operate against the party who gives it, until he shews that it was given by mistake, and establishes a perfect title to relief.

It is ordered and decreed, that Chancellor Johnston's decree be reversed, and that the petition of the defendants be remanded to the Circuit Court for an examination of the facts stated in it, and for a decree upon the same.

JOHNSON, J., concurred.

HARPER, J., absent.

Patterson, for the appellant.

2 Hill, Eq. *54

*Ex parte JAMES HEARD, Guardian.

(Columbia. May, 1834.)

[*Guardian and Ward* ⟸168.]

Under what restrictions the Court of Chancery may order the funds of an infant under its control, to be paid to a guardian appointed, and residing in another State.

[Ed. Note.—Cited in Cochran v. Fillans, 20 S. C. 213; Carr v. Bredenberg, 50 S. C. 485, 27 S. E. 925.

For other cases, see Guardian and Ward, Cent. Dig. § 562; Dec. Dig. ⟸168.]

Barnwell—February 1834.

The petition, in this case, stated that the petitioner removed from this State to Georgia, where he was regularly appointed the guardian of the persons and estates of his children, who are entitled to certain personal property in this State, and to monies now in the hands of the Commissioner; and that he has given bond and security for the proper discharge of his duties: That he is desirous of removing the property of his wards to Georgia, where it can be more profitably invested than in this State; and prays an order of the Court, authorizing the same to be paid and delivered to him.

On the petition being referred to the Commissioner, he reported that the petitioner was a proper person to receive the appointment of guardian, that he had given sufficient security, and that it would be for the benefit of his wards to grant the prayer of the petition. On the report being submitted, Chancellor Johnston made the following order:—

On reading the petition, it was referred, that the facts might come out, in order that the Court of Appeals might have the whole matter before them, and correct my judgment in rejecting the petition, which I felt that I must do for the want of power to transfer trust funds out of the jurisdiction. At the same time, I will allow the petitioner upon security here to borrow the funds from the Commissioner. It is Ordered that the petition be rejected. It is also Ordered that the Commissioner vest the funds in his hands at interest, taking good bond and security, and that the petitioner have leave to borrow on those terms.

The petitioner now moved the Court of Appeals to reform this order, so as to grant the prayer of the petition.

Patterson, for the appellant.

O'NEALL, J. In the case ex parte John Smith, 1 Hill, Eq. 140, in the matter of the executors of James Bradshaw, decided at Charleston, April Term 1833, an application, similar to the present, was held to be within the power of the Chancellor.

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*In that case my brother Harper says, "I have no doubt on principle and the practice of the Court of Chancery, of the competency

of the Court to order funds of an infant, under its control, to be paid to a guardian appointed and residing in another State." In pointing out how an order of transfer might be guarded against abuse, he suggests three things to be examined into and reported by the Commissioner:—First, the fact of the guardian having been regularly appointed, according to the laws of the State in which the wards reside; secondly, the fitness of the guardian for his appointment; and thirdly, whether sufficient security has been given.

The two last of these enquiries were made in this case, under the order of the Chancellor; and the Commissioner reported in the affirmative on each: he, also under the order, reported that it would be for the benefit of the wards to make the transfer. The Chancellor denied the motion to confirm the Commissioner's report, and transfer the funds, as he says, "for want of power to transfer trust funds out of the jurisdiction."

The case cited shows that he had the power which he disclaimed, and his decree must be reversed. But, as the Commissioner did not enquire into the fact, whether the petitioner had been appointed guardian of his minor children, according to the laws of Georgia, it will be necessary that the cause should go back to the Circuit Court, to enable the Commissioner to examine into that question; and while he is doing that, he may as well re-examine the whole case, and report upon all the points to the next Circuit Court.

It is therefore Ordered and decreed, that the Chancellor's decree be reversed, and that the cause be remanded with directions to the Commissioner to make an examination of the case, according to the principles contained in this opinion, and report upon the same to the next Court for Barnwell District.

JOHNSON, J., concurred.

HARPER, J., absent.

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2 Hill, Eq. *56

*WM. FRYER and Wife, Adm'r and Adm'x of J. Harrell, v. BROWN BRYAN, and —— BIGHAM, Sheriff.

(Columbia. May, 1834.)

[*Fraudulent Conveyances* ⟸130.]

One, apprehensive that a decree for a large amount would be had against him, & with a view to defeat it, gave his bond to the defendant, his son, for $20,000, on which judgment was obtained, and monies arising from the sales of property by the sheriff claimed under it. On a bill to set aside the bond and judgment as fraudulent and void, the defendant admitted that the sum of $382 was all that was really due to him, and claimed that the judgment should stand as a security for that amount—*Held*, that the defendant, as a party to the fraud, was entitled to no favor; that the Court would not examine into the fraud to ascertain if any thing be really due; and the bond and judgment being fraudulent and void, the defendant should derive no benefit from them.

[Ed. Note.—Cited in Bowie v. Free, 3 Rich. Eq. 411; Garvin v. Garvin, 55 S. C. 371, 33 S. E. 458.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 405; Dec. Dig. ⟸130.]

Marion—February 1834.

The plaintiffs, as creditors of Lemuel Bryan, filed this bill to set aside a judgement obtained by the defendant, Brown Bryan, against his father, Lemuel Bryan, on which funds arising from the sale of his property by the sheriff were claimed—charging the same to be without consideration and fraudulent. The facts of the case, and the questions made in argument, are fully stated in the following Circuit decree:

De Saussure, Chancellor. The real question in this cause is, whether the object of the bond executed by Lemuel Bryan to his son, Brown Bryan, and the judgement thereon, was to defeat and defraud, or delay just creditors of their lawful demands; and if so, whether the same be void.

The condensed statement of the case is as follows: That Lemuel Bryan being largely indebted to various persons, and being under apprehension of a decree in Equity against him, in a suit then pending for a considerable amount, made and executed a bond to his son, Brown Bryan, in the penalty of $20,000, with a condition for the payment of $10,000—there was no subscribing witness to the bond. After some time, and before the decree in Equity, a suit was brought on the bond, and judgement obtained thereon, and entered up, in the penalty of $20,000, and execution issued and lodged in the sheriff's office. No steps were taken by the son, Brown Bryan, to enforce said execution, but the same remained as a lien on the estate and effects of Lemuel Bryan. Other judgements and executions for smaller sums were enforced, and property sold, and the money paid to those creditors, without any interposition on the part of Brown Bryan. A large surplus, arising from the sales of the property, was in the hands of sheriff Bigham, which still remains there. Brown Bryan, sometime after the judgement and execution and sales, caused an

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entry to be made on the execution *on his judgement, stating that the sum of $382 was the only sum actually due him; and it is not pretended that any more ever was due, nor has that amount, or any sum approaching it, been proved to be due by Lemuel Bryan, to his son, Brown Bryan. Meanwhile, a decree in Equity, for a considerable sum, had been obtained by Fryer and wife, as administrators of J. Harrell, in behalf of the children of Harrell, for their interest in the

estate of Jacob Harrell, whose estate had been received and unaccounted for by Lemuel Bryan.

In attempting to enforce the decree, and to procure the payment of the debts established in behalf of the children who had been injured by the conduct of Lemuel Bryan, the effort was resisted by setting up the judgement of Brown Bryan against Lemuel Bryan, as a prior lien, and covering all his property—and although an entry was finally made on the execution, that only the sum of $382 was due on the execution, yet this judgement has been interposed up to this time, as a shield to protect the estate of Lemuel Bryan against the decree and the demand for the money due thereon. On a rule taken out, calling on the sheriff to shew cause why so much of the money arising from the sale of the estate of Lemuel Bryan, as exceeded the $382, latterly claimed for Brown Bryan, reserving that amount for discussion and decision, should not be paid to the plaintiffs, that rule was resisted, and no order could be obtained for the payment of such surplus; the return to the rule must have been of such a nature as to have produced that effect, and that return is not to be found. It has very improperly been withdrawn from the proceedings in the case, and leaves it uncertain on what ground the order proposed was then refused, which now, on full argument of the merits, is acquiesced in. The grounds taken in that return made by the sheriff, in order to have produced the effect of their defeating the rule, must have been some acknowledged uncertainty of what was actually due on the judgement of Brown Bryan. The sheriff's answer to the bill relies on the uncertainty, as an excuse for not paying the money; and states that he had received $2,134, and paid away $1,112 on prior judgments, and had a balance of $1,022 in his hands which he could not pay over to the plaintiff, on account of the claims of the contending parties. It was argued, that the bond executed by the father to him for $20,000, was a fair bond given to secure the payment, not of $10,000, as is expressed on the face,

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but of a small sum alledged *to be bona fide due to him by his father, and some small additional advances expected to be made to him; and that it was good to secure and cover the amount actually due him, and claimed to be $382. It was relied upon, that the answer of the defendant, Brown Bryan, denying any fraud in the transaction, was sufficient to repel the charge of fraud, and was conclusive in the case of a bill of discovery. This is a bill for discovery and relief, and the answer is contradicted by the testimony of the witnesses. They prove that Brown Bryan knew very well that his father did not owe him a twentieth part of what the bond stipulated in the condition to pay, even if he owes him anything, (which has by no means been proved satisfactorily,) and that he (Brown Bryan) aided his father in preparing the bond for this fictitious debt, and wrote it for him, and has relied on the judgement obtained upon it, and it set up as a screen to protect the property of Lemuel Bryan from his creditors, the plaintiffs. The witnesses prove that Brown Bryan well knew the nullity of such a bond and judgement, and so he stated to them.

Upon a careful review of the circumstances of this case, I cannot have a doubt of what I am bound to do. It was clearly a case in which a debtor, apprehensive of a large debt being established against him, in a suit pending against him, on behalf of orphans, whose father's estate he had mismanaged, set up a fictitious demand against himself, and gave it the legal form of a bond and judgement, expressly in order to defeat, defraud and delay that just demand; it was given, and has been used for that purpose; and I am bound to declare such bond, and the judgement founded on it, to be fraudulent and void.

A good deal of stress was laid, in the argument, on the character of Brown Bryan. It was alleged, and proved by respectable witnesses, entitled to perfect credit, that his character was pure, and indeed high in the estimation of his fellow citizens; I am very glad of it, as it will protect him from the imputation of moral fraud, even if the circumstances of the case should compel the Court to decide that Lemuel Bryan committed an actual fraud, and his son misled by filial duty, or any other circumstance, should be adjudged to have incurred the blame of legal fraud, by lending his name and character to cover the attempts of his father to shelter his property from his creditors and their just demands on him, by setting up a fictitious and enormous debt, as due by the

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father to *the son. The Court cannot permit justice to be entangled in such a cobweb, and where the proofs of fraud are clear, the good character of a third person, who is induced to lend his name in the case, cannot be allowed to prevail against them.

There is another question remaining to be decided. It is admitted that Brown Bryan has no such enormous demand on his father, as the sum conditioned to be paid in the fictitious bond for $10,000; but it is contended, that at the time the bond was executed, there were some small debts due by the father to his stripling son, amounting to about $124, and that it was intended to make other occasional advances to the father, to be covered by the bond; and that, in fact, the son did make other advances to the father, so that the latter really now owes the former $382; and the son claims payment for that amount, out of the fund in the sher-

iff's hands, as protected by the bond and judgment. This claim is resisted by the plaintiffs, on two grounds: first, that it is not shown, that the sum of $382 was really and justly due by Lemuel Bryan to his son Brown Bryan. Some proofs were given of a small debt of about $124, (at least the answer states that) beyond this no debt was proved. The second objection made by the plaintiffs is, that the defendant, Brown Bryan, having mingled whatever amount of fair claim he had on the father, in the fraudulent transaction of his father, cannot be permitted to protect, under that fraudulent bond and judgment which are null and void, even what may be really due to him, and therefore he stands merely on the footing of a simple contract creditor.

This question has come before the Court in several cases: In Miller v. Tollison, and others, (Harper's Eq. Rep. 145, [14 Am. Dec. 712,]) I decided that the transactions were fraudulent and void; but that B. Holder having some just claims on Tolleson, the conveyance of the land should stand as a security for what might be found to be justly due to him: The then Court of Appeals affirmed the decree, except so far as respected the debt alleged to be justly due Holder; but reversed that. Chancellor Gaillard, who delivered the opinion of the Court of Appeals, stated that the decree must be supported as far as it decides against the defendant. But the Court was of opinion "that the decree did not go far enough. It orders the deed, made by Tolleson, conveying the land to Holder, for the nominal consideration $20,000, should stand as a security for such balance as might be found to be bona fide due

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by J. Tolleson *to Holder. The Court was of opinion, that although there might be something due by Tolleson to Holder, the latter is not entitled to the benefit of the conveyance, as a security for what may be found due, because the deed making an absolute conveyance by Tolleson to Holder for a large nominal price, was intended as a fraud to cover his property from his creditors; and as Holder lent his name to this fraud, he ought not to derive any benefit from it.—The deed must therefore be considered void, and Holder must be allowed to pursue his remedy against Tolleson, if there be any thing due to him, which is at least doubtful." It appears to me that this decision is conclusive in the case we are considering, unless later decisions, made by the Court of Appeals, should have reversed it and changed the law.

I am told that in a case in Lancaster, of ———,(a) decided by me, I followed out the principle established, as above stated, and decreed according to the decision in Miller v. Tollison; but that the Court of Appeals, in affirming the decree generally, did let the security stand for as much as really had been paid. I was not furnished with a copy of the decree of the Court of Appeals, nor do I know the grounds of the decision. But I am satisfied that there must have been something peculiar in that case, which made an exception proper, and that the Court did not mean to set aside the principle in Miller v. Tollison, which I consider a very salutary one to discourage frauds of this kind.

It is therefore Ordered and decreed, that the bond of Lemuel Bryan to Brown Bryan, for the very large penalty of $20,000, (conditioned to pay $10,000) when there was nothing really due but a very trifling sum, and that not satisfactorily proved, being made to delay, defeat and defraud creditors, is fraudulent and wholly void; and it is further Ordered, that the defendant, sheriff Bigham, do immediately pay over to the plaintiffs the whole amount of money remaining in his hands, arising from the sale of the property of Lemuel Bryan—Costs to be paid by the defendant, Brown Bryan.

From this decree, the defendant, Brown Bryan, appealed on the ground:—

That the Chancellor should have decreed the judgment to be valid to the amount of $382, the sum claimed to be due.

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*Graham, for the appellant, cited 2 Poth. 156-8; 13 Ves. 47; 2 John Ch. 89; 1 M'C. Ch. 440; 2 M'C. Ch. 102; 1 Ves. sen'r, 37; 1 John. Ch. 482; 4 John. Rep. 536, 598-9; 1 Eq. Rep. 167; 1 M'C. Ch. 265.

Moses, contra.

JOHNSON, J. The fact, that the bond and judgment were intended as a fraud on the creditors of Lemuel Bryan, is ascertained by the Chancellor's decree, and is fully sustained by the evidence: and as a party to that fraud, the defendant, Bryan, is entitled to no favour. We concur, therefore, with the Chancellor, that the judgment ought not to stand as a security for what may be due. The Court was not bound to disentangle a web of fraud of his own manufacture, to ascertain that there may have been some good material mixed up with it.

Motion dismissed.

O'NEALL, J., concurred.

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2 Hill, Eq. 61

SHAROD SIMS, Jr., v. JOHN SIMS, Adm'r. cum. test. ann.

(Columbia. May, 1834.)

[*Assignments* ⇐41; *Limitation of Actions* ⇐36, 102; *Release* ⇐33; *Wills* ⇐740.]

The plaintiff had paid $100 to testator in part price of a negro; after testator's death, six out of eight of the residuary legatees, gave

(a) Probably, Brown v. McDonald, 1 Hill, Eq. 297; which does not, however, sustain the position here contended for. R.

their bond to the administrator with the will annex'd relinquishing their interest in the $100. and authorizing the payment of their shares therein to the plaintiff:—*Held*, that the bond was an assignm'nt of their interest in that fund to the plaintiff.—that this was an equitable and not a legal demand, and the statute of limitations did not apply to it: That this claim arises not under the will, but on the assignment, and a receipt for "his dividend" applies to his share under the will, and does not preclude the plaintiff.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 76; Dec. Dig. ⟸41; Limitation of Actions, Cent. Dig. §§ 169, 495; Dec. Dig. ⟸36, 102; Release, Cent. Dig. § 78; Dec. Dig. ⟸33; Wills, Cent. Dig. § 1894; Dec. Dig. ⟸740.]

[*Executors and Administrators* ⟸284.]

The administrator, will not in such case be discharged, on the ground that he has no assets in his hands in consequence of the legatees having purchased at his sale more than the amount of their shares.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1132; Dec. Dig. ⟸284.]

Lancaster.—Before Chancellor Johnston.

This bill was filed against the defendant for an account of his administration claiming amongst other things, for the plaintiff, the sum of one hundred dollars, under the circumstances detailed in the following judgment of this Court. The Statute of Limitations being pleaded, the Chancellor held, that it barred the demand, and that the evidence offered for that purpose was not sufficient to take it out of the statute; and an appeal was taken from his decision on this point.

HARPER, J. With respect to the first question, the statement is, that the testator by his will gave to the plaintiff a negro boy, John; which boy the plaintiff afterwards purchased of the testator in his life-time at the price of five hundred dollars; paid one

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hundred *dollars in cash, and gave his promissory notes for four hundred dollars. After testator's death, six out of the eight residuary legatees of the estate entered into a bond to the defendant, the administrator, reciting those facts and conditioned that they "shall relinquish and quit claim to any interest which they may have in and to the said negro, John, and to the said notes, and shall authorize and give full liberty to the said John Sims to pay to the said Sharod Sims, jr. the sum of one hundred dollars, being the amount in part which he paid for the said negro, John, and to deliver into the possession of the said Sharod Sims, jr. the said notes and the said negro, John, and shall save harmless the said John Sims for the said transaction." The negro and the notes were delivered, the hundred dollars remain unpaid.

We concur with the Chancellor, that by this bond the plaintiff became the assignee of the obligors and entitled to their respective interests in the funds as far as one hundred dollars. They stipulate to relinquish and quit claim their interest to that extent to the plaintiff, and Equity regards that as done, which ought to be done.

We concur, of course, with the Chancellor in his conclusion on the facts, that no express promise of the defendant to pay this amount was proved either within four years before the filing of the bill or at any other time.

But we do not concur that this was a legal demand to which the statute of limitations could apply. Regarding the bond as an assignment to plaintiff, it transferred only an equitable interest, and his remedy was only in Equity. In general a mere equity will not be barred in less than twenty years. Before the bond, defendant was a trustee as to this fund for the residuary legatees, and the bar of the statute would not apply to them. By the assignment, the plaintiff was put in the place of the residuary legatees, and by accepting the bond, the defendant made himself a trustee for him.

It was urged that the defendant would not be charged, on the ground of not having assets in his hands, several of the legatees having purchased property of the estate for more than the amount of their shares. But their debts to him for these purchases must be regarded as assets. It is in his power to recover these. He knew of the state of things when the arrangement was made, and he accepted the bond, and must have looked to the bond for his indemnity.

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*Nor do I think there was such an acquiescence as will preclude the plaintiff. He gave defendant a receipt for his "dividend" of the estate. The obvious interpretation of this, is such proportion of the estate as he was entitled to under the will. But this claim does not arise under the will but on the assignment. He may have known that defendant had distributed the estate, reserving nothing to meet this claim. But he does not appear to have sanctioned this otherwise than by silence; and he may have been silent as to what was past and what he could not prevent.

Decree for the plaintiff.

JOHNSON and O'NEALL, JJ., concurred.

Clinton, for the appellant.
Blanding, contra.

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2 Hill, Eq. 63

DANIEL MATHENEY and SARAH ANN MATHENEY, v. JOHN GUESS and DAVID FELDER, Ex'ors., and Others.

(Columbia, May, 1834.)

[*Husband and Wife* ⟸11.]

The husband's assignment of his wife's chose in action passes her interest only where he has

the power to reduce it into possession:—and where he has this power, his assignment will be regarded as a reduction into possession; but where he has not the power of reducing into possession, his assignment does not transfer the property, until by subsequent events he comes into the situation of being able to reduce it into possession; and then the previous assignment will operate on his actual situation, and the property will be transferred.

[Ed. Note.—Cited in Reese v. Holmes, 5 Rich. Eq. 564, 568; Duke v. Palmer, 10 Rich. Eq. 387.

For other cases, see Husband and Wife, Cent. Dig. § 52; Dec. Dig. ⟸11.]

[*Descent and Distribution* ⟸52.]

In England the husband may acquire the absolute right to his wife's chose in action, even after her death, by administration; but the rule is different in this State, for under our statute of distributions, he would only be entitled to his distributive share as her heir at law.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 83, 135–140, 144, 147–149, 151–158, 161–167, 169–171, 296–308; Dec. Dig. ⟸52.]

[*Husband and Wife* ⟸8.]

Where the wife was entitled to an estate expectant on the death of her mother, & during the lifetime of the wife and the tenant for life, the husband for a valuable consideration, conveyed his wife's interest in the estate, & she died before the death of the tenant for life: —*Held*, that the assignment of the husband operated only to the extent of his own share of his wife's estate under the Act of distributions, & did not defeat the rights of her children to the remainder.

[Ed. Note.—Cited in Reese v. Holmes, 5 Rich. Eq. 564, 568; Duke v. Palmer, 10 Rich. Eq. 387.

For other cases, see Husband and Wife, Cent. Dig. § 25; Dec. Dig. ⟸8.]

John Guess, the maternal grandfather of plaintiffs, devised and bequeathed both his real and personal estate to his wife for life, and after her death to be divided amongst his children, of whom Rachel, the mother of the plaintiffs, and wife of John Matheney was one. During the life-time of his wife, and of her mother the tenant for life, John Matheney, for a valuable consideration, sold and assigned all the interest which he had in the estate in consequence of the bequest to his wife, to Patrick Quartermus. The wife of Matheney died, and after her death, the tenant for life surrendered the estate, and procured a division of it to be made by the executors to the will. The executors, in consequence of the assignment, delivered to Quartermus two slaves, on account of Mrs. Matheney's legacy. The plaintiffs claim two thirds of this property as distributees of their mother—they pray an account against the executors—that their father, the executors, and Quartermus may be made liable—and for partition and relief.

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*HARPER, J. [sitting as Chancellor]. It is not disputed that, according to the English authorities, the assignment by the husband would be good, in as much as he survived his wife. But it is supposed that this is only because the husband surviving the wife, in England, is entitled to her whole personal estate, and does not apply under our statute of distributions, where the children are entitled along with him. The familiar distinction, however, which has not been adverted to, is entirely conclusive. If a husband make a voluntary assignment of his wife's chose in action, this will not bind her in case she survives him; if it be for valuable consideration, however, she will be bound. Burnett v. Kinnaston, 2 Vern. 401; Carteret v. Paschal, 3 Pr. Wms. 197; Bates v. Dandy, 2 Atk. 207. To the same effect was the decision of our own Court of Equity in Forrest v. Warrington, 2 Desaus. Eq. Rep. 254.

The husband's assignee, however, is subject to this disability, that if he is under the necessity of coming into Equity to make his claim effectual, Equity will not aid him but on the condition of his making a proper provision for the wife.

When the Master of the Rolls, in White v. St. Barbe, 1 Ves. & B. 405, says that a husband can dispose of such property of his wife in expectancy, against every one but the wife surviving, he speaks in reference to a voluntary settlement which the husband had made. In this case there is no doubt but that the assignment was for valuable consideration. Quartermus has not come into this Court seeking the property, but has it in possession.

It is therefore Ordered and decreed that the bill be dismissed.

From this decree the plaintiffs appealed on the ground:

That the plaintiffs are entitled to two thirds of their mother's part of her father's estate; and on account and distribution should have been accordingly decreed.

Patterson, for the appellants.—If no assignment had been made by Matheney, on the death of his wife he would have been entitled to only one third of her estate. How then can the assignment convey a larger interest than he would have without it? For the mere act of assignment is not a reducing into possession, when he had no right to possession. The English authorities agree, that the assignee has the rights of the husband and no more—and it will not be denied that an assignee, even for valuable consideration, can resist the wife's right to a settlement.

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Like v. Beresford, 3 Ves. *411; McCauley v. Philips, 4 Ves. 19; Salisbury v. Newton, 1 Eden, 370; 4 Ves. 515. The effect of such an assignment is a question not decided in any reported case in this State. In Forrest v. Warrington, 2 Eq. Rep. 254, the husband had the right to possession; the marital rights had attached by the act of assignment. It has no application to this case. It can be shown on principle and authority, that if the wife in this case had outlived her husband,

her interest as survivor would prevail against the assignment: and it follows, therefore, that the assignment is void so far as the interest of the plaintiffs is concerned. Burnet v. Kinnaston, 2 Vern. 401.

The cases cited sustain this position: That where the husband assigns the wife's estate vested in interest, but expectant on the death of a tenant for life, to a purchaser for valuable consideration, and the wife and tenant for life outlive the husband, the wife is entitled by right of survivorship; but if the husband survive, the assignee will take. The reason is, that Equity considers the assignment as an agreement by the husband that he will reduce the property into possession—and that what a party agrees to do shall be considered as done: and therefore, when the husband has the power of reducing into possession, his assignment will be regarded as a reduction into possession. On the other hand, when the husband has not the power or right of reducing the choses into possession, his assignment will not transfer the property until by some subsequent event he acquires the right to reduce into possession, and then his previous assignment will operate, and the property be transferred. Honner v. Morton, 3 Russ. Ch. 65; 3 Cond. Eng. Ch. Rep. 298; Hornsby v. Lee, 2 Mad. 16; Purdew v. Jackson, 1 Russ. Ch. 1; Pierce v. Thornely, 2 Sim. 167; 2 Cond. Eng. Ch. Rep. 364. In England the law gives the husband the right to his wife's choses after her death, by administration: and there such an assignment as this would operate. But the law is different in this State; for, by our statute of distributions, he takes only his share as heir at law. In this case the tenant for life survived the wife, the husband had no right to the possession, and therefore could not reduce into possession during coverture; and on the death of the wife, he is only entitled to his share under the statute, which is all that the assignment can operate on.

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*Elmore, for the defendants, contended, that Mrs. Matheney took a vested interest under the will which her husband could convey, and that his assignment would be valid against every one but the wife surviving; and he cited and relied on the following authorities. White v. St. Barbe, 1 Ves. & B. 405; Chit. Dig. 507; Wildman v. Wildman, 9 Ves. 177; Hawkins v. Bryan, 2 Atk. 549; Bates v. Dandy, 2 Atk. 208; Chit. Dig. 509; Ripley v. Wood, 2 Sim. 165; Fitzer v. Fitzer, 2 Atk. 511; Sansum v. Dewar, 3 Russ. Ch. 91.

O'NEALL, J. There is no doubt that the plaintiffs are entitled to have partition of the testator's real estate, and an account of whatever sum still remains in the hands of the executors of the testator to which their deceased mother was entitled. That the Circuit decree did not make provision for these interests, arose from the fact that the effect of the husband's assignment of his wife's chose in action, appeared to be the only matter in controversy.

It is now necessary to examine the Circuit decree in relation to that matter. I agree generally with my brother HARPER, that the husband may assign the wife's chose in action, and that she would if it was for a valuable consideration, be bound by it. But this concession of a general rule must be taken as subject to a qualification and exception, which is, I think, very well stated by the Lord Chancellor: in the case of Honner v. Morton, 3 Russ. 65, and 3 Cond. Eng. Chan. Rep. 298, he says, "When the husband assigns the chose in action of his wife, one would suppose on the first impression, that the assignee would not be in a better situation than the assignor; and that he too must take some steps to reduce the subject into possession, in order to make his title good against the wife surviving. But equity considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession; it likewise considers what a party agrees to do as actually done; and, *therefore, where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession. On the other hand, I should also infer, that when the husband has not the power of reducing the chose in action into possession, his assignment does not transfer the property till, by subsequent events he comes into the situation of being able to re-*

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*duce the property into possession; and *then his previous assignment will operate on his actual situation, and the property will be transferred.*"

The Chancellor, in that case, after a very elaborate examination of all the authorities, in which he showed clearly and conclusively that this qualification and exception was well sustained by direct authority, and that it was not opposed by any express adjudication, although several dicta would appear to conflict with it, held, that the vested interest of a wife in remainder after a life estate, which had been assigned by husband and wife for a valuable consideration did not pass under the assignment, inasmuch as the husband died during the life estate, leaving his wife surviving; and the estate in remainder to the wife could not, therefore, have been reduced into possession by him. A different result would have taken place if the wife had died and the husband had survived the termination of the life estate; in such a case, by the law of England, he would have been entitled to the administration of his wife's estate, and by such administration he would have become the legal owner of her choses in action without any liability to account for the same to her heirs.

This would, in this last mentioned case, have made his assignment effectual, on the ground "that he had the power to reduce the chose in action into possession," for his own use.

In the case of Purdew v. Jackson, 1 Russell, 1, it was ruled, that "where husband and wife by deed executed by both, assign to a purchaser for valuable consideration a moiety of a share of an ascertained fund, in which the wife has a vested interest in remainder expectant on the death of a tenant for life of that fund, and both the wife and tenant for life out-live the husband, the wife is entitled by right of survivorship to claim the whole of her share of the fund against such particular assignee for valuable consideration."

In the same case, (at page 80,) Sir Thomas Plumer, the Master of the Rolls, stated the result of his elaborate examination to be, that "all assignments made by the husband of the wife's outstanding personal chattel, which is not or cannot be then reduced into possession, whether the assignment be in bankruptcy or under the insolvent acts, or to trustees for the payment of debts, or to a purchaser for valuable consideration, pass only the interest which the husband has, subject to the wife's legal right by the survivorship."

These two well considered English cases, must certainly be regarded as settling conclusively, that the husband's assignment can

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only *operate to pass the interest of the wife in her chose in action, when he had or has the power to reduce it into possession for his own use; if he never has any such power, his assignee can have no rights.

The previous English cases it appears to me, so far as I have had the opportunity to examine them, may be very well reconciled with this qualification and exception. They generally relate to bonds and mortgages in the actual possession of the husband, or to legacies to the wife which are due and payable in presenti, or become due and payable during the continuance of the coverture. In all these cases it will be seen that the husband has the right and power to reduce the chose in action of the wife into possession for his own use, and hence his assignment has effect.

The case of Bates v. Dandy, (reported more fully and accurately in a note to Honner v. Morton, 3 Cond. Eng. Ch. Rep. 301, than it is in Atkins,) was, where the husband was in the actual possession of the mortgages which had been set apart as his wife's share of her deceased brother John Dyer's estate, but which were not assigned by the executor during the life-time of the husband; the husband assigned them to secure a sum of £200 borrowed from the plaintiff's intestate; it was held, by Lord Hardwicke, that the assignment was a valid assignment of the mortgages, as the wife's chose in action, and that unless she redeemed by paying the amount borrowed, with interest and costs, that the assignment should become absolute. There can be no doubt that that case, which is a leading one, is plainly reconcilable with the cases of Honner v. Morton and Purdew v. Jackson. The husband there could have reduced the chose in action into possession during his life: for he could have compelled John Dyer's executor to have assigned to him, and under his assignment have foreclosed the mortgages and received the amount secured to be paid by them.

In the case of White v. St. Barbe, 1 Ves. & B. 405, the Master of the Rolls, Sir William Grant, speaking of an interest of a feme covert in remainder after the death of a tenant for life, which had been settled by her husband to the use of their children after the death of the tenant for life, said, "A husband can dispose of such property of his wife in expectancy, against every one but the wife surviving; and this is just such a settlement as the Court would have directed." In that case the wife died in the life-time of the tenant for life, and the husband

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took out adminis*tration upon her estate. The facts of the husband's survivorship and administration, according to the law of England, would have entitled him to reduce his wife's chose in action into possession for his own use, and hence his assignment or settlement of it was legal and valid.

The case of Forrest v. Warrington, 2 Desaus. Eq. Rep. 254, is the only reported case in this State on the subject; it was the case of an assignment for valuable consideration, of the Bank stock of the wife by the husband. The husband had the legal possession of the stock, and it was on that ground his assignment was sustained; for, Chancellor James, who delivered the decree of the Court, (at page 261,) says, "After the marital rights had attached, it only remained for the husband to reduce the property into possession, to be able in law to assign the same; and this, it appears, he did by exercising acts of ownership over it; first, by receiving the dividends for three years; second, by depositing the certificates for the same in the Charleston Insurance Company; and third, by assigning the same to the defendant." So far as that case is to operate as authority, it unquestionably does not militate against the qualification and exception which is stated by the Lord Chancellor in the case of Honner v. Morton.

According to that qualification and exception, it is plain that in this case, if the wife had survived the husband, his assignment would not have defeated her rights in remainder after the death of her mother. Does her death vary the case? It is clear that in this State, it does not. The husband's adminis-

tration would not entitle him to reduce her chose in action into possession for his own use. His only interest is as one of his wife's distributees. The twelfth section of the Act of Distributions, (1791,) 1 Brev. Dig. Tit. 101, p. 424, directs that "on the death of any married woman, the husband shall be entitled to the same share of her real estate, as is herein given to the widow out of the estate of the husband, and the remainder of her real estate shall be distributed among her descendants and relatives in the same manner as is heretofore directed, in case of the intestacy of a married man." The fourteenth section provides, "that in all cases of intestacy the personal estate shall be distributed in the same manner as real estates are disposed of by this act." Looking back to the third section, it will be seen that it establishes the rule of distribution of an intestate's estate when he dies leaving a widow and children,

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to be *one third to the wife, and the remainder to be divided among the children. According to the provisions cited, the real and personal estate of the wife, dying intestate, is to be divided in the same manner as that of the husband. So that John Matheney, on the death of his wife, was only entitled to one third part of her real and personal estate. His assignment of her interest in remainder, after her mother's death, could only convey his distributive share of it as his wife's heir at law, for during her life-time he could not reduce it into possession; and at her death it was her estate, to be administered after the termination of the life estate, and distributed according to the Act of 1791. His assignee (Quartermus) could, at most, only have the right to administer on Mrs. Matheney's estate; and as her administrator he could only retain to his own use the share of her husband under his assignment; the remainder he would be bound to pay over to her distributees. It follows, that the husband's assignment does not defeat the rights of the plaintiffs.

It is therefore Ordered and decreed, that the Circuit decree be reversed, that the writ of partition do issue to make partition of the real estate of John Guess, sen. (deceased); that John Matheney and Patrick Quartermus do account to the plaintiffs for so much of the share of their mother, Rachel, of the personal estate of John Guess, sen., which the said Patrick received from the executors under the assignment of the said John, which may exceed the said John's one third part of her whole share of the personal estate of the said John Guess, sen. with the interest thereon from the death of the tenant for life; in the event of the said John Matheney and Patrick Quartermus being unable to pay the same, the executors John Guess and David Felder, will account for and pay the same. It is also Ordered and decreed, that John Guess and David Felder do account for and pay to the plaintiffs, the entire balance of their mother Ratchel's share of her father John Guess' estate, remaining in their hands after the said payment to Patrick Quartermus, with the interest upon the said balance.

JOHNSON, J., concurred.

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2 Hill, Eq. *71

*Ex parte JOHN VINCENT MARTIN and CAROLINE E. MARTIN.

(Columbia. June, 1834.)

[*Guardian and Ward* ⇐15.]

Guardian intending to remove from the State with her wards, the court required her before entering on the appointment to give bond for the return of one of them at a suitable age to receive his education in this State & of both, when required by the Court.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 56-64; Dec. Dig. ⇐15.]

Columbia—April 1834.

This was a petition on the part of minor children, praying the appointment of Mrs. Sally Maria Martin, their step-mother, as their guardian.

De Saussure, Chancellor. Mr. Blanding appeared for the petitioners and Mr. Gregg for their paternal relations, when the petition was read, and the minors being present, were examined by me, and declared their anxious desire that their step-mother, Sally Maria Martin, should be appointed the guardian of their persons; that they were extremely unwilling to be separated from her, and that they had deliberately chosen her for their guardian, after due consultation with their relations.—Under these circumstances, I am constrained to make the appointment, and I do it the more readily from the fact that I am personally well acquainted with Mrs. Martin, and know, that for judgment and attachment to these children, she is entitled to the entire confidence of the Court, as she possessed that of her husband. —But on the part of the relations of the minors, it is objected that it is the intention of Mrs. Martin to remove to the State of Maryland with the said John Vincent Martin; that they are unwilling that he should be removed from the State and receive his education abroad.

After hearing the objection thus raised, and duly considering the same, I am of opinion that it ought not to prevail. The minor is now only fourteen years of age, and his education preparatory to his collegiate course can safely be confided to his step-mother. But as it is the wish of his relations who reside in this State, where his property is situated, that he should receive his collegiate education here, I think their views in this respect ought to prevail.

It is therefore Ordered that the said Sally Maria Martin be appointed guardian of the persons of the petitioners, John Vincent Martin and Caroline E. Martin; and that the said John Vincent Martin be returned to this State, in case he should be removed from it, as soon as he arrives at the age of seventeen, or sooner, if he should be sooner prepared to enter College; and that he, or

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his *relations, be then at liberty to move this Court for further directions respecting his education.

And it is further Ordered that it be referred to the Commissioner of the Court of Equity for Richland district, to report what will be a proper annual allowance to be placed in the hands of the said guardian, for the support and education of each of the said wards; and that before making up such report, Edmund Martin, the administrator of the estate of their father, be notified of this order, and of the time and place of making the said enquiry.

On appeal, the following is the judgment of the Court:—

O'NEALL, J. This Court is satisfied with the reasons assigned by the Chancellor, for his appointment of Mrs. Martin as the guardian of the petitioners.

It is therefore Ordered and decreed, that his order making the appointment, be affirmed generally; and that the following addition, thereto be made and observed, to wit: that before entering on the duties of the said appointment, Mrs. Martin do, before and to the Commissioner of the said Court, enter into sufficient and satisfactory security for the discharge of her duty as guardian; and also to return to this State, the ward, John Vincent, according to Chancellor De Saussure's order; and both of her wards, whenever the Court of Equity for Richland District may require it to be done.

HARPER & JOHNSON, JJ., concurred.

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2 Hill, Eq. 72

JAMES CHESNUT and JOHN CHESNUT v. THE FIRE AND MARINE INSURANCE COMPANY, SARAH VAUGHAN, BENJAMIN BINEHAM, WM. BLANDING and GEO. L. CHAMPION.

(Columbia. June, 1834.)

[*Creditors' Suit* ⇐51.]

Funds being in possession of the Court, (or subject to its order) the Court ordered notice to be published for creditors to come in and establish their claims in opposition to one of the defendants, who claimed it as a principal creditor—*Held*, that all the creditors who came in under the order were rightly in Court, properly parties to the case, and bound by the proceedings:—And an order of the Chancellor requiring them to file a cross bill, in order to establish their demands, reversed.

[Ed. Note.—Cited in Gee v. Humphries, 49 S. C. 256, 27 S. E. 101.

For other cases, see Creditors' Suit, Cent. Dig. § 209; Dec. Dig. ⇐51.]

[*Creditors' Suit* ⇐54.]

Order of the Chancellor quashing the reports of a former Commissioner on claims of creditors, because it did not appear that before making them up he had given the parties notice, or an opportunity afterwards to contest them—reversed. In the absence of proof, it will be presumed that the Commissioner had done his duty and given due notice; but under the circumstances, the reports referred back to the present Commissioner, with instructions to regard them as prima facie evidence in favor of the claims reported, but with leave to falsify them by proof.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 212; Dec. Dig. ⇐54.]

[*Equity* ⇐91.]

In a contest between creditors for a trust fund in the possession of the Court, the executrix of the deceased debtor is not a necessary party.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 250; Dec. Dig. ⇐91.]

Camden—

Wilie Vaughan, by deed dated 12th April, 1819, in consideration of natural love and affection for his wife and children, and also in consideration of five dollars, conveyed to Benjamin Bineham, Wm. Blanding and George L. Champion all his estate, in trust,

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for his *wife, Sarah Vaughan, for her separate use for life, and after her death, in trust for such of the heirs of her body, by the said Wilie begotten, and in such manner and portions as she by deed or will may limit and appoint, and in default of appointment in trust for Claiborne Vaughan, Eliza Virginia Vaughan, and such other heirs of the body of the said Sarah, by the said Wilie, hereafter to be begotten, as may survive the said Sarah, share and share alike, &c. The property to be in no manner liable to the future debts of Wilie Vaughan. The trustees, or a majority, are authorized to collect the debts due and apply them to paying just debts, and the deed thus proceeds: "But as the debts due to me will be insufficient to pay the debts I owe, for the complete and final discharge of my debts, the said William, Benjamin and George, or a majority of them, are hereby authorized and empowered to sell and dispose of, in such manner and on such terms as they, the said William, Benjamin and George, or a majority of them, shall think fit, any portion of the said property, real or personal, and to make good titles therefor. And after the debts are paid, they or a majority, are authorized to sell the lands and make titles, and invest the proceeds in such way as they, or a majority, shall think fit, subject to the limitations, directions and purposes above set forth."

Bineham and Blanding declined the trust.

George L. Champion alone acted and sold to John and James Chesnut, the plaintiffs, several of the negroes, for which he took their bond for $3,000—and sold to James Chesnut three of the negroes, for which he received cash. He sold the bond to the defendants, the Fire and Marine Insurance Company, at fifteen per cent. discount and one per cent. brokerage.

On the 15th of January, 1823, the plaintiffs filed this bill against Champion, the Insurance Company, the two other trustees, and Sarah Vaughan, setting forth their purchase of the slaves from Champion alone, the other trustees having declined to act—That there were specific liens upon the slaves, and they required the proceeds of the sales to be applied to discharge them. They state that Champion had assigned their bond to the Insurance Company, who demanded payment: that plaintiffs ought not to pay until Champion caused the title to the slaves to be perfected by procuring the assent and joint sale by a majority of the trustees, and by applying the amount of sales to discharge the specific liens.—They pray to be relieved from their contracts, or their title to be

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*confirmed and quieted against the claims of the cestui que trusts and the execution creditors.

Blanding and Bineham answer that they declined the trust.

Champion's answer admits the sale of the negroes, and that Mrs. Vaughan, as executrix of Wilie Vaughan, joined in the sale: that he transferred the bond to the Insurance Company, who gave him the money for it, but at fifteen per cent. discount, and that he expended the money as trustee of Vaughan, in discharge of debts due by the estate and the general exigencies of the estate: that he alone acted under the trust. That as the proceeds of the negroes have been appropriated to the benefit of the trust estate, the bond or sale ought not to be set aside or cancelled: That a trustee ought to be appointed by the Court to act with him, with orders to confirm the titles, as the estate has had the benefit of the sales.

The Charleston Fire and Marine Insurance Company answer, that the bond was assigned to them on the 23d May, 1821, by endorsement thereon of George L. Champion, acting trustee of the estate of Wilie Vaughan, and Sarah Vaughan, his executrix and residuary legatee. That the Company knew nothing of any discounts against the bond, nor of the nature of the debt. That Champion had a right to sell the slaves, either to pay debts or for the other purposes of the trust. That plaintiffs have a good title to the slaves and have nothing to do with the fund that may come into Champion's hands. That as trustee, he was authorized to receive the money on the bonds, even if bound to apply it to any existing demands. That the advance of the money by them on the bond must be viewed in the same light as if the plaintiffs had paid it, and that they are therefore entitled to hold the bonds and receive the amount in discharge of their advances to Champion and Sarah Vaughan. That they are purchasers without notice, and if Champion is bound to apply the proceeds to any particular purpose, he has received the amount, and the Court may order him to apply it as it pleases. They trust that he will be ordered to make a good title to the slaves, and that the plaintiffs be ordered to pay them the bond.

The Commissioner reported on the 10th February, 1824, as follows:—That on the 12th April, 1819, Wilie Vaughan made a deed of trust to the trustees with power to sell his estate to pay his debts, and for the benefit of Sarah Vaughan, his wife, and his children. That the sales made by G. L.

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Champion and Sarah *Vaughan were without sufficient authority, because Bineham, Blanding and Champion were appointed trustees, and a majority were authorized to sell; and Mrs. Vaughan could only sell her interest, which was a remote one. He recommends a confirmation of the sale, because the price is greater than could be got now.—That the funds, or the greater part arising from the sales, were applied to pay pressing demands against Wilie Vaughan, and in support of his family, and that subsequent sheriff's sales have been made to an amount sufficient to discharge the liens in plaintiffs' bill mentioned.

Order, February Term, 1824.—On motion, Ordered that the report be confirmed, and that plaintiffs pay the amount of the bond yet remaining due, into the hands of the Commissioner, subject to the future order of this Court. Referred to Commissioner to report at the next Court upon the claims of persons entitled to this fund, and that G. L. Champion account before the commissioner for his application of the funds which came into his hands from the sale of the bond to the Insurance Company, and that the Commissioner give notice to the creditors to come in and make their claims.

A decree was pronounced at the same term by Chancellor De Saussure, upon the claims of Drs. Blanding, De Leon and Anderson, who had proved their demands, and claimed payment out of funds raised by sale of part of the estate of Wilie Vaughan, under the trust deed. The only question was as to interest, which the decree allowed contrary to the report.

Order, June Term, 1825.—Upon motion, it is Ordered that the funds now in the hands of the Commissioner, and such as may come into his hands before a final report, be paid over to the Fire and Marine Insurance Company, subject to the rights of the contesting

claimants, and subject to the further order of this Court.

At June Term, 1827, the Commissioner, Mr. Evans, reported, viz.:—"That on the 12th April, 1819, Wilie Vaughan assigned his whole estate to Bineham, Blanding and Champion, in trust for his family, and to pay his debts, giving a majority of them power to sell for that purpose. Champion alone accepted, managed the estate, made considerable sales of personal property, and applied part of the proceeds to pay the debts due by W. Vaughan before the assignment, and part for debts contracted by himself as trustee. He sold several negroes to John Chesnut, for which he took the joint bond of John and James

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Chesnut for $3000; several negroes *to William Trapp, and took the joint bonds of Wm. Trapp and A. F. Peay for $2326. On the 2d June, 1821, these bonds were sold to the Fire and Marine Insurance Company of Charleston, at large discounts; Chesnut's at fifteen per cent. and Trapp's and Peay's at ten per cent., and one per cent. on the whole for brokerage. Chesnut's bonds have been enjoined by this Court, and have been paid. Trapp's and Peay's bonds were not specially enjoined. In consequence of these transactions between the trustee and the Insurance Company, I have reported them creditors of the said estate, after the assignment, to the amount of money actually paid by them for the said bonds; this Court having already decreed that George L. Champion acted in the sale of the negroes without sufficient authority. The amount of demands against the estate which have been rendered to the Commissioner, and were contracted previous to the deed of trust, is.....$ 6,038 50

Amount of demands, including the sums due to the Insurance Company on account of their purchase of Chesnut's bond, and Peay's and Trapp's bonds, and interest to the 23d June, 1827, and debts contracted by the trustee, or otherwise 8,712 78

$14,751 28

That Wilie Vaughan was appointed guardian of his children in 1813, and entered into the usual bond, and acted till 1820, when his letters of guardianship were revoked. He never made a return. He planted in common with his children, the place called Rocky Branch, and was entitled under the authority of this Court to one half the proceeds of the crops. His children, on this account, must have large demands against his estate, as good crops were generally made, and produce high; but in consequence of his having made no returns, I am unable to fix on any amount. Wilie Vaughan also sold in 1819 or '20, a negro woman, Beck, and child, the property of his children, to James Gardner, for $800. The sale was made without the authority of this Court, and has never received its sanction or confirmation. I recommend that his estate be chargeable with this amount, together with the interest from the time of sale."

The report states that the "available funds belonging to the estate of Wilie Vaughan, including the bonds of John and James Chesnut, and Trapp and Peay, amount to $12,047.-

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34; and re*commends that the debts reported to be due before the assignment, and stated in the schedule attached to this report, and the amount which may be found to be due to the children of Wilie Vaughan, be first paid; and the creditors of the trustee, after the assignment, be next paid, in equal degree."

The report further recommends, that the "bond of John and James Chesnut, which has been paid by the order of the Court, be delivered up to them; and that the whole real estate of Wilie Vaughan, in the assignment, and not sold by the trustee, be sold by the Commissioner on a credit."

The following report of the same Commissioner, without date, also appears in the proceedings:

"That on the 12th April, 1819, Wilie Vaughan assigned to Bineham, Blanding and Champion, in trust, his whole estate, for the benefit of his family and to pay his debts; authorizing them or a majority, to sell any part of his estate for the purposes aforesaid. —G. L. Champion alone accepted the trust, and managed from April 1819, to January 1824, and sold, to James and John Chesnut, negroes to the value of $3000; and to William Trapp and A. F. Peay, negroes to the value of $2,093.40. This Court, in a former decree, decided that Champion acted without sufficient authority in the management of the estate, but confirmed the sale to John and James Chesnut, because it was favorable for the estate. The sale to Trapp and Peay has not as yet been confirmed.

"I report that judgments to the amount of $4,319.42, have, since the assignment, been recovered against Wilie Vaughan and his trustee, Champion; and property has been sold by the sheriff of Kershaw District, to the amount of $——— and applied to the said judgments, and the estate is now wholly insolvent.

"I report that Wilie Vaughan, in 1813, became gnardian of his children, and acted as such until his death, in 1821, without making any return of his acting as such to this Court, and that his children, in consequence of his guardianship, are creditors of his estate to the amount of $4,418.

"I report that at the time of the assignment, on the 12th April, 1819, all his creditors ought to have been placed on the same footing, and paid in proportion to their several demands.

"I recommend that a trustee be appointed to carry into effect the intention of the assignment, and that the persons who have obtained judgments and received the whole of

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their demands be made *parties to this bill, and he compelled to refund what they have received over and above their dividends.

"I report that James and John Chesnut have paid the amount of their bonds which were sold by G. L. Champion to the Fire and Marine Insurance Company, and the simple interest on the same, into this Court, in pursuance of an order of this Court, June Term, 1824. I therefore recommend that the said Company be compelled to deliver up said bonds on the payment to them of the principal and interest, deducting, however, the interest on the same during the time it was impounded by this Court."

The cause was continued from term to term until it came before Chancellor Johnston, special term, November 1833. Mr. W. F. De Saussure then moved to confirm the two last reports of the ex-commissioner, Evans, one dated June 1827, and the other without date. And as incident thereto, that the Court should take up and consider the question, who is entitled to the money secured by the bond of the plaintiffs described in the pleadings.

Mr. W. Mayrant opposed the motion, on the ground that the reports were made without authority and without summoning the parties; and that unless the reports are properly made up, the rights of the claimants cannot be properly decided.

The Chancellor granted an order quashing both the last reports—"because no evidence was reported with them to enable the Court to judge of their correctness or incorrectness, and because it did not appear that before the Commissioner made them up, he had called the parties interested before him, or given them any opportunity to attend to their rights; nor had they notice of the reports so as to enable them to except. Besides, it appeared that for the last seven or eight years, the Court had declined to act on the reports, which (thus travelling from the Commissioner's office to the Court and back again, each party insisting that the other should be the actor, which was retorted,) formed a serious impediment to the case."

Mr. Mayrant, then, on the part of the Insurance Company, moved that the bill be dismissed as to them for want of prosecution, as well as because, after the confirmation of their purchases, there were no longer any equities in the bill entitling it to be retained as against them. At the same time Mr. Blanding moved that the claims of Vaughan's creditors, heretofore rendered and not established, be referred to the present

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Commissioner to report thereon, *distinguishing such as were contracted before and after the execution of the deed of trust. That the accounts of Champion be referred, and that he account; and that the Commissioner report the amount of funds received and how applied.

Both motions were refused, but the Court passed an order to the following effect:—

That the bill be retained, but further proceedings in the cause be suspended. That persons claiming the fund in opposition to the Insurance Company, have leave to file a cross bill laying claim to the same, setting out the ground of their claims, and making the parties necessary to a full decision: that unless such bill be filed by the —— day of —— this bill stand dismissed as to the Insurance Company, without prejudice.

Chancellor Johnston. The bill was not dismissed at present, because the Court, by confirming the sale to the Chesnuts, and ordering the fund to be paid in, and allowing creditors to render their claims, had, in some sort, pledged itself to see their claims duly dealt by; and if the bill were now dismissed, injustice might be done by the lapse of time or act of limitations, to which their dependance on the pledge of the Court may have subjected them: to say nothing of the expenses to which they may have been subjected on the same confidence.

Proceedings were stayed, because the experience of eight or ten years was proof, that, without a cross bill, the responsibility of becoming actor could not be thrown on any one, and in the present course, there was no likelihood of ever seeing the end of the cause. Whose duty was it to press George L. Champion to an account? Were Vaughan's creditors bound to do it? Were they entitled to this fund until they established a deficiency of other assets, and that there was no other resource? If not—if they were bound to show such exertion and deficiency, what means had they to enforce such accounting? Where were their charges? How had he been allowed the benefit of this answer? Again, did it not appear from the reports and other proceedings, that there were trust assets which had never come to his hands, and never been disposed of? In whose hands are they? Who claims them? How are the claimants of them, whether they be executors, legatees, cestui que trusts, or others, represented here? How can a decree disposing of them be made, un-

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less these be represented? *And again, do not the proceedings disclose that Champion made other sales on no better authority than this? Are the creditors, if entitled at all, entitled to be paid solely out of this fund; or ought the other purchasers to contribute? Must not the creditors then bring them in also? It appears that Mrs. Vaughan was an obligee, and joined in the assignment, thus enabling G. L. Champion to receive funds. If, by reason of his misapplication of them, the Insurance Company are to be deprived of the bond, are they to be without a decree against him,—or rather, ought she not to be first liable? But she is not one of the parties. Who can make her, or any one else

who has not voluntarily come in, a party, as the proceedings now stand? Is it desirable in a Court of justice, to stick to a course of practice, whereby the justice of the case cannot be reached?

A cross bill was allowed because the Court being committed, and the present course not allowing of a satisfactory decision, no other means suggested itself. What other is there? Upon the bill filed in this case, could any creditor obtain a decree against the plaintiffs, upon a substantive demand, distinct from the matters stated in the bill, without a cross bill? Under any thing like sound practice, I apprehend not. And can a defendant obtain a decree against a co-defendant upon easier terms than against the plaintiff? Is a co-defendant any more to be deprived of an answer to the matter laid to his charge than the plaintiff? Is he to be surprised? If not, how is he to be guarded against it when every thing lies in mere breath? What is he to meet? What witnesses is he to summon? What is he to disprove? It is worse than this. Is it not? If the creditors here obtain a decree upon the present proceedings, is it not asserting, not only that co-defendants can have a decree against each other, when they could not against the plaintiffs, but that one who is not a defendant at all, can have it against one of the defendants! And all this upon mere parol!

There is no way equal to the most regular way. None speedier—none more conducive to justice; none, on the whole, less expensive; none in which the record can be made more effectually to carry the justification of the final judgment—none furnishing such means of correcting it, if erroneous; and, certainly, none showing so clearly what has been decided, between whom, and who are bound or barred by the judgment. When

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parties are *asking leave to take some short cut in practice—like persons about to open a friendly suit, how fair they are! What a mighty anxiety to go upon the merits! We only want to ascertain our real rights: every thing is agreed on: we understand each other: no need of blacking paper, or making up a regular record: why then load us with expense by compelling us to go by rule? But just yield to them—give up one sound principle of law—break down one wholesome rule of practice—and see the consequences. Each is instantly tempted to take advantage of the other—the one cheats—the other is surprised—one insists that the onus of some duty is upon his opponent—he denies and retorts—every thing gets into confusion—the rules to restrain and govern them have been given up, and at length they come in at the final judgment, irritated and discontented. Nor is this all—no one can tell what that judgment should be, nor whether it will meet the merits of the cause. It is above correction if never so wrong—and, worst of all, it is ten to one, if half the parties or their privies are bound by it. And at last, the parties angered by the contest and instructed by experience, set about a regular suit, to go over the same ground again. This is liberal practice—this is cheap litigation. It corrupts most, satisfies none, and impoverishes all.

The Insurance Company was, by the order, allowed to be the defendant, or one of the defendants, because some one must be, and they might as well be as any others.

It appeared also, that their right to the fund was prima facie good, and it was but right that those who would impeach it should be put to do so—that whenever the Court confirmed the sale, that of itself imparted a consideration to the bond which prima facie enured to the obligees, and that the Company holding the bond, even without an assignment, held such a right to payment as not only Equity but Law recognizes. They could have sued and collected in the name of the obligees. That, although the Court at the time of confirming the sale, ordered the fund into Court, directing a litigation for it, that did not amount to any declaration that as a condition of the confirmation the creditors or cestui que trusts should have it. If that had been intended as a condition of the confirmation, the fund would at once have been decreed to the creditors or cestui que trusts. The terms of the order showed no such condition. Upon the terms of the order the Insurance Company might as well insist that the confirma-

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tion was *npon condition that they should receive the money, as the creditors could. The only condition of the confirmation was, that the money be paid in to be litigated for. The cross bill carries out that condition into practice.

In one thing I am afraid I was wrong. I forgot to declare by the order, that for default of filing a cross bill by a given day, the Insurance Company should be at liberty to move for the dismissal of the bill; instead of declaring that in such case it should stand ipso facto dismissed.

John C. Vaughan, Claiborne C. Vaughan and Eliza Virginia Vaughan, children of Wilie Vaughan, and creditors of his estate, called in under the order of the Court to establish their claims in this cause, appealed from the decretal order of Chancellor Johnston, ordering the bill to be dismissed nisi, on the following grounds:—

1. Because all the proper parties are before the Court necessary to a final adjudication of the cause, and they are in this Court by virtue of its orders made in June 1824, and June 1825.

2. Because, if it be necessary that another bill be filed to ascertain to whom the proceeds of the bonds should be paid, such bill

should be filed by the Insurance Company.

3. Because the orders made by this Court, at June Term 1824, and June Term 1825, have never been appealed from, and without such appeal, cannot now be reversed by an order of a subsequent Chancellor, overruling those orders and giving a new direction to the cause.

4. Because it is the duty of the Insurance Company to bring George L. Champion to account: and it is their duty to shew that he is in advance to the estate of Wilie Vaughan, in order to subrogate themselves to his rights, and thus establish their claim to the proceeds of the bond of the Chesnuts; and it is not the duty of these appellants.

5. They further appeal from the Chancellor's decree refusing to confirm the reports made by the Commissioner at June Term 1827, and the undated report, (of June Term 1828,) establishing the amount due by the estate of Wilie Vaughan to his children; and they move to confirm said reports.

6. And if said reports are not confirmed by this Court, they further appeal from the order refusing to grant the motion made by

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*Mr. Blanding for a reference, and move this Court to grant the said order.

The cause was argued by Mr. Wm. F. De Saussure on these grounds, before the Court of Appeals, in December 1833, and the following judgment pronounced in that Term.

O'NEALL, J. It appears that the price of the negroes bought by the plaintiffs, and belonging to the trust estate, was, on the decree confirming their title, paid into Court, "subject to the future order of the Court." In the meantime, it was referred to the Commissioner to report upon the different claims to this fund; and a part of the order of reference directed "that G. L. Champion account before the Commissioner for his application of the funds which came into his hands from the sale of the bond to the Insurance Company, and that the Commissioner give notice to the creditors to come in and make their claims." Under this part of the order, several creditors came in, established their demands, and obtained a decree directing payment. At June Term 1825, the fund in Court, and such as might come to the Commissioner's hands before a final report, were directed to be paid "to the Fire and Marine Insurance Company, subject to the rights of the contesting claimants, and subject to the further order of this Court." Since this order, the Court has done nothing further than continue the cause from term to term, under reference, until November 1833, special Term, when the cause came on before Chancellor Johnston for trial. Two reports of the late Commissioner, establishing a large sum due by the trust estate to John C., Claiborne C., and Eliza Virginia Vaughan, were presented for confirmation, which was resisted by the Fire and Marine Insurance Company; and the Chancellor quashed the reports, and ordered this bill to be dismissed as to the Fire and Marine Insurance Company, unless the persons claiming the fund in opposition to the Company should file a cross bill within a limited time.

From this decree, John C., Claiborne C., and Eliza Virginia Vaughan, appeal on various grounds, which make the following questions:—1st. Were the appellants rightly in Court, under the orders made in the cause as creditors claiming the funds? 2nd. If so, had the Chancellor a right to quash the Commissioner's reports, and to cast upon the appellants the burden of filing a bill against the Fire and Marine Insurance Company to try the right to the said fund?

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*1. The fund in controversy came properly into the hands of the Court; for, on confirming the plaintiffs' titles to the slaves which they had bought, it was the business of the Court to see that their price was applied to the purposes of the trust which had authorized their sale. This could not be done by leaving the fund to be paid by the Fire and Marine Insurance Company: they were not creditors of the grantor of the trusts, but of his trustee, Champion. They bought the plaintiffs' bond from him, but the title to the negroes which he sold, and for which the bond was given, was defective, he having no power to make the sale. They could not have recovered the bond from the plaintiffs on account of this defect of title. When the Court of Equity confirmed the title, they assumed the trust, and the price was properly payable to them, as the fund applicable to the payment of the debts of Wilie Vaughan, in place of the slaves sold. The Fire and Marine Insurance Company having obtained nothing by their purchase of the bond, had a plain right to recover the amount paid by them to Champion for the bond from him; and if they could shew that he was in advance to his trust estate and was insolvent, then to take his place as a creditor of the trust, to the amount of the sum paid by them to him, if he was so far in advance to the estate; if not, to the extent he was. This is the state of the claim of the Fire and Marine Insurance Company: that it was properly before the Court is not denied. To decide whether it would entitle them exclusively to the money, three facts had still to be made out: 1. That there were no unsatisfied creditors of Wilie Vaughan. 2. That the trustee Champion was in advance for the trust estate to a sum equal to the fund in dispute; and 3. That he was insolvent.—Until the first was established, the Fire and Marine Insurance Company could have no exclusive right to the whole fund. The most they could contend for, on establishing the other two facts, would be to come in rateably with the other creditors of the

trust, if there were any. To ascertain whether there were any creditors, all the creditors of Wilie Vaughan were requested by notice to come in and establish their demands. All who came in under that notice are parties to the cause, and are bound by all the proceedings. The appellants, it appears, came in under the order, and have (perhaps on an ex parte reference) satisfied the Commissioner of the debt due to them by Wilie Vaughan. This made them properly parties in Court, and as much entitled

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to its favor as the *Fire and Marine Insurance Company. For, notwithstanding they are in possession of the fund, they are in possession subject to the further order of this Court, and the appellants were moving to have it paid over to them. In such a case the Court must decide on the hostile rights of the two claimants; and to enable it to do so, it might be referred to the Commissioner to ascertain and state the facts upon which the Court is called upon to decide. In this way, every thing would appear by the record. There is nothing irregular in such a course of proceeding. It is every day's practice on a creditor's bill, to bring all the creditors before the Court by a notice requiring them to come in and prove their demands. In such a case there may be hostile and conflicting claims among the creditors; upon them the Court must decide on the coming in of the Commissioner's report. A fresh bill would hardly be required to be filed in such a case, to make the creditors, coming in under the notice, parties before the Court.

2. If the Commissioner's reports were made up entirely on an ex parte hearing of the plaintiffs, they might have been set aside; but I have looked through the Chancellor's report in vain to see any evidence of the fact that they were so. In the absence of proof the legal presumption would be, that the Commissioner had done his duty and given due notice before hearing the plaintiffs. That presumption is, I think, strengthened by the entries on the dockets at June Term 1827 and 1828. In all events, I think the Chancellor erred in quashing the reports and ordering the appellants to file the cross bill (as he has called it). We have seen they were properly parties; and notwithstanding there had been great delay and negligence in bringing the cause to trial, it is no more to be imputed to them than it is to the other parties. If the case presented to him did not justify him in pronouncing a final decree in favor of the appellants, he ought at least to have sent them back to the Commissioner, with instructions. Situated as the case is, I do not think that we ought to confirm the Commissioner's reports of 1827 and 1828, and direct the fund to be paid to the appellants.

It is Ordered and decreed that the order quashing the reports, and the decree of the Chancellor, be reversed: that the cause be remanded to the Circuit Court, and that the Commissioner be directed to examine and report upon the claims of the creditors of Wilie Vaughan, which have been rendered to the former Commissioner and not decreed upon; distinguishing which debts were con-

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*tracted before and which after the execution of the deed of trust: in such investigation, the Commissioner's report of 1827, and the undated report, (supposed 1828,) will be prima facie evidence of the claims of the appellants; and the Fire and Marine Insurance Company will have the right to examine and point out from the reports, or the evidence on which they were founded, any part or parts of the said claims which have been allowed improperly; and upon them the present Commissioner will decide and report: so too, they may by proof disprove the whole or any part of the said claims, and upon the proof which they may adduce, the Commissioner will decide and report.

It is also Ordered and decreed, that the order of February Term 1824, requiring Champion to account for the funds which came into his hands for the sale of the bonds be extended, and that the Commissioner do forthwith take the account ordered by it.

JOHNSON, J., and HARPER, J., concurred.

Mr. Mayrant, the counsel for the Insurance Company, being absent at the last Term of the Court of Appeals when the foregoing opinion was delivered, by leave of the Court, at this sitting submitted the following grounds in support of the Circuit decree:

1. That the Commissioner's reports are unaccompanied by evidence; and were made up on ex parte hearings, as appears by the Chancellor's decree, and his decretal order quashing the reports; which last recites the fact, that it did not appear that the parties had been summoned to attend the referenees, and which order was not before the Court at its last sitting.

2. That Mrs. Sarah Vaughan, the executrix and residuary legatee of Wilie Vaughan, was never made a party to these proceedings; and that persons claiming in opposition to her and to the Company should proceed by a cross bill and make her a party.

3. That the orders heretofore made suppose the Company to be prima facie entitled to the fund, and no legal or equitable demands having been established against it, the decree of the Chancellor in relation thereto was right.

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*On which the Court delivered at this Term, the following judgment:

O'NEALL, J. At the instance of the defendant's counsel, (who was absent at the

last Term, when this cause was decided, and who it seems did not receive until after the adjournment of this Court, the notice of appeal, which had in due time been forwarded to him by mail,) we have looked into the former opinion and are perfectly satisfied with its correctness.

We did suppose from the papers before us at the last Term, that Mrs. Sarah Vaughan was regularly a party in Court. For her name is set down in the report of the cause as one of the defendants; and she appeared to the case by her counsel, Stephen D. Miller. But it seems that process of subpœna to answer was not prayed against her; and she is not therefore regularly a party in Court. This cannot, however, affect the result of this case. As executrix or residuary legatee, she has no interest in it. The contest is between creditors; and the question is—who are entitled to a fund arising under a trust deed to which she was not a party.

The motion is dismissed.

JOHNSON, J., and HARPER, J., concurred.

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2 Hill, Eq. 87

THOMAS SUMTER, Adm'r. of Thomas Sumter, Sen., v. JOSIAH B. MORSE, CYRUS MORSE, and A. T. MORSE.

(Columbia. June, 1834.)

[*Limitation of Actions* ⟸148.]

If there be mutual running accounts between the parties and any of the items have accrued within the time of the statute of limitations, this amounts to an acknowledgm't. of the previous account and a promise to pay.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 597–603; Dec. Dig. ⟸148.]

[*Limitation of Actions* ⟸145.]

The plaintiff, (an administrator,) claimed demands in his bill against the defendants extending down to a period within the statute; and set forth that he as the agent of his intestate had frequently called on the defendants and requested them to come to a settlement of their accounts, and pay what upon balancing the accounts should appear to be due: *Held*, that this statement of the bill is such an admission of the previous accounts of the defendants as will prevent the operation of the statute of limitations; and being made by his agent, is obligatory on the estate of the intestate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 588; Dec. Dig. ⟸145.]

[*Limitation of Actions* ⟸15.]

Before answer filed, it was agreed between the parties that neither should plead the stat. of limitations to the demands of the other, and the defendants did not in their answer, or on the reference, urge that plea; the plaintiff will not afterwards be permitted to plead the statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 65; Dec. Dig. ⟸15.]

[*Executors and Administrators* ⟸228.]

Generally an executor or administrator may or may not plead the statute of limitations:—The only exception is when the demand is in whole or in part due to himself, in which case the legatees or distributees have been permitted to plead it when he had not: but when the administrator is the sole distributee, his agreement not to plead the statute has every possible legal and equitable sanction.

[Ed. Note.—Cited in Wilson v. Wilson, McMul. Eq. 332.

For other cases, see Executors and Administrators, Cent. Dig. § 826; Dec. Dig. ⟸228.]

Sumter.—February 1834.

The bill stated that the defendants, J. B. and C. Morse, were indebted to the plaintiff's intestate, General Sumter, for house rent, negro hire, monies paid by him as their security, for goods delivered from his store, and supplies from his plantation; which debts were contracted at different times, from 1817 until 1830. These demands are detailed at length in the bill. That the plaintiff, as the agent of General Sumter, in his life-time, frequently applied to the said J. B. and C. Morse, and desired them to come to a settlement of their accounts with General Sumter, and to pay what, upon the balance of their accounts, should appear to be due;

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*which they neglected and refused to do. That through the assistance thus afforded by General Sumter, they purchased considerable real and personal property, which, with the view of defrauding their creditors, they caused to be conveyed to the defendant, A. T. Morse, who holds the same for their use and benefit, they being insolvent. The bill prays that this property, and certain other property in the possession of Cyrus Morse, may be decreed liable for their debts; and as defendants are about to remove, for a ne exeat and general relief.

The defendants in their answers deny fraud in the conveyance of the property to A. T. Morse, or any intention on their part to evade the payment of just debts. J. B. and C. Morse insist that they have claims against General Sumter, and that on a fair and full settlement, it will be found that they are not only not indebted to him, but that he is indebted to them.

The cause was referred to the Commissioner to make up the accounts, who reported, that on stating the accounts, there appeared a balance of $58.23, in favor of J. B. and C. Morse.

The report states that the plaintiff claimed to have admitted by the defendants, J. B. and C. Morse, certain items of charges for money and other things made in the hand writing of General Sumter against them, which they objected to as not being evidence of the demands therein stated, which objection the Commissioner sustained. It further states, that since the day of reference the plaintiff insisted upon the statute of limitations against the demands of J. B. and C. Morse, but that the defendants objected thereto, upon the ground that there had been

an understanding between the plaintiff and the defendants that the statute should not be pleaded; which objection the Commissioner sustained, and refused to allow to the plaintiff the benefit of the statute.

The plaintiff excepted to the report of the Commissioner on the ground:—

That the Commissioner refused to allow the plea of the statute of limitations on the part of plaintiff, upon an alledged agreement that plaintiff would not plead the statute; the evidence of which agreement he has not been allowed time to contradict, except by his own affidavit, which, after understanding that testimony of such agreement had been given by defendant's counsel, he tendered to the Commissioner, who rejected it.

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*Chancellor de Saussure. It appears by the statement of the defendant's counsel, that he called upon the plaintiff before the answers were filed, and enquired if he intended to urge the statute against the demands of the defendants; and stated that if he did not mean to rely upon the statute, the defendants would also waive it.—That the plaintiff assented to this course, and the statute, in consequence was not insisted upon by the answers.

Unquestionably if the defendants have been induced to waive the statute in consequence of this understanding the Court will not permit them to be prejudiced by it, and inasmuch as the plaintiff now urges that plea against the defendants' demands, it will be considered as pleaded by them against the demands of the plaintiff. Indeed it appears by the affidavit of Mr. Potts, the plaintiff's counsel, that after the first reference, but before the final reference of the accounts between J. B. and C. Morse and the plaintiff, and before any report made thereon, he expressly insisted in writing upon the plea of the statute, on behalf of the plaintiff, and at the same time gave notice that the defendants were at liberty to urge it on their side if they thought proper to do so. The counsel for the plaintiff alleged in argument, that the plaintiff consented to this arrangement upon the supposition that, as the books of account kept by the defendants were to be evidence, so, on the other hand, the accounts kept by his intestate, Gen. Sumter, in his own hand writing, would be received as evidence against the defendants; and that he only insisted upon the statutory protection, when these memoranda of his intestate were objected to by the defendants, and rejected by the Commissioner. Independent then of the objection that an administrator cannot by his promise revive a debt barred by the statute of limitations in the life-time of the intestate, I think the plaintiff ought not to have been deprived of the protection of the statute. But it is objected on the part of the defendants, that the statute cannot be pleaded in this case: first, because both parties were merchants; and secondly, because there were mutual unsettled demands between the parties, an account current with items on both sides running through the whole period of the respective demands; and this is the important question in the case.

It is true, that both the intestate and the defendants, J. B. and C. Morse, owned stores, and each had a store account against the other. But it appears that the store ac-

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count of Gen. Sumter against the *defendants, commenced on the 16th October, 1817, and terminated in March 1818; while the store accounts of the defendants against him commenced on the 4th June, 1817, and terminated on the 27th December, 1821. The exception in the Statute of Limitations is in the following words: "Other than such accounts as concern the trade of merchandize between merchant and merchant, &c." The plaintiff's intestate died on the 1st June, 1832, and this bill was filed on the 9th of January, 1833; and the answer of the defendants, setting up these claims, on the 21st of January, 1833. Thus, more than ten years had elapsed between the date of the last item in the accounts and the institution of this suit. The question, whether the statute will operate as a bar where the account is between merchants and concerning merchandize but more than four years have elapsed since the last item, has been much discussed, and the decisions are contradictory, but the better opinion seems to be, that the statute may be pleaded. In Coster v. Murray, 5 Johnson's Ch. Rep. 522, Chancellor Kent reviews the cases and comes to that conclusion. And in the case of Van Rhyne v. Vincent, 1 M'Cord's Eq. 316, Judge Nott, after referring to the authorities, says, "I do not at present see any good reason why merchants and factors, after all dealings between them had ceased, should not be as well entitled to the protection of the statute as other persons." He observes, however, that he does not mean to give an opinion upon the point because the case did not require it. I have come to the conclusion, that the object of the statute was to prevent dividing of the account where it was between merchants; and if there are any items within the period of limitation, these will save the whole account. Here there are no such items, and the statute is a bar: Nor will it help the defendants, that there were subsequent dealings between them and the plaintiff's intestate; there were clearly no such dealings between them as merchants, and the subsequent transactions are, moreover, none of them within four years before this suit, as will be shewn hereafter.

But it was argued, that although the parties be not merchants, nor the account concern merchandize, yet the statute does not

apply where there have been mutual unsettled current accounts between the parties; and such is the law, provided there be some item within the period of limitation. Fitch v. Hillary, 1 Hill's Rep. 292. Is there any such item in this case? The latest dealing between the parties was in 1824, when the

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intestate indorsed *a note to be discounted in the Bank of the State, for the accommodation of J. B. and C. Morse. More than four years elapsed between that transaction and the filing of the bill, and the objection thus urged by the defendants against the operation of the statute cannot prevail. But it is urged by the defendants, that the filing of the bill seeking an account and admitting that there are unsettled demands between the parties, shuts out the plaintiffs from the benefit of the statute. Upon examining the bill, I do not feel the force of this argument; but give the defendants the benefit of it as a general principle, how can it operate in this cause? The plaintiff is an administrator—the defendant's demands were barred in the life-time of the intestate. Can he revive these demands against the estate by any acknowledgment on his part? I consider it as settled law that he cannot.—Executors of Fisher v. Executors of Tucker, 1 M'Cord's Eq. 175.

It is argued for the defendants that plaintiff's demand for the Bank debt, reported by the Commissioner as now amounting to $2,-141.63, is barred by the statute of limitations —that the plaintiff has alleged in his bill that he paid the debt to the Bank, and that the statute therefore began to run from the period of such payment. The statement in the bill is, that in 1824 the intestate indorsed a note in Bank for the accommodation of J. B. and C. Morse, whom the Bank sued, and the intestate being also threatened with suit, paid the Bank and took an assignment of the suit, which he prosecuted to judgment in the name of the President and Directors. The plaintiff now relies on that judgment, but the defendants allege that the debt was paid when the judgment was obtained. The defendants then mean to ask this Court to set aside that judgment—upon what Equity? That the debt had been already paid? By whom had it been paid? By the party now setting up the judgment. The suit was assigned to the intestate, who paid, for the privilege of carrying it on, the amount of the note; and this was the proper mode of protecting himself. This is, therefore, a judgment debt, and is not subject to the operation of the statute of limitations.

The decretal order directs the case to be referred back to the Commissioner, with leave to both parties to plead the statute of limitations; from this decree the defendants appealed, and move for a reversal thereof, on the ground that the Chancellor erred in his decision on the statute of limitations.

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*Blanding, for the appellant cited 6 T. R. 192; Fitch v. Hillary, 1 Hill, 292; 1 M'C. Ch. 175.

De Saussure, contra, cited 5 John. Ch. Rep. 522; Ang. on Lim. 207, chap. 10, 197; 1 M'C. Ch. 310; 5 Cranch. 15.

O'NEALL, J. I agree with the defendants, that the statute of limitations cannot avail the plaintiffs upon two grounds, to wit: first, the statement in the bill of a running account on the part of General Sumter against the defendants J. B. and C. Morse, from 1817 to 1830, and the allegation in the bill having reference to this account, and the counter account of the said defendants, "that the plaintiff, as the agent of General Sumter, in his life-time, frequently applied to the said J. B. and C. Morse, and desired them to come to a settlement of their accounts with the said General Sumter, and to pay what upon the balance of their accounts should appear to be due:" Secondly, the agreement between the plaintiff and the counsel of the said J. B. and C. Morse, that neither of the said parties should plead the statute of limitations, and the actual execution of this agreement by the plaintiff, is not pleading the statute of limitations until the account had been taken of all the charges on the part of the defendants against General Sumter.

First. It is well settled that if there be mutual running accounts between parties, and any of the items have accrued within the time of the statute, this amounts to an acknowledgment of the previous account and a promise to pay. Fitch v. Hilleary, 1 Hill, 292. I am disposed, however, to think, that the reason the statute does not run, in such a case, is because the plaintiff's cause of action does not accrue to him until the mutual dealing has ceased. It is only at and after the last item, that a balance can be struck; until then it is uncertain who may have the right to sue. I am not speaking now in reference to the exception, in the statute of limitations, of accounts which "concern the trade of merchandize between merchant and merchant, their factors and servants," and as to which it will be unnecessary to give any opinion in this case, but of mutual running accounts existing between the plaintiff and defendants, of any character or kind.

From the statement of the accounts in this case, made by the Commissioner, it appears that from 1817 to the close of 1821, there were mutual running accounts between Gen-

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eral Sumter and *J. B. and C. Morse. The statute would (if this was all to prevent) run from the first of January, 1822, and thus entirely exclude this account. But it appears from the bill that the plaintiff's claims extended down to 1830: and that, in reference to them, as the agent of General Sumter, he frequently called on the defendants J. B.

and C. Morse, and requested them to come to a settlement of their accounts with the said General Sumter and pay what upon the balance of their accounts should appear to be due. This statement on the part of the plaintiff is an admission by General Sumter of the accounts of the defendants as a previous and subsisting debt, which he is willing and liable to pay. For it is in substance saying "here are my accounts extending to 1830, produce yours, deduct the amount and pay the balance." After such an acknowledgment made, as we must presume in 1830, for the plaintiff's account against one of the defendants then ceases, it would be strange indeed if the plaintiff could set up the statute of limitations, which his intestate had thus waived. I speak of the acknowledgment, as made by General Sumter himself; for although it was made by the plaintiff, yet it was made by him as the agent of General Sumter, and by his authority, and is his acknowledgment, upon the plain legal maxim, "qui facit per alium, facit per se."

Second. That the plaintiff could not, in this case, plead the statute of limitations, after his agreement not to plead it, and his actual execution of it, by not attempting to plead it, until the defendants' accounts had been proved, is, I think, perfectly demonstrable. It is true, that the defendants' agreement not to plead the statute, would not, as an executory contract, bind him; but in pursuance and in execution of it, he did not plead it; and the question now is not, was he bound by his contract not to plead the statute; but, can he have leave to plead it after he has in pursuance of his agreement declined at the proper time to plead it.

An executor or administrator generally may or may not plead the statute of limitations. This privilege is conceded to him as well on account of his legal identity with his testator or intestate, as also on account of his supposed knowledge of the legal liability of his testator or intestate to pay the debt claimed. The only exception to this rule, which has been recognized in this State, is when the debt or demand is due in whole or in part to the executor or administrator, in such

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a case, the legatees or distributees *have been permitted to plead the statute of limitations, notwithstanding the executor and administrator declined to plead it. In the case before us, the plaintiff is not only the administrator, but also the only distributee, and under such circumstances, his act must have the sanction of every possible legal or equitable interest to sustain it.

He did, in pursuance and in execution of his agreement, decline to plead the statute of limitations. For, to the accounts set up by him, the defendants did not by their answer, or on the reference, plead the statute of limitations; this was a performance on their part, of that part of Colonel Blanding's agreement which they were to perform. They could not after this have pleaded it. On the part of the plaintiff, no written replication to the defendants' answer is required. His objections to the accounts set up by the defendants lay altogether in parol, and ought to have been urged, either before the order of reference was made, so as to have excluded from the account which it directed all the defendants accounts; or, at least at the time when the accounts were presented to the Commissioner, and were about to be proved. If the plaintiff had intended to rely on the statute of limitations, he should at one or the other of these times have urged it. Not having done so, he must be taken in good faith, to have declined to plead it, and be placed in the same situation of the defendants, who after their agreement and answer could not have pleaded it. Would the Court under these circumstances give to either or both of these parties on the application of one of them leave to plead the statute of limitations? Where a party has failed to plead the statute at the proper time, the Court is slow to give him that leave; but after a case is on trial, and the proof is heard on one side, it is then too late to ask leave to file the plea. That was exactly the case here: the Commissioner had heard the defendants' proofs; they had legally established their demand, which the plaintiff's silence as to the statute of limitations admitted to be subsisting, and that he was willing and liable to pay. After this, the Commissioner was right in refusing to allow him the benefit of the statute of limitations; and the Chancellor erred in allowing to both parties, on the application of the plaintiff alone, the liberty to plead it.

Decree modified.

JOHNSON, J., and HARPER, J., concurred.

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2 Hill, Eq. *95

*HENRY PARKER v. LEWIS HOLMES and JOHN SPANN.

(Columbia. June, 1834.)

[*Fraudulent Conveyances* ⇐186.]

When actual fraud in a judgment or conveyance is clearly proved, it is wholly void & will not be permitted to stand as a security for what is actually due; but when Equity infers fraud from the circumstances and relation and character of the parties, it is at the discretion of the Court, to allow the security to stand good for what is really due.

[Ed. Note.—Cited in Bowie v. Free, 3 Rich. Eq. 411; DuPont v. DuBos, 52 S. C. Append. 600.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 594; Dec. Dig. ⇐186.]

Edgefield.—Before Chancellor De Saussure, June 1833.

The plaintiff, as a judgement creditor of John Spann, filed this bill to set aside

a judgement the defendant Holmes had against Spann, charging the same to be fraudulent, and praying that certain monies which Holmes had received on it of sales by the sheriff, may be decreed to him. Spann has left the State. The answer of Holmes denies fraud in the judgement, and affirms that the consideration was for services rendered by him in attending on behalf of Spann to an important suit in Equity, and for monies advanced to him.

Evidence was given on both sides for and against the fairness of the transaction, which need not be detailed. The Chancellor's decree declares that the transaction between Holmes and Spann, was contrived and intended as a cover of Spann's property against his creditors, which is fraudulent; or that it was an imposition by Holmes on the weakness and credulity of Spann, an habitual drunkard and exposed to the acts and extortions of designing men, and cannot at any rate be allowed to affect creditors: That Holmes is entitled to credit for the actual advances of money by him, and the true value of the services rendered; and to ascertain these a reference was ordered.

Both parties appealed; but as the defendant's grounds depend wholly on the facts, they need not be stated.

Griffin, for the plaintiff, now moved the Court to reverse so much of the decree as allows the defendant for advances made, or services rendered, on the ground—that the transaction being fraudulent, he should derive no benefit from it; and cited Miller v. Tolleson, Harp. Eq. Rep. 145; 1 Jac. & Walk. 119.

Wardlaw, contra, cited 2 Sch. & Lef. 501; 1 John. Ch. Rep. 178; 8 Ves. 282.

HARPER, J. [After noticing the facts and concurring with the Chancellor in his conclusions thereon.] Nor can we, in relation to the plaintiff's ground of appeal, say

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that the Chancellor has erred *in decreeing the judgement to stand as a security for what shall be found actually due to Holmes. When actual fraud (dolus malus) is clearly proved, the judgement or conveyance is wholly void, and will not be permitted to stand as a security for what is actually due. Miller v. Tollison, Harp. State Rep. Eq. 145 [14 Am. Dec. 712]. But where Equity infers fraud from the circumstances and relation and character of the parties, it is at the discretion of the Court to allow the security to stand good for what is actually due. 1 John. Ch. Rep. 478.

Decree affirmed.(a)

JOHNSON and O'NEALL, JJ., concurred.

(a) See Smith v. Loader, Prec. in Ch. 80; Abingdon v. Butler, 1 Ves. jr. 206; Townsend v. Lowfield, 1 Ves. sen. 35; Herne v. Meeres, 1 Vern. 465.

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA, IN DECEMBER 1834, AND JANUARY 1835.

JUDGES PRESENT.

HON. DAVID JOHNSON, President.
" J. B. O'NEALL.
" WM. HARPER.

2 Hill, Eq. *97

*JOHN PEAY, Administrator of Samuel M'Creary, v. JOSEPH FLEMING and Others, Creditors of Samuel M'Creary.

(Columbia. Dec., 1834.)

[*Executors and Administrators* ⇐391.]

If an administrator, on a sale of his intestate's property, take any other security than that required by the terms of the order for sale, he becomes personally responsible, and if loss ensue it must fall on him.

[Ed. Note.—Cited in Roberts v. Adams, 2 S. C. 342.

For other cases, see Executors and Administrators, Cent. Dig. § 1589; Dec. Dig. ⇐391.]

[*Execution* ⇐348.]

A levy is prima facie evidence of satisfaction:—but this presumption may be rebutted by showing that satisfaction in fact, has not and could not have resulted from the levy by reason of senior executions which would have covered a larger amount than the value of the levy.(*a*)

[Ed. Note.—Cited in Dilling, Baker & Co. v. Foster, 21 S. C. 338.

For other cases, see Execution, Cent. Dig. § 1088; Dec. Dig. ⇐348.]

Chester.—Before Chancellor De Saussure, July 1834.

Bill to marshall assets. The bill was filed to compel the creditors of the intestate to come in and establish their demands, and receive their respective proportions of the assets. Under an order of the Court the plaintiff was required to account for his administration, and the Commissioner, in stating the account, deducted from the amount of the sale bill seventy dollars, the price of a horse sold to one M'Sherry, which had not been collected. The Commissioner, also under the order of the Court, made a report on the execution of Eli T. Hoyt, one of the creditors of the intestate, recommending that it should be paid out of the funds in hand.

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*That part of the report disallowing the charge against the administrator for the price of the horse was excepted to by the creditors generally, and the exception was sustained by the Chancellor. And the other creditors excepted to so much of the report as recommends Hoyt's execution to be paid; but this exception the Chancellor overruled.

Both parties appealed. The facts connected with both questions are stated in the following opinion of this Court.

Clarke & M'Dowell, for the plaintiffs.
Williams, for the creditors.

O'NEALL, J. The first part of this case relates to the appeal on the part of the plaintiff, he contends that he is not liable for the price of a horse sold by him as administrator, to a man of the name of M'Sherry. The facts appear to be, that at the sale of his intestate's estate, the plaintiff sold the horse for seventy dollars on the usual term of note and security: the purchaser, without complying took off the horse without the plaintiff's knowledge; he pursued M'Sherry, and took from him a note on one Eccles, who was then, and for a year afterwards, solvent: the note was for more than the price of the horse, and the plaintiff paid M'Sherry the difference.

From this statement, it is apparent that the note of Eccles would not be regarded as

(*a*) See Davis v. Barkley, 1 Bailey, 140; Mazyck & Bell v. Coil, 2 Bailey, 101.

the assets of the estate; it was received in satisfaction, it is true, of the price of the horse, but the receipt of it was the act of the administrator outside of his duty as such. If loss has ensued, it must fall on him. For he and not his intestate's estate must be regarded as the owner of Eccles' note. It was his duty, as administrator, to see that the terms of the sale were complied with by note and security being given for the property, or to resell it. If he chose to take any thing else in satisfaction of the purchase, he made it his own, and became answerable to the estate—if the parties in interest elected so to consider it, and so to deal with him. But the fact that he paid more for the note than the price at which the horse was sold, shows that the acquisition of the note was his own speculation. We concur, therefore, with the Chancellor, in sustaining the exception to the Commissioner's report in this respect.

The second part of the case relates to Hoyt's execution. It appears that in the time of M'Creary it had been levied by Mr.

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Sher*iff Kennedy of Chester, on a slave, who, if he had been sold would have sold for a sum greater than that due on the execution; but he was left by the sheriff with M'Creary, on his giving bond to Mr. Kennedy, as an individual, to deliver the said slave for sale. The slave was carried out of the State by M'Creary, or by his consent. Six years after the levy he was brought back and delivered to Mr. Kennedy, who entered a receipt upon the bond for him as delivered by the security: he was not sold, but permitted by Mr. Kennedy, who had been out of office for some time, to return to his owner out of the State. At the time of the levy and for several years after, and indeed, until paid in this case, there were executions against M'Creary, in the sheriff's office of Chester District, senior to that of Hoyt's, to an amount much beyond the value of the slave.

A levy is, in legal contemplation, satisfaction of a fi. fa., that is, it is presumptive evidence that satisfaction may result, or has resulted from it. But as soon as it is shown how the levy has been disposed of, and that satisfaction has not and could not have resulted from the levy, the legal presumption is rebutted, and the execution may be again levied, if it has not lost its active energy: and if it has the judgment, may be revived by sci. fa., or sued upon in debt.

In this case, the plaintiff in execution, Hoyt, never could have obtained satisfaction from the levy; for, if the slave had been sold, the elder executions must have been first satisfied before he could have received any thing. They would have taken up a larger sum than the value of the slave. If he had sued the sheriff for not selling the negro, he would have been answered as the Court answered the plaintiff in the case of Gains v. Downs, Harp. State Rep. 72, that "he (the sheriff) was only liable to them who were injured by his neglect." The senior execution creditors were the persons in this case, as in that, who had the right to complain. We are therefore satisfied with the Chancellor's decree in this respect.

It is Ordered and decreed, that the Chancellor's decrees upon these two parts of the same case, be affirmed.

HARPER, J., and JOHNSON, J., concurred.

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2 Hill, Eq. *100

*CHARLOTTE H. HEATH v. JURIAH HEATH, Executrix, W. G. HUNT and Wife, and Others.

(Columbia. Dec., 1834.)

[*Wills* ⇐S18.]

Contribution, by legatees to a child born after the execution of the will and before the testator's death, decreed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 212; Dec. Dig. ⇐S18.]

[*Husband and Wife* ⇐12.]

When the husband goes into a Court of Equity to obtain possession of his wife's choses in action, a suitable provision will be made for her and her children.

[Ed. Note.—Cited in Trustees v. Bryson, 34 S. C. 411, 13 S. E. 619.

For other cases, see Husband and Wife, Cent. Dig. § 58; Dec. Dig. ⇐12.]

[*Executors and Administrators* ⇐304.]

Executrix being in the receipt of the annual profits of an estate which the will directs shall be paid over to the legatees on their coming of age or marriage, instead of paying it according to the will, she loaned out the whole amount from time to time to the legatees, and among the rest to the husband of one of them; on the parties being brought into this Court, and the wife insisting on a settlement:—*Held*, that if the money advanced by the executrix to the husband was intended as a payment of his wife's share, the executrix will be allowed credit; otherwise, if as a mere loan. Reference ordered on this point.

[Ed. Note.—Cited in Hill v. Hill, 1 Strob. Eq. 25.

For other cases, see Executors and Administrators, Cent. Dig. § 1244; Dec. Dig. ⇐304.]

[*Husband and Wife* ⇐12.]

The wife's interest in the shares of two deceased children, which could not have been reduced into possession by the husband at the time the executrix advanced to him, is not subject to the payment of such advances. The fact that the husband was not entitled to possession until the termination of a life estate, precludes the possibility that a payment of his wife's interest therein was intended.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 58-67, 396; Dec. Dig. ⇐12.]

Orangeburg—

The bill stated that Frederick Heath, the plaintiff's father, executed his last will and testament, the 16th February, 1807, and died in 1816, between which periods the plaintiff

was born, and therefore, no provision was made for her by the will. After giving three negroes to each of his children (except plaintiff) when they attained to twenty-one years, or married, and leaving the balance of his estate to his wife Juriah Heath, during her natural life, the testator willed and directed as follows:—"In case of the death of any of the aforesaid my children without lawful issue, I desire that such portions allotted now to them may be taken and considered as part of the residue of my estate, and divided as hereinafter directed. After the decease of my dearly beloved wife, Juriah Heath, my will and desire is, that the residue of my estate shall be equally divided amongst my children herein before named, to them or the survivor or survivors of them. And as it is my desire that an increasing fund should arise for the benefit of my children, I direct my executrix and executors, hereafter mentioned, to have my planting interest carried on, and that the monies arising from the crops, after deducting what may be deemed necessary house and plantation expenses yearly, that the overplus may be put out to lawful interest, and that such of my children as may want education, I desire that they may be put to school and educated as amply as those of my children in my life-time; that the expenses thereof to be paid out of the interest arising from such money so put out to interest: And when the children come of lawful age, or marry, my desire is that each may draw an equal portion of said money, to be laid out for them for such purposes the most advantageous, as my said executrix and executor deem the most proper and expedient for their interest." Benjamin Hart and Juriah Heath were appointed executor and executrix, the latter of whom alone assumed the execution of the trust. After testator's death, Wade and Mary, two of his children, died under age and unmarried, and their interests under the will continued in the possession of the executrix, as tenant for life.

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The testator's other children *have either married, or are of lawful age. The object of the bill was to compel the other children to contribute to make up a share for the plaintiff, according to their respective interests under the will; and that plaintiff's interest in the surplus arising from the crops may be ascertained and paid to her, and also that her right to the balance of testator's estate in the possession of the executrix for life, might be declared.—Juriah Heath, the executrix, admitted by her answer that the testator made a will of the tenor and effect set forth in the bill, and that plaintiff was born after the execution of the will, and before testator's death, and is unprovided for by it. She says that a considerable sum has been raised from the annual crops, besides what was necessary for plantation expenses, and that she has loaned to each child (except plaintiff) a considerable sum, and took their notes for the same, believing this the most advisable step until a final distribution of the fund could be made, and that she is ready to account. She also admits that Mary and Wade, two of the children, are dead, and that their shares are in her hands as tenant for life, but that she will, under the authority and sanction of the Court, deliver them to her children for division.

William G. Hunt and wife, by their answer, admitted that plaintiff was born after the execution of the will, and unprovided for by it, and that Mrs. Hunt received four negroes and some other personal property from the testator in his life-time; but that they never received any part of his estate since his death. William G. Hunt stated that he had borrowed from the executrix, out of (as he understood) the funds of the estate, about $1500, but these defendants submitted that they could not be called upon to contribute to the plaintiff, until a full account of the executrix's administration be taken.

The other defendants, John Kaigler and wife, and Frederick and Francis Heath, filed no answer, and the bill was taken pro confesso against them.

The Commissioner made a report to January Term, 1831, stating the amount received by each legatee, and the amount in the hands of the executrix, and that she had loaned to her children about $7988. At the hearing, Chancellor De Saussure decreed, that an average should be made of the whole estate devised and bequeathed to the other children, and the plaintiff's share paid to her; and the executrix having relinquished her inter-

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est for life to *the estate of the two deceased children, he ordered their shares to be divided among the surviving children. The Chancellor also decreed that the surplus fund laid out on interest should be divided equally among the surviving children, and that the estate not specifically bequeathed, and not forming part of the surplus from the annual crops, should, on the death of the tenant for life, be divided among the testator's children, including the plaintiff. In obedience to the decree, the Commissioner, at January Term 1832, made his report, fixing the share which each legatee should rateably contribute to the plaintiff, and also ascertaining the amount due by the executrix, including the sales of some personal estate, cash on hand at the testator's death, and the surplus arising from the annual crops, which the Commissioner reported to be $9269.57,—or each child's share, $1813.91.

The defendants, Hunt and wife, excepted to that part of the report which fixes the share to be contributed by each legatee, and Chancellor Johnston referred the case back to the Commissioner, and established principles to govern him in calculating the value of the property, received by the legatees under

the will; and he also ordered that a writ of partition should, on application, be issued to divide the shares of the deceased children.

At January Term, 1834, the Commissioner, conformably to Chancellor Johnston's directions, reported the amount which each legatee should contribute, and ascertained the amount due by Wm. G. Hunt and wife to be $450, with interest from the 25th March, 1829. It also appeared that the testator, in 1816, left forty-two negroes, which, in January 1832, had increased to seventy-five: that the amonnt of money loaned to Wm. G. Hunt by the executrix, on his individual responsibility, with interest to the 10th January 1832, exceeded the amount which the executrix was indebted to him upwards of $1000. It was proved that the executrix, besides raising 33 negroes, had realized from the plantation upwards of $10,000 in sixteen years, and it was admitted that Wm. G. Hunt is insolvent. No exceptions were taken to this amended report.

Mr. Glover, on the part of the executrix, moved for confirmation of the report, and at the same time for an order subjecting the interest of Wm. G. Hunt and wife, in the negroes of the two deceased children, to the payment of the amount due by Hunt and wife to the plaintiff; and also for the balance due by the same to the executrix, Juriah Heath,

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for money loaned: And that Mrs. *Hunt's interest in her father's estate (subject to these payments) be settled on her and her issue.

The motion was opposed by Mr. Chappell: 1. As regards the lien to the plaintiff. 2. As concerns the lien for Hunt's debts. 3. As respects the form of the settlement, which under the circumstances, he insisted should be referred to the Commissioner.

Chancellor Johnston made the following order in lieu of that moved:—

"It is Ordered, that the amended report of the Commissioner (dated the 10th inst.) be confirmed: It is further ordered, that when the negroes, of which Wade and Mary died possessed, shall be divided, the share that may be allotted to William G. Hunt, and Elizabeth his wife, shall be subject to the payment of 450 dollars, with interest agreeably to said report, which the said Wm. G. Hunt and wife are required by the Commissioner's report to contribute to Charlotte H. Heath: And the Commissioner is hereby directed to report the trusts deemed by him most proper for a settlement of Mrs. Hunt's share."

The executrix, Mrs. Heath, appealed and now moved this Court to enlarge the order so as to subject the interest of Mrs. Hunt to the payment of the amount due to her, as executrix, by William G. Hunt.

Glover, for the appellant.
Chappell, contra.

O'NEALL, J. The questions to be decided, arise between the co-defendants, Mrs. Heath, and Hunt and wife. To a clear perception and a just decision of them, a summary of the facts may be useful. Mrs. Heath and Mrs. Hunt are the widow and one of the children of Frederick Heath, who, among other things, by his will, directed the annual profits of his estate to be put to interest as a fund for the education of his children; and the will directs, "when the children come of lawful age or marry, my will and desire is, that each may draw an equal portion of said money, to be laid out for them for such purposes the most advantageous as my said executrix and executor deem the most proper and expedient for their use." The executrix, Juriah Heath, managed the estate with great prudence, and realized large annual profits. Instead, however, of paying it out to the children as they came of age, or

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*married, she loaned out the whole sum amongst them, and the defendant, William G. Hunt, borrowed a part of it, which with the interest, now amounts, it is said, to near $3000, greatly exceeding Mrs. Hunt's share of this fund.

Since the death of the testator, two of his children and devisees, Wade and Mary, have died without issue: in such an event, the testator's will directs that their parts of his estate should fall into the residuum, which is bequeathed to his widow and executrix, Juriah, for life, and at her death to be equally divided among his surviving children. In this case Mrs. Heath has surrendered her life estate in the parts of the said Wade and Mary, which are now therefore divisible among the testator's children.

It is contended on the part of Mrs. Heath, that she is entitled to deduct and retain Mrs. Hunt's share of the annual profits of the estate, out of Mr. Hunt's debt to her for money loaned out of the said fund; and that, for the balance of his debt, she is entitled to a lien on Mrs. Hunt's share of the parts of Wade and Mary, now divisible. Mrs. Hunt opposes these claims, and sets up her equity to have a suitable provision made for her and her children, out of this her estate. Her husband, William G. Hunt, it seems, is entirely insolvent.

The case will be considered, first, as to Mrs. Hunt's share of the annual profits of the estate; and second, as to her share of Wade and Mary's parts. Before, however, taking up the separate consideration of each of these parts of the case, it will be well to state some general principles, alike applicable to both.

There is no doubt, when the wife has a perfect legal estate in goods and chattels, whether it be in severalty, joint tenancy, in common or in coparcenery, it will vest in the husband jure mariti; but if her interest be a mere chose in action at law, or a mere

equity as where money and other property is in the hands of an executor or a trustee for the use of a feme covert, the husband has no legal right until he reduces them into possession. If he can do this without the aid of the Court of Equity, he will hold them discharged of the rights of his wife; but, if by the decree of the Court of Equity, he is to obtain possession, the wife's equity to have a suitable provision made for her and her children, will be supported and enforced.

First. The question as to the application of Mrs. Hunt's share of the annual profits of the estate to the extinguishment of the

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*debt for money loaned to Hunt by Mrs. Heath, will depend upon the fact, whether, when she advanced the money to Hunt, she intended it as a payment. For there can be no doubt that Mrs. Hunt, who is understood to have been of full age before her marriage with Mr. Hunt, could at any time have claimed the payment of her share before her marriage; and after that event she and her husband were entitled to receive it at any time when they thought proper to demand it. If the husband alone had received it, it would have been such a reduction into possession as would have barred her Equity. This part of the case may therefore have a different result from that which remains to be considered, if it should appear on the reference that the money loaned to Hunt was intended to be for his wife's share of this fund. In that event the Commissioner will ascertain the amount due Mrs. Hunt when her husband received the money, and apply her share to the amount then received. But if it appears that the money advanced was not intended for his wife's share, but was a mere loan for interest, then the question will arise, whether the wife's Equity can be made liable for the debt of the husband; which will depend upon, and be decided by the view which shall be taken of the second part of this case.

Second. Can the share of Mrs. Hunt of the parts of Wade and Mary, be declared liable to the payment of any sum advanced by Mrs. Heath to William G. Hunt, out of the profits of the estate? I think not. This is an equitable chose in action, not reducible into possession by Mr. Hunt at the time he received the money from Mrs. Heath. This precludes the possibility that a payment was then intended. But he could not at any time have reduced it into possession, until by the decree of this Court it is made available; for it was a mere expectancy in remainder among several joint tenants after the death of Mrs. Heath, until she surrendered in this case her life estate, and the Court decreed partition. To permit such an interest to be made liable for the husband's debt would defeat the wife's Equity. For, whether he be solvent or insolvent, the same result would follow: his debt would be no provision for the wife. But in Equity, he must, whether he be plaintiff or defendant, if he receive his

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wife's por*tion by the decree of the Court, make an adequate settlement upon her. If the wife's portion is to be regarded as paid to him in his own debt, he might, if solvent, be compelled to settle the same sum; but if he was insolvent he could not do this, and the wife would be left unprovided for. But the Court would never suffer the wife's fortune to be applied to the husband's debt, only where it could regard him as a purchaser of it by a previous or a present adequate settlement.

The cases which I have looked into, it seems to me, sustain these views, except the last, which is, I think, a necessary deduction from the preceding.

In Howard and Wife v. Moffatt, 2 John. C. R. 206; which was the case of husband and wife, suing for the money of the wife in the hands of her brother, and which she had requested should not be paid over to her husband, the Chancellor said, "the general rule is, that where the aid of the Court is requisite to enable the husband to take possession of the wife's property, he must do what is equitable by making a reasonable provision out of it for her maintenance and that of her children, and without that, the aid of the Court will not be afforded him." If Hunt could not receive his wife's fortune without making a settlement, it would seem to follow that Mrs. Heath, who can have no greater rights than he has, must at least consent to and make an adequate settlement before she could claim to have it made liable to her debt.

In Kenny v. Udall & Kenny, 5 John. C. R. 464, which was a bill against the husband and the assignee of husband and wife (when an infant) of the wife's equity: the Chancellor held, that the assignment was null and void. In that case, at page 473, he said, "It is now understood to be settled, that the wife's equity attaches upon her personal property when it is subject to the jurisdiction of the Court and is the object of the suit, into whosoever hands it may have come, or in whatever manner it may have been transferred." In Haviland v. Myers, 6 John. C. R. 27, the Chancellor said, "the wife's Equity, to a suitable provision for the maintenance of herself and children, out of her separate real and personal estate descended or devised to her during coverture, is well established, and would prevail equally against the husband or his assignee, or any sale made or lien created by him, even for valuable consideration, or in payment of a just debt; and whether the suit in protection of that Equity be instituted by the wife, or by any

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*other person on her behalf." These authorities are too clear to admit of a doubt

that the wife's fortune cannot jure mariti, be decreed in Equity to be paid to the husband, his assignee or creditor, until a suitable provision has been made for the wife and her children. In this State, in Durr v. Bowyer, 2 M'C. Eq. R. 372, the same principles were acknowledged and supported. In that case, my brother Johnson, speaking of the wife's Equity, and after having ruled that the Court will not suffer it to be removed out of the jurisdiction until provision is made, says: "The same protection is afforded to the wife in opposition to others claiming through the husband, whether their claims arise by operation of law, as in cases of bankruptcy or insolvency, or under the voluntary assignment of the husband for a valuable consideration."

In this case, Mrs. Heath claims under Hunt, and as his creditor: but she has not as high claims as she would have were she his assignee by operation of law, or by his own deed. How can it be pretended that she is entitled to make the wife's fortune liable to a claim against the husband, unaccompanied by even his consent to such a course, when it is clear that even his assignment could not prevail against her rights?

In Thomas v. Sheppard, 2 M'C. Eq. R. 36 [16 Am. Dec. 632] the Court, upon principles and for reasons which are to my mind clearly erroneous, refused to set up the wife's Equity, yet recognized and acknowledged the rules which I have already stated.

From these views, it is clear that the share of Mrs. Hunt, of the parts of Wade and Mary, is not, and cannot be made liable to the payment of any sum advanced by Mrs. Heath to Wm. G. Hunt, out of the annual profits of the estate.

The Chancellor's decree, directing a settlement of this part of Mrs. Hunt's Equity, and referring it to the Commissioner to report the proper trusts for a settlement thereof, is affirmed. It is also Ordered and decreed, that the Commissioner enquire and report, whether the executrix, Mrs. Heath, intended, and Mr. Hunt accepted the money loaned to him, as an indirect payment of Mrs. Hunt's share of the annual profits of the estate; if so, that her share be applied in extinguishment of the sum so advanced at the time advanced; but if not, that he report the proper trusts of a settlement of her share of the annual profits.

BUTLER, J. (sitting for HARPER, J., who was absent) concurred.

JOHNSON, J., dissented.

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2 Hill, Eq. *108

*JOHN BELL, Survivor, v. ANN and ELIZABETH COIEL.

(Columbia. Dec., 1834.)

[*Evidence* ⇐=253.]

Generally the declarations of a grantor made after a sale cannot be admitted to impeach the sale; but where there is a community of interest and design in several, or circumstances showing a conspiracy between the grantor and the defendants to defraud the plaintiff, such declarations would be admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994–1002; Dec. Dig. ⇐=253.]

[*Witnesses* ⇐=52.]

Where the husband would be a competent witness the wife may be sworn: and where the husband if living would have been competent to prove fraud in a deed from himself to his sisters, his wife is competent to prove his acts and declarations.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 131; Dec. Dig. ⇐=52.]

Lancaster.—Before Chancellor De Saussure, July 1834.

The plaintiff, a judgment creditor of Alston Coiel, filed this bill to set aside a bill of sale for negroes which the latter had made to the defendants his sisters, alledging it to have been executed with an intent to defraud creditors. The Chancellor, by his decree, declared the bill of sale void, and the property subject to the payment of Coiel's debts; and the defendants appealed. The only grounds which need be stated, and the facts connected with them, are set out in the opinion of this Court.

Clarke & Clinton, for the appellants.
De Saussure, contra.

JOHNSON, J. Excluding altogether the evidence which is regarded as exceptionable in the grounds of this motion, and which was expressly reserved by the Chancellor, we concur with him that the merits are with the plaintiff; and that might suffice for the case itself, but there are some questions of law arising out of it which deserve a more particular consideration, and I shall notice the circumstances only so far as may be necessary to show their application.

The plaintiff was the creditor of Alston Coiel, for a large amount, for which he had obtained judgement. A ca. sa. was issued, on which he was arrested and committed to jail, where he died insolvent; and the object of this bill was to set aside a bill of sale executed by him not long before his arrest to the defendants, his sisters, for ten negroes, on the ground that it was covinous and intended to defraud the plaintiff and others, his creditors, and to charge the negroes with the payment of his debts. To prove the fraud, Mrs. Terry, (late widow of Alston Coiel,) and who had formally released her interest in his estate, was sworn for the plaintiff. It appeared that during his confinement Alston Coiel had intended to render a schedule of his estate, with a view to apply for the benefit of the insolvent debtor's act, and the defendants being apprehensive that he would include these negroes in it, one of them (Elizabeth) entreated this witness to

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advise him against it, saying *that witness

would be as much benefited as herself—she did speak to him on the subject, and he stated in reply that the negroes were in truth his own—that defendants had never paid anything for them—that he had evidence which would show it, and would not swear a lie about it.

Two objections are raised to the admissibility of this evidence: First, That being declarations made after the execution of the bill of sale to the defendants they were inadmissible: Secondly, That the widow of Alston Coiel was an incompetent witness to prove his declarations.

First. The general rule certainly is, that the declarations of third persons are not evidence for or against the parties, nor will the declarations or admissions of a grantor or sellor, made subsequently to the grant or sale, be received against the grantee or buyer, because, having been divested by the grant or sale of the thing granted or sold, neither his acts nor declarations can divest the rights which arise out of them. But where there is a community of interest or design in several, in relation to the same subject matter, and that fact is clearly established, the acts and declarations of one in reference to it, are received in evidence against the others. Thus the admissions of one partner in relation to the partnership concerns, are evidence against the others; so of the admissions of one of several joint makers of a promissory note that is not paid: so in the King v. the Inhabitants of Harwicke, 11 East, 585, where Lord Ellenborough, recognizing the general rule that the admissions of one of several defendants in trespass is not admissible to prove that the others were co-trespassers, yet lays it down, that if they be established to be co-trespassers, by other competent evidence, the declaration of one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to be combined together for the common object. Very many examples founded on the same principle might be drawn from cases of conspiracy where the rule is, (the fact of conspiracy being proved,) the admission of one is evidence against all the conspirators. (See Starkie, part iv. 407, tit. Conspiracy.)

Independently of the particulars before stated, the circumstances of this case create a very strong presumption that there was a combination between the defendants and Alston Coiel to defraud the plaintiff; but that presumption appears to me necessarily to grow out of the facts stated by Mrs. Terry.

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If the transaction *was bona fide, how were the plaintiff's interested in Alston Coiel's including or not including those negroes in his schedule? What motive could they have had to induce his wife to practise upon him to prevent it, unless it was the consciousness that the transaction would not bear investigation when opposed by an honest purpose on his part? These circumstances sufficiently show the combination, and, according to the rule, his declarations were admissible.

Second. In general, the wife cannot be examined for or against the husband, or in any case to which he is a party, or in which he may be interested; and the rule is so imperious that it cannot be dispensed with even when the husband consents that she may be sworn against him. Barker v. Dixer, Ca. Tem. Hardwicke, 264. The only exception allowed is in the case of personal violence done by the husband to the wife, when she is admitted from necessity: and in Aveson v. Kinniard, 6 East, 192, it is said arguendo that the dissolution of the marriage by divorce, or even death, will not absolve the wife from the obligation to preserve the secrets of her husband inviolate. But when the husband himself would be a competent witness, the wife may be sworn, and if the party might insist on swearing the husband, and by this means obtain the truth, it would be straining the rule of policy too far to deprive him of the evidence of the wife when that of the husband could not be obtained. Williams v. Johnson, 1 Str. 505; Starkie Ev., part iv. 709. Now, Alston Coiel stood indifferent between these parties, for although he was interested, his interest was equally balanced on both sides. If the plaintiff recovered, this would have been so much subtracted from his debt due to them, and he would have been liable to the defendants for the value of the negroes—if the defendants, then he would have been still the debtor of the plaintiff in the whole amount. He might, therefore, have been sworn, and consequently the plaintiffs are entitled to the benefit of the wife's evidence.

Decree affirmed.

O'NEALL, J., and HARPER, J., concurred.

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2 Hill, Eq. *111

*JOHN BACKLER and Others, v. W. FARROW and Others.

(Columbia. Dec., 1834.)

[*Partition* ⇐⇒83.]

On a bill for partition, the Court, in ordering an account for rents and profits, may also decree compensation for the deterioration of the land by cultivation, as for waste.

[Ed. Note.—Cited in Johnson's Adm'rs v. Johnson's Ex'rs, 2 Hill, Eq. 295, 29 Am. Dec. 72.

For other cases, see Partition, Cent. Dig. § 228; Dec. Dig. ⇐⇒83.]

[*Equity* ⇐⇒35.]

[Cited in Barr v. Haseldon, 10 Rich. Eq. 60; Scaife v. Thomson, 15 S. C. 367; Vaughan v. Langford, 81 S. C. 288, 62 S. E. 316, 128 Am. St. Rep. 912; Connor v. McCoy, 83 S. C. 177, 65 S. E. 257; Marion County Lumber Co. v. Tilghman Lumber Co., 84 S. C. 510, 66 S. E.

124, 877, to the point that, where a court of equity has proper jurisdiction of a case, it may determine incidental questions, afford complete justice and prevent multiplicity of litigation.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 99–102; Dec. Dig. ⟸35.]

Spartanburgh.—June 1834.

The bill in this case was filed for partition. The defendants had been for many years in possession of the land, and cultivated it, by which its value was impaired. The Appeal Court in December 1832, after partition had been made, ordered an account to be taken of the rents and profits, and in the opinion of the Court the following language is held: "Rent, which the land was rendered capable of producing by the labor and expense of the tenant in possession, as by erecting buildings, or clearing, or draining lands, is not to be taken into the account. But if, by any of these means, the land has deteriorated in value, he is accountable for this as for waste. The motion is granted, and a reference on these principles ordered." On the reference, it appeared that the whole of the land had been rendered capable of producing rent by the labor of the defendants, and that it had also deteriorated in value in consequence of their cultivation to an amount reported by the Commissioner. On exception being taken to the report, the Chancellor sent it back to the Commissioner, on the ground that it was not made up in conformity to the decree of the Appeal Court.

The plaintiffs now move this Court to reverse the decision of the Chancellor, and to confirm the report.

Bobo, for the appellants, submitted the case on the above brief, without argument.

HARPER, J. This case is very imperfectly presented to us in the absence of counsel. The exception to the Commissioner's report seems to have been sustained on the ground that damages for waste cannot be recovered in this Court; the remedy being at law. This, no doubt, is in general true; but having proper jurisdiction of the case, there is hardly any question in relation to property, which this Court may not determine incidentally for the purpose of doing complete justice, and preventing multiplicity of litigation. The rule is laid down in the case of Jesus College v. Bloom, 3 Atk. 262; Amb. 54, that a bill will not lie for waste merely; but, if the party be properly in Court for another pur-

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pose, *as to obtain an injunction, then an account of past waste will be granted. The principle is very fully illustrated in the reasoning of the case. There are many cases in which an account has been allowed of the produce of mines; and the opening of mines is waste. There is no question but that the Court was properly in possession of this case, and incident to it was the account for rents and profits, and the account for waste.

The motion is therefore granted, and the Commissioner's report confirmed.

JOHNSON, J., and O'NEALL, J., concurred.

2 Hill, Eq. 112

JANE SMITH and Others, v. JAMES SMITH and Others.

(Columbia. Dec., 1834.)

[*Subrogation* ⟸33.]

The costs of a judgment on an administration bond ag'nst the surety (or co-administratrix,) who was subrogated to the rights of the creditor, cannot rank as a bond debt.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 97; Dec. Dig. ⟸33.]

Spartanburgh, June 1834.

O'NEALL, J. Jane Smith and William R. Smith administered upon the estate of James Smith: William R. Smith had the entire management of the estate, and all the funds were received by him; Jane Smith, however, survived him, and William Bradford, as guardian, recovered against her as surviving administratrix, the sum of $230.50, with interest from the first of March, 1809, which she paid on the 16th of September, 1824: She also paid $60.87 costs.

Inasmuch as Jane Smith's liability for the payment of the principal sum and interest recovered, arose out of the administration of William R. Smith, she was in Equity substituted for the creditor, and was held to be entitled to be paid as a bond debt.

The Commissioner and Chancellor have allowed the costs of that recovery to stand upon the same ground; but this is inadmissible, the costs never were, in any point of view, such a demand as could have been recovered on the administration bond. They could not, therefore, have rank as a bond debt.

But Jane Smith ought to have paid the demand against her without a suit; the costs were therefore unnecessary and she is not now entitled to recover them.

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*The exception of the defendant to the Commissioner's report in this respect, is sustained, and the Chancellor's decree reformed.

JOHNSON, J., and HARPER, J., concurred.

Bobo, for the appellant.
Smith & Thomson, contra.

2 Hill, Eq. 113

MATTHEW BRYSON, Adm'r. eum. test ann. of William Bryson, Sen., v. GEORGE NICKOLS and Others.

(Columbia. Jan., 1835.)

[*Wills* ⇐573.]

Testator's will directs, that after the death of his wife, his negro girl Fan is to be sold, and her proceeds divided among his five eldest children; but if his son Wm. choose he may keep Fan by paying to each of the said children $100.—And directs the residue of his estate to be divided among his five younger children: Fan had one child after the execution of the will and before testator's death, and five after his death and before the death of the tenant for life:—*Held*, that the increase of Fan before testator's death, fell into the residuum: that a specific vested legacy in Fan, to take effect on the death of testator's wife, was not given either to William, or (on his refusal to take her at the price fixed) to the elder children; but that this was a mere direction to divide the proceeds of Fan's sale among the elder children, with a privilege to William of taking her at that time at a fixed price; and consequently, that her increase after testator's death did not belong either to William (if he had elected to take her) or to the elder children, but fell into the residuum, and was divisible among the younger children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1248; Dec. Dig. ⇐573.]

[*Executors and Administrators* ⇐111.]

When there is a necessity for an executor or administrator to come into a Court of Equity to obtain its judgment, a counsel fee paid by him will be refunded out of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 453; Dec. Dig. ⇐111.]

Laurens.—Before Chancellor Johnston, July 1834.

William Bryson, sen. died leaving of force his last will and testament, which contains the following clauses: "It is further my will that after the death of my wife, that my negro girl Fan, if my son William think proper, is to be sold and the proceeds of her to be equally divided among my sons Matthew, James and Robert, and my daughters, Margaret and Agnes: but if William choose to keep the girl Fan, and not sell her, it is my will that he may, by paying to each of the above named children one hundred dollars. It is also my will and desire that all the rest of my negroes that are not before named shall remain on the plantation as long as any two of my children shall remain single and live together, and also, all stock of every kind, household and kitchen furniture, and all other things necessary to keep up the plantation. And it is further my desire, and I leave it discretionary with my executors, hereafter named, that as any of my children marry, that they give them such property and things as they think fit and necessary for them. And it is my will, that as soon as my children be all married or break up living together, that the last named negroes and stock and all the other property left on the plantation, shall be divided among my son William and my four youngest children; and I do hereby vest my son William with the power to divide the property between himself and his younger brothers, and two younger sisters, as he may think fit and

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necessary; only it is my will, that if *any of the negroes given and named to any one of my children, shall die before this division takes place, it is my desire that the loss be made up to them out of that property, and I give the same to them and their heirs, forever." William and the widow were appointed executor and executrix, and qualified.

After the execution of the will and before the testator's death, the negro woman Fan, named in the first clause of the will, had one child named Milly; and after the testator's death, and before the death of his widow, Jane Bryson, who had a life estate in her, Fan had five other children, all of whom remained in Mrs. Bryson's possession, until her death.

William survived his mother, and after the death of both, the plaintiff administered on the testator's estate with the will annexed, and sold all the negroes.

This bill was filed against all the parties interested, requiring them to present their claims to the Court, and asking the advice and direction of the Court as to the disposition of the monies arising from the sale, according to a legal interpretation of the will.

On the hearing of the cause, evidence was given, from which it seemed that William Bryson, after the death of his mother, refused to take Fan at the price fixed in the will.

JOHNSTON, Chancellor. I came to a decided opinion on this case, at the hearing, and regret I did not then pass a decretal order on it, and thus have prevented unnecessary delay. The Legislature seems, however, to have required that decrees should be accompanied with the reasons of the Court. Intending to give my reasons with the decree, I took time for that purpose; and have, by an unusual and uncontrollable train of circumstances been prevented from doing so hitherto, and even now must content myself with but an imperfect exposition of those reasons.

There is no doubt but that the price for which Fan sold, must be divided among the five children of the testator, Matthew, James, Robert, Margaret and Agnes. Whether Wil-

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liam, jun., did or did *not elect to purchase her, she has been sold by the plaintiff, in his capacity of executor, and as I understand, the sale is not impeached, nor is there any objection to the payment of the proceeds to the persons I have named.

It is conceded, that the child born of Fan,

between the execution of the will and the testator's death, did not pass with her, but fell into the residuary clause: of course the proceeds of that one are distributable among the residuary legatees, William Bryson, Henry Bryson, Hunter Bryson, and the testator's two daughters, Jane and Polly.

The contest is for the proceeds of the children born of Fan after the testator's death. The five older children claim them under the clause of the will first recited in the bill; the younger children under that last recited; and the representative of William, jun., claims them exclusively, setting up an election for William.

I think the older children are not entitled; that William is not exclusively entitled, whether he elected or not, or whether his representative has or has not a right now to elect for him; but that the younger children, of whom William is one, are among them entitled.

The claim of the older children, and the exclusive claim of William, both stand upon this assumption, that there was a good specific bequest of Fan, and that, by force of law, carried with her such issue as she had after the testator's death: That is, that at the testator's death, Fan became a vested legacy, and a right in her thus settling in the legatee, she was thenceforth the legatee's property, and her issue being issue of the legatee's property, belonged also to him.

In my apprehension, Fan was never bequeathed at all. My construction of the will is simply this: That the testator directed her to be sold, giving William a preference among the purchasers, and in case he bought, fixed the price. There was an obvious propriety in his fixing the price if William should be the purchaser, and neglecting to fix it if she should be exposed to public sale.—William was one of the executors, and if he should not avail himself of his preferable right to purchase, but expose Fan to sale, the biddings would determine the price. But if he chose to purchase himself, and not expose the property to sale, he being one of the executors, unless the testator fixed the price, one could not be fixed. There would be

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wanting the two minds which the *law requires to meet in a contract. The testator, therefore, chose to offer proposals forming his side of the contract, while yet alive.

But, although Fan was not bequeathed, but a mere power to sell her was given, still, as the will gives the older children a right to the proceeds—a right which vested in them at the testator's death, it was plausibly contended that all her after increase enured to the same right. This might prevail, if there were nothing to show that the sale was to extend to Fan, and to Fan only—that the testator did not intend to include the increase in the sale.

The sale was to take place at the widow's death. The testator fixed a price. The subject of sale was Fan. Her value the testator could fix, because he knew her; but if he intended the increase to go with her, he could not have set a price, since he could neither know whether she would have children, or how many, or the value of any of them. Would it have been tolerated that William should take Fan and a large family of children at five hundred dollars? Would not every body have exclaimed against this as a gross and corrupt violation of the testator's intention? That "a bargain is a bargain," is the maxim of unfair dealers; but the law replies, "no bargain is good but a fair one." Then, what William was to get under his purchase, is a fair measure of the rights of the older children. They have a right to the proceeds of that property, and that only, which he had a right to take at five hundred dollars. He was entitled to take, at five hundred dollars, the same property, neither more nor less, which, if he did not choose to purchase it, he was bound to expose to public sale. He was not bound to expose to public sale any thing which he had not a preferable right to buy, and that at five hundred dollars. Would it do for the elder children to say by virtue of their interest in the proceeds, "if William buys, he is only to get Fan, because he gives but five hundred dollars, but if others purchase, the increase shall be included in the sale?"

My opinion then is, that the younger children are entitled among them to the proceeds of Fan's issue, born after the testator's death.

The parties may, however, very well have entertained doubts on the proper construction of this will. Therefore, I shall direct that the costs be paid rateably out of the three funds arising from the sale of Fan, of her issue in the testator's life, and of her issue after his death, before those funds are

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distributed agreeably to this opin*ion: which funds must be accounted for, if required, before the Court.

Let the foregoing opinion stand for the decree of the Court.

An appeal was taken on the part of the testator's five elder children, and a motion made before this Court to modify the decree of the Chancellor on the grounds:

1. That Fan is bequeathed to the five elder children, and the increase follows the condition of the mother.

2. That the younger children having no interest in Fan, can have no right to her increase born after the death of the testator.

3. That William Bryson, jun. having failed at the proper time to make his election to keep Fan at the price fixed, the right of the elder children became vested, and William's administrator cannot now set up his right to elect.

And the executor appeals on the ground:

That he should have been allowed for a counsel fee out of the estate, for having this case brought before the Court for its adjudication.

Irby & Caldwell, for the appellants.
Young, contra.

O'NEALL, J. I agree with the Chancellor, that the negro woman Fan has been properly sold, and that her proceeds are divisible between the testator's sons, Matthew, James and Robert, and his daughters Margaret and Agnes; and that the child born before the testator's death is a part of his residuary estate, and is divisible under the residuary clause of his will.

I also agree with him that the increase of Fan, born after the testator's death, but before the death of the tenant for life, constitutes another part of the residuary estate, and must be divided between the residuary legatees.

It is not, as I understand, pretended that William Bryson ever did elect to take Fan at the price or sum limited by the will; but if he had done so, he could not have acquired any right to the increase; for, at a certain time (the death of the widow) he is allowed to buy Fan, if he chooses, for a given sum. Until he made the purchase by taking the slave and agreeing to pay the price, he could have no vested right in her which would entitle him to the increase.

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*The five elder children, it seems to me, have proceeded under a mistaken notion that Fan was bequeathed to them at the death of the testator, and the possession postponed until the death of the widow. If this had been so, then their construction of the will would have been right; but she never was bequeathed to them at all; her proceeds, when sold, were directed to be paid to them. But, if the bequest of the proceeds of the sale of the slave was equivalent to a bequest of the slave herself, still I think the plaintiffs would not be entitled to more than the specific slave.

The words of the clause, under which the five elder children claim, are: "It is further my will that after the decease of my wife, that my negro girl Fan, if my son William thinks proper, is to be sold, and the proceeds of her to be equally divided among my sons Matthew and James and Robert, and my daughters, Margaret and Agnes, but if William choose to keep the girl Fan, and not sell her, it is my will that he may, by paying to each of the above-named children, one hundred dollars."

The first rule in the construction of a will is, that the intention is to have effect, if it can be clearly ascertained from the will and be not contrary to some known rule of law. Here the intention is perfectly clear, that the testator only intended that the specific slave should be sold, and the proceeds divided. This is manifest by his designating her as the negro girl Fan, and by the price which he fixed on her alone.

But, to entitle the elder children to the increase of Fan, the legacy in their favor ought to have given them a vested right in her from the death of the testator, to be enjoyed at the death of the tenant for life. The legacy is, however, purely future and contingent; it is a mere direction by the will that she should, after the death of the testator's widow, be sold; but this was not even positive and peremptory—it was to be so "if my son William think proper:" if he thought proper he might take her himself, by paying to the elder children one hundred dollars each. These provisions made the legacy of Fan (if it can be so considered) purely contingent: no one under the will had a fixed right as a legatee to her. She might be sold by William, or he might keep her; and until the death of the widow, and he had decided which course he would pursue, the will was wholly provisional. "The distinction between vested and contingent legacies is, that a vested legacy, immediately on the death of the

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testator, attaches as a debt upon *his real or personal estate; whereas a contingent legacy does not attach upon either, until the contingency happens. In the first case, the legacy is debitum in præsenti, solvendum in futuro; but where the legacy is merely contingent, non constat, whether under the will, the fund will ever be charged with it." 2. Bridg. Dig. Tit. Leg. sec. ix. par. 320. This rule applies more particularly to pecuniary legacies, but still its analogy will reach to specific legacies. For the question in both is, whether a present interest passes: if it does not, the legatee cannot have any right until the contingency happens. In this case, so far as the older children are concerned, the legacy before us is pecuniary and contingent: it is pecuniary, because it entitles each one to a share of the proceeds of the slave, in money: it is contingent, because its eventual payment depended upon the life of a slave, as the thing, whereby the fund was to be created. As was said by that eminent lawyer and good citizen, Mr. Grimke, (whose early death South Carolina will long deplore,) in his argument of Taveau v. Ball, 1 MC. Eq. Rep. 13: "If the time of division be not the substance of the gift, it is only matter of regulation." That applies to cases where there has been a gift to several, and a future time appointed for division—then, if the time of division be not the substance of the gift, it only operates to regulate the division to be made. But in this case, the rights of the elder children are not to the thing itself, but that the proceeds of the slave, when sold, should be divided among them. The division is hence of the substance of the gift; and they can take no interest, until by law, or rather by the will, that division is to be made. The rule, as to the vesting of legacies, is very well stated in

Bac. Ab. tit. Leg. E. 2: "If a legacy be devised to one to be paid or payable at twenty one, or any other age," it is vested—"the time being annexed to the payment, and not to the legacy itself;" "but if a legacy be devised to one at twenty-one, or when he shall attain the age of twenty-one," the legacy would not vest until the legatee was of the age prescribed. The application of this rule to the case before us, shows that the legatees now claiming had no vested right until the death of the widow. For it is a bequest to them, "after the decease of my wife." This is a distinct clause from that in which he had given her a life estate; and her death is fixed upon as the commencement of their interest: and the clauses do not authorize the construction that the estate for life and the remainder constitute together

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one gift: each is separate and *distinct, and the testator, after his widow's death, is to be regarded as then making a disposition of the slave.

The case of Swinton v. Legare, 2 M'C. Eq. Rep. 440, is a very clear authority in favor of the view that the elder children did not take a present interest. There the testator devised and bequeathed to his daughter Susannah Swinton, "during life, and after her death to be equally divided among the survivors of her children, to each of them share and share alike, as they shall attain the age of twenty-one or marriage." The question was whether all of her children living at the testator's death, or only those who were alive at her death, would be entitled to take. It was held, that the legacy in remainder, did not vest at the testator's death in all Susannah Swinton's children; but, at her death, it vested in those then alive. That case turned, it is true, upon the construction of the word "survivors," but still the case is an authority for my purposes here. For as Judge Nott in the conclusion of the case said, "being given to her during life, and after her death to be divided among her surviving children, it must necessarily relate only to those who were living at the time of her death." So here, the bequest being after the death of the testator's widow, that the slave Fan should be sold, and her proceeds be divided among certain persons, it follows that their rights arise at the death of the testator's widow, and not before.

The case of Taveau and Ball, 1 M'C. Eq. Rep. 7, if it has any application to the case, militates against the purposes for which it was cited. In it the Chancellor says, "the time of the division is not at all connected with the gift. The preceding clause had given these estates, absolutely to the sons, and gave a plain vested interest." In the case before us, the clause of the will does not give Fan to the elder children absolutely, nor does it give them any plain and vested interest in her. The time of division here is directly connected with the gift: indeed, it depends upon the sale for division. If it had been impossible to make a sale, by the death or worthlessness of the slave, the gift to the elder children would have failed.

The case of Brailsford and wife v. Heyward, 2 Desaus. Eq. Rep. 18, turned altogether upon the intention of the testator, and has not the slightest analogy to the case before us.

So far, therefore, I am perfectly satisfied with the Chancellor's decree: and I have added these remarks, to those contained in

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his *decree, more to satisfy the parties than from any actual necessity requiring it to be done in order to a correct understanding or decision of the cause.

But I think the Chancellor ought to have directed the counsel fee paid by the plaintiff to be refunded to him, in the same manner in which he directed the costs to be paid. There seems to have been a necessity for the plaintiff to come into the Court of Equity to obtain its judgement, as to the construction of the testator's will. The case of Warden v. Burts, 2 M'C. Eq. Rep. 76, allows the counsel fee as well as the costs, where they have not been the result of the executor's or administrator's misconduct.

The Chancellor's decree is in this respect modified, and in all others affirmed.

JOHNSON, J., and HARPER, J., concurred.

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2 Hill, Eq. 121

JOHN P. SARTER and Wife and Others v. JESSE GORDON, Adm'r.

(Columbia. Jan., 1835.)

[*Infants* ⇐47.]

If one undertake for minors his act will bind him, although it may not them, and the contract will be binding on the other party, altho' voidable at the option of the minors.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 99; Dec. Dig. ⇐47.]

[*Specific Performance* ⇐49.]

Inadequacy of price unaccompanied with circumstances of fraud, not sufficient to prevent enforcement of a contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 151; Dec. Dig. ⇐49.]

[*Contracts* ⇐261.]

Time, when not of the essence of the contract, no excuse for nonperformance unless it amount to an abandonment.

[Ed. Note.—Cited in Columbia Water Power Co. v. Columbia, 5 S. C. 238.

For other cases, see Contracts, Cent. Dig. §§ 1174–1180; Dec. Dig. ⇐261.]

[*Specific Performance* ⇐3.]

General principles on which specific performance of contracts is decreed and the cases on the subject considered.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 3, 3½; Dec. Dig. ⇐3.]

[*Specific Performance* ⇐69.]

The general principle is, that any fair and reasonable contract will be enforced specifically, unless it appears that full justice may be done by a compensation in damages. In some cases of contracts for slaves, damages would not be sufficient compensation.

[Ed. Note.—Cited in Horry v. Glover, 2 Hill, Eq. 523; Young v. Burton, McMul. Eq. 256; Field v. Pelot, Id., 404; Bryan v. Robert, 1 Strob. Eq. 341.

For other cases, see Specific Performance, Cent. Dig. § 201; Dec. Dig. ⇐69.]

[*Specific Performance* ⇐69.]

According to the principle of all the cases, a bill may be maintained for slaves brought up in a family: And it may be laid down as a gen'ral rule that a bill will lie for the specific delivery of slaves, as for the specific performance of a contract for the sale of land.

[Ed. Note.—Cited in Young v. Burton, McMul. Eq. 267; Edings' Ex'r v. Whaley's Adm'rs, 1 Rich. Eq. 306.

For other cases, see Specific Performance, Cent. Dig. §§ 200–202; Dec. Dig. ⇐69.]

[*Specific Performance* ⇐69.]

There may be exceptions to the rule—as if the purchaser contracted for the slaves as merchandize intending to sell again; in such case, justice would be done by damages.—But this is not generally so, or to be presumed.

[Ed. Note.—Cited in Horry v. Glover, 2 Hill, Eq. 523; Young v. Burton, McMul. Eq. 256, 265.

For other cases, see Specific Performance, Cent. Dig. §§ 200–202; Dec. Dig. ⇐69.]

[*Equity* ⇐219, 247.]

If it appear on the face of a bill, that it was prematurely filed, and advantage be taken by demurrer, it will be fatal; but if there be no demurrer, and the case be not bro't to a hearing till after the time fixed for the performance of the contract, the Court will not then dismiss the bill, but give leave to amend on terms. A bill may properly be filed to prevent the sale of slaves before the time fixed in the contract of sale for their delivery; and then it is proper, to prevent mutiplicity of suits, that all matters in controversy be bro't forward.

[Ed. Note.—Cited in Haskell v. Waties, 2 Rich. Eq. 9; Sollee v. Croft, 7 Rich. Eq. 41.

For other cases, see Equity, Cent. Dig. §§ 496, 520; Dec. Dig. ⇐219, 247.]

[*Specific Performance* ⇐19.]

Any one offering to perform a contract on behalf of infants is their agent, and his offer will be sufficient to compel performance by the other party.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 47; Dec. Dig. ⇐19.]

[*Specific Performance* ⇐32.]

In a contract with the father for the benefit of his infant children, there is not such want of mutuality as will exonerate the other party from performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 95; Dec. Dig. ⇐32.]

[*Specific Performance* ⇐12.]

Specific performance of contracts for leases has, in some cases, been refused on the ground of the insolvency of the tenant—different on a contract to purchase; for there the Court will not decree title to be made until the money is paid.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 37; Dec. Dig. ⇐12.]

[*Specific Performance* ⇐28.]

The contract sought to be enforced being certain, it will not be affected by any uncertainty in another separate contract for a different matter, contained in the same instrum't.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 64; Dec. Dig. ⇐28.]

Union—

This bill was filed 17th November, 1832, by John P. Sarter, and wife Patsey, late Patsey Sims, daughter of Reuben Sims, the said Reuben Sims and his infant children, Ann, Mary, John, James, William and Reuben, by their next friend, Nathan Sims, against the defendant, as administrator with the will annexed of Edward Stevens. It states that the said Edward Stevens, in his life-time, and Reuben Sims, entered into the following agreement, to wit:—

State of South Carolina,
Union District.

Agreement made and entered into this 11th day of January, 1832, between Edward Stevens of the State and district aforesaid, of the one part, and Reuben Sims, of the State and district aforesaid, of the other part, as follows: The said Edward Stevens doth hereby agree with said Reuben Sims, to sell to the children or their agent, of the said Reuben Sims, all that family of negroes

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*and their increase, known by the name of Abram and his family, that I bought at sheriff's sale at Union Court House on sale-day, in September in the year 1827, for the sum of eighteen hundred dollars and interest from the time that he bought them; and that he, the said Edward Stevens, in January next, on receiving from the children or their agent, of said Reuben Sims, the said sum of money, then he is to execute a bill of sale of the said negroes to the said children or their agent, of said Reuben Sims, free from all incumbrances, which bill of sale shall contain a general warranty, and the usual full covenant: and the said R. Sims agrees with the said Edward Stevens, that the children or their agent, of the said Reuben Sims, shall and will, in January next, and on the execution of such bill of sale, pay unto the said Edward Stevens the sum of eighteen hundred dollars, and interest aforesaid. And it is further agreed between the parties aforesaid, that the said Edward Stevens do pay hire for the use of the aforesaid negroes from the first January, 1828, until January next, when, and upon the delivery and bill of sale, the possession is to be delivered to the children or their agent, of the said Reuben Sims; It is agreed between the parties that the children or their agent, of the said Reuben Sims, do pay the said E. Stevens for his trouble and expense for attending to a law suit, what any two or three good disinterested men shall say it is worth: and it is understood that the stipulations

aforesaid are to apply to, and to bind the heirs, executors and administrators of the respective parties: and in case of failure, the parties bind themselves, each unto the other, in the sum of six thousand dollars, which they hereby consent to fix and liquidate as the amount of damages to be paid by the failing party, for his non-performance, whereof the parties have hereunto set their hands and seals, the day and year aforesaid. Edward Stevens, [L. S.]
R. Sims, [L. S.]

That in pursuance of this agreement, Stevens received $400, and has had the use of the negroes, for which he was to pay hire, both which must be deducted from the price agreed to be paid for the negroes. That the time fixed for the performance of the agreement has not yet arrived; and that the defendant as administrator, has recently advertised for sale all the personal property of Stevens not specifically bequeathed, includ-

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ing these negroes, and *is about to sell the same in December (then) next. That the negroes are valuable, and Stevens' estate so embarrassed, that after the payment of his debts there will not remain sufficient to discharge the $6,000 which has been fixed in the agreement as liquidated damages for its non-performance: and if the defendant should be permitted to sell the negroes, they may be scattered abroad, or perhaps removed out of the jurisdiction of the Court, whereby a specific execution of the contract, which was the main object of the parties, would be prevented, to the irreparable injury of the plaintiffs:—and under these circumstances they have no adequate remedy at law. The bill prays for an injunction to restrain the defendant from selling—that the defendant account for the hire, and give bond and security for the delivery of the negroes at the time specified in the agreement,—and that the said agreement may be specifically performed.

On filing the bill, a motion was made before the Commissioner for an injunction, which was refused.

On the 8th June, 1833, the defendant put in a general demurrer to the bill, which Chancellor Johnston overruled, and at the same time granted an injunction and leave to amend the bill. The amendment to the bill alleges, that in January 1833, the plaintiffs, by their friend and agent, Nathan Sims, offered to perform the agreement on their part, and tendered to the defendant the sum stipulated to be paid, which he refused to accept, and refused to perform the agreement on the part of said Stevens to be performed.

On the 5th August, 1833, the defendant filed his answer, in which he requires proof of the execution of the agreement set out in the bill, and of the payment of four hundred dollars in part performance. He answers, that not believing that the plaintiffs seriously intended to prosecute their claim, he had advertised the negroes for sale, but has since declined selling until the matter is adjudicated: nor has he any intention of removing them from the State. He cannot say what the main object of the agreement was, but the estate of Stevens will be amply sufficient to pay any demand the plaintiffs could recover on account of the said agreement. That the time for the performance had not arrived at the filing of the bill, and submits to the Court, that if the plaintiffs had performed their part of the agreement, they had a plain and adequate remedy at law. That if the plaintiffs could, at the time of filing their bill, have come into this Court for relief, it could only have been for an

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*injunction until the time of performance; and that part of the case has failed by the rejection of the application by the Commissioner: and as the case now stands, [before the amended bill,] it is a bill filed in November 1832, to enforce an agreement, which, by its terms, is not to be performed until the January following, without alleging that the plaintiffs have performed or offered to perform the agreement on their part—in effect, asking the Court to enforce an agreement against the defendant before the time specified in it, and at the same time to absolve the plaintiffs from the performance on their part. And he pleads in bar the want of such an allegation in the bill, and to the jurisdiction of the Court.

To the amended bill the defendant answered, that neither the said Reuben Sims, nor his children, did, at the time the agreement was to be performed, offer to perform their part. That he did not know there was any agent for the children, or who he was; neither does he believe that there was any such person legally authorized to act for them, and requires proof thereof.

The cause was heard before Chancellor De Saussure, June 1834. On the trial the agreement set out in the bill was produced and the signature of Stevens proved. It was also proved that, in January 1833, Nathan Sims, the uncle of Reuben Sims' children, and their next friend in this case, with bank bills in hand sufficient for this purpose, offered to pay Gordon the money due, according to the agreement, and stated that if objections were made to the bills he would procure specie; to which Gordan replied that he made no objection to the bills, but that he did not know the amount which would be due according to the agreement, and if he did, he would not accept the money. The estate of Stevens, it appeared, was much embarrassed, and from the statement of the administrator, (which was admitted by consent,) there will remain, after the pay-

ment of the debts, (exclusive of these negroes, or the sum of $1,800 in the agreement,) about $3,000 for distribution. Reuben Sims was insolvent in 1832, and is so now. It was further proved that the negroes in question came by Mrs. Sims in marriage, and some of them had been raised with her. They were purchased by Stevens, at sheriff's sale, as the property of Reuben Sims, and after the sale he said that if the family of Sims, or their friends for them, would pay him what he gave, and some compensation for his trouble, they should have the negroes. The negroes were proved to be worth about $4,000, and their hire from January 1828, $275 per annum.

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*Chancellor De Saussure. The principal questions which arise in this case, are: First. Whether this is such an agreement as is binding on the representative of the estate of Edward Stevens? And whether this is a case in which the Court ought to give the relief prayed for, by decreeing specific performance of the agreement? At the hearing of the case, it was urged, though not very strongly, that there was no jurisdiction in the Court; but in answer, it was insisted that Chancellor Johnston had already decided that question, which was not appealed from, and that would be sufficient. But in truth, the plaintiff would have substantially the benefit of that plea, if the Court should be of opinion that this is a case in which it ought not to decree a specific performance.

On examining the first question above stated, it appears to me, after ascertaining the facts proved in the cause, that the agreement is binding on the representative of Edward Stevens. The objections made were, that there was no person with whom he could legally contract, and therefore the contract for the slaves was void; and also, that the consideration was too low and inadequate. It is true that Reuben Sims, with whom Mr. Stevens contracted to sell and deliver the slaves in question, did not contract on his own behalf, but on behalf of the children, or in other words, was constituted a trustee on their behalf. Now, it is the doctrine of law as well as of common sense, that if a stranger undertake to contract for minors, his act, though it may not bind them, will bind him; for, in the very instrument of agreement he binds himself to pay the stipulated sum of $1800, and interest for the slaves, with a heavy penalty if the terms are not complied with: besides, it is not true that all contracts should be so absolutely mutual that mutual remedies should flow from them. One exception is, that if an adult male make a promise of marriage with a minor and fail to perform it, he would be liable for damages, though she would not be liable. Others would be made under peculiar circumstances. When an adult deals with a minor, knowing his minority, and in contracts for property with a minor, the deeds are not void, but voidable only at the option of the minor, and if they be for his benefit, will be sustained. I think, therefore, that Mr. Edward Stevens and his representatives were bound by this contract. As to the inadequacy of the consideration, it is true that the contract was for $1800, and the slaves were proved to be worth $4000. If this had been an ordinary case of persons of mature

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age dealing *with each other at arm's length, this disproportion of price to value would not have been of itself a sufficient ground to put aside the contract without some circumstances of fraud, imposition, or utter ignorance. But none of these things have occurred: there is a real and valuable consideration, and no allegation of fraud or imposition. Mr. Stevens knew he had obtained a great bargain at the sheriff's sale, at the expense of a large family, and seems to have been induced by kind feelings to let the children of the family have the slaves at the same price he had given, and who were to pay him in this act of beneficence. The objection by his administrator seems to me to be unfounded. Another objection was made, that the terms were not complied with and the money not paid at the stipulated time. In transactions of this kind it is not understood that time is of the essence of the contract. To be sure, great and long continued non-performance will in some instances, in which circumstances are greatly changed, be construed into an abandonment of the bargain. This, however, is rare, and takes place only when the conduct of the parties indicates the intention to abandon the contract, or the delays have produced great injury to the one seeking to get rid of the contract. In the case we are considering, there is no evidence of any design on the part of the minors, or their friend and trustee, Mr. Sims, to relinquish the contract—on the contrary, an effort was made to complete the payment to the administration of Mr. Stevens, which, if it did not absolutely amount to a formal tender of the purchase money according to strict rule, was so substantially; and utterly takes away all pretence of the contract being abandoned or so grossly neglected for an immoderate length of time as ought to preclude the enforcement of it now, by the administrator. The offer to pay the money was refused.

The principal question in the cause, and one involving real difficulty, is whether it is legal and proper to decree the specific performance of an agreement for the sale of slaves. It is not to be questioned that the general doctrine of the Court of Equity is, that specific performance will not generally be decreed of contracts of personal goods and chattels, though it will as to real estate. The reason is, that the former are of a perishable and transient nature, and not always capable

of being decreed in specie as land may; and also, because compensation in damages may, and generally will be an adequate and proper remedy. There are, however, exceptions to the rule, when the personal property is of

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a peculiar *character, and where a peculiar value is placed upon particular articles, such as pictures, vases, arms, armorial bearings—from feelings of affection, family attachment, or other considerations of that kind. It has long been a question, how far the rule or the exception should be applicable to the case of contracts for slaves. All the reasons which apply to the exception, apply to the case of slaves; not, perhaps, broadly and unqualifiedly, but to domestic servants brought up in a family, and who became, as in this case, the subjects of contract with the family who raised them. In many of the contracts for slaves, compensation in damages would not be a proper or adequate compensation. In most cases, slaves are purchased with a view to the settlement and cultivation of land, and if a disappointment in the purchase of the slaves takes place, the land may be uncultivated and a burthen. The Courts have been approaching to this view of the subject, and I understand that the Court of Appeals has leaned favorably to it. It is time that the doctrine should be settled, and I shall therefore decree, according to my judgment, in favor of the specific execution of this contract, in order to have the question distinctly carried up to the Court of Appeals for its final judgment.

Other questions were made at the hearing. By the contract for the negroes between Stevens and Sims, on behalf of the minor children, it was agreed by the said Stevens, to sell to the children, or their agent, all that family of negroes (now in question) for the sum of $1800, and interest from the time he bought them at sheriff's sale, (September 1827,) and that he, Edward Stevens, would in January next, after date of the agreement, (January 11, 1832,) on receiving from the children, or their agent, Reuben Sims, the said sum of money, ($1800,) would execute a bill of sale of the said slaves, to the said children, or their agent, of the said Reuben Sims, free from incumbrances, and with a clause of warranty, whereupon the said sum of $1800 was to be paid, with interest, to the said Edward Stevens. And it was further agreed, that the said Edward Stevens should pay hire for the use of the said slaves, from the first of January, 1828, until the first of January then next ensuing, (January 1833,) when the possession of the slaves was to be delivered to the said children, or their agent. It was also agreed, that the children, or their agent, should pay to Edward Stevens for his trouble and expense for attending to a law suit, what two or three good disinterested men shall say it

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is worth. The parties also *bound themselves, and their heirs, executors and administrator, respectively, in the sum of six thousand dollars, as the amount of damages for the faithful performance of the stipulations of the agreement. These stipulations are sufficiently distinct and precise. Yet it was argued for defendant, that if interest should be allowed on the sum of $1800, paid by Mr. Stevens, and hire allowed for the work of the slaves during the time they were held by him, that it would be greatly to the disadvantage of the estate of Stevens, as the usual rate of hire would greatly exceed the interest. If this should operate hardly on Mr. Stevens' estate, it would be the effect of his own express agreement. Such are the terms of his own agreement. It might be inexplicable why he entered into such stipulations, unless we understand what I think all the circumstances warrant and even require us to believe, which is, that Mr. Stevens, throughout the whole transaction, acted as the friend of the children, and though a bona fide purchaser of the slaves at sheriff's sale at a low price, he never meant to make a profit on the purchase, but to let them have all the profits of the hire and labor, provided he was re-imbursed his advance of $1800, with interest. This, I think, the true clue to the whole transaction, in which there was no impropriety towards any, and great kindness and good will to these children.

It is therefore Ordered and decreed, that the plaintiffs do pay over to the defendant the administrator of Edward Stevens, the sum of $1800, with interest, according to the agreement; and that the said administrator do convey the said slaves in question, and their increase, to the said children, mentioned in the pleadings, or to their agent, and account for their hire and labor, according to the terms of the agreement. But under the circumstances, the rate of hire should be fixed at a very moderate rate. And that the Commissioner to whom the case is referred to examine and make up the account for hire, do also examine and report what compensation ought to be allowed to Mr. Stevens' estate for his services in the law suit mentioned in the agreement, of which there is no proof before the Court. Costs, in such a case as this, to be paid out of the property in question.

The defendant appealed on the following grounds:

1. That the bill was prematurely filed: the injunction part having failed, there was no ground on which it could be retained, and the demurrer should have been sustained.

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*2. The amendment to the bill ought not to have been allowed: it was too late, but if allowed, it should have been on terms.

3. The agreement was not proved as re-

quired by the answer, there being no proof that Reuben Sims executed it.

4. There was no proof that Reuben Sims, his children, or their agent, offered to perform their part of the agreement at the time it was to have been performed, or at any time since: the agreement requires performance by the children or their agent, and there was no proof of any such agency—the unauthorized acts of Nathan Sims were not such an offer to perform as required performance on the part of the defendant.

5. The positive answer of the defendant, that there was no offer to perform by the plaintiffs or their agent, is conclusive against them, the proof as to the acts of Nathan Sims being vague and indefinite.

6. That there is a plain and adequate remedy at law, and this Court has therefore no jurisdiction.

7. That the consideration is grossly inadequate—the agreement is unequal, unreasonable, unfair, unjust and unconscionable.

8. There is no party responsible to the estate of the testator—no reciprocity in the contract—no mutuality.—Sims being insolvent, and his children minors, they should not only be willing, but able to perform the contract.

9. Reuben Sims is insolvent—the contract uncertain and executory, and no part performed,—no injury can therefore result to the plaintiffs.

10. That the decree is in every respect contrary to Equity and evidence.

Herndon, for the defendant, argued that after the motion for injunction had failed, the bill being filed before the time fixed for the performance of the agreement, was stripped of all Equity. After the time fixed for performance, and on the case being called for trial, leave to amend was granted, by inserting an important allegation; it was in effect a new bill, for relief could not have been had under the first bill at the time it was filed, and with the statement contained in it. Under such circumstances, to allow the amendment was improper: or if allowed, the costs of the case up to that time, should have been paid for the leave. The agreement was not pro"ed, and the answer requires proof of it.

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Stevens' sig*nature was proved, but not Sims', and such proof was necessary. New. on Const. 161. On the fourth and fifth grounds, he contended that there was not sufficient proof of an offer to perform on the part of the plaintiffs or their agent. There was no evidence that Nathan Sims was acting for the children, and unless he came with authority from them, the defendant would not have been justified in delivering the negroes to him. But at most, conceding that he was authorized so to act, it was a mere loose conversation; to make it effectual as a tender, the money should have been deposited with the Commissioner. The defendant, however, denies that such an offer was made, and the answer must be evidence, unless contradicted by two witnesses, which it is not. It is incumbent on the plaintiffs to show that they had done all they could do. Mad. Chan. 331.

But there is a plain remedy at law by action on this agreement, in which it seems the damages are liquidated, and adequate relief could thus be had. Can a bill be maintained for the specific performance of a contract for the sale of negroes? The rule clearly is, that such a bill cannot be sustained for personal chattels in general; and if the case of an agreement for the sale of slaves is to constitute an exception, it will be now for the first time made. "The general rule is, that the Court will not direct the specific delivery of a chattel, because the party has plain and adequate remedy at law." Nott, J. in Lining v. Geddes, 1 M'C. Ch. 308; Farley v. Farley, 1 M'C. Ch. 506, decides the point that a bill will not lie to compel the delivery of slaves. There is nothing peculiar in the circumstances of this case, or alleged in the bill, to induce the Court to exercise its extraordinary powers in compelling specific performance—nothing to prevent plain and adequate relief at law. New. on Contr. 313.

On the ground of inadequacy of price, he insisted that there was a distinction between executed and executory contracts—that while mere inadequacy of price would not be a ground to set aside the former, it might prevent the Court from interposing to enforce the latter; and that to entitle a party to specific performance, the contract must be fair, just and reasonable. Osgood v. Franklin, 2 John. Ch. Rep. 23; 1 Mad. Chan. 323, 407, 425; 1 Bro. Ch. Ca. 326; 10 Ves. 292; Cas. Temp. Talb. 234; Newl. on Contr. 69; Cabeen v. Gordon, 1 Hill, Ch. 54; Butler v. Haskell, 4 Eq. Rep. 673.

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*According to the evidence, these negroes were worth at the time of the contract $4000, and their yearly hire from 1828 to the time of performance $275, making for their value and hire $5375. The price agreed to be paid with interest, to the same time, is $2472, leaving $2903—a clear gain to the plaintiffs, and actual loss to the defendant. Besides, the hire so far exceeds the interest, that if the negroes remain much longer in his possession, the plaintiffs will have nothing to pay. Will a Court of Equity enforce such a contract?

The want of mutuality should prevent its enforcement. Sims is insolvent and his children minors, and if they were not, he could not compel them to perform, or make any contract which would be obligatory on them. They are not legally bound by this agreement. Will the Court enforce the execution of a contract where but one of the parties is bound? In any event, before performance was decreed, they should have been required to put down the money. 1 Mad. Ch. 423; 1 Mad. Rep. 11; 1 M'C. Ch. 38.

Lastly, the uncertainty of the agreement is an objection—the amount to be paid to Stevens for his services is uncertain, and as yet entirely unknown. Mad. Ch. 426; New. on Cont. 157.

J. J. Caldwell & A. W. Thomson, for the plaintiffs. They insisted that the agreement was sufficiently proved. There was proof of Stevens' signature, the party against whom it was to be enforced, and Sims is a party plaintiff in the bill which he has sworn to; besides, no such objection was urged on the trial when the agreement was regarded as being in evidence, on full proof of its execution. The important question in the case is as to the jurisdiction. The bill was not filed prematurely. The negroes were about to be sold; and the bill was filed on the familiar principle that a Court of Equity will interpose to secure the forthcoming of property to a party not entitled to the present possession, but in remainder. This is a proper ground of Equity jurisdiction, and the refusal of the Commissioner to grant the injunction, does not destroy the Equity. The case then, being properly in Court for one purpose, may be retained for every purpose; the Court having possession of the case, will do complete and ample justice, and not send the parties to another tribunal. Rathbone v. Warren, 10 John. Rep. 596; King v. Baldwin, 17 John. Rep. 384. The subsequent amendment to the bill

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was properly allowed. *Leave to amend is a matter in the discretion of the Court, and that discretion has been properly exercised to subserve the ends of justice.

The general rule, that a bill will not lie to enforce the delivery of specific chattels, proceeds on the ground that adequate relief can be had at law by way of damages. But in this case, such relief cannot be had, for it is at least doubtful whether the estate would be sufficient for that purpose. Exceptions, however, have been allowed to the rule, on account of some peculiar value attached to some chattels, where compensation adequate to the loss could not be had in damages: as in the cases of the Pusey horn, and family paintings, &c. The same reason applies here. These are family negroes, the most of them raised with the plaintiffs—their qualities were known, and feelings of kindness and attachment had grown up between them. Will the Court exercise its sensibilities in favor of a painting or a Pusey horn, and withhold them in the case of a human being? From the principles laid down in all the cases on this subject, it appears, that where damages would be no adequate compensation, or the injury would be irreparable without it, specific performance will be decreed. In Howard v. Hopkins, 2 Atk. 371, the specific performance of articles for the purchase of an estate was decreed, although a penalty was fixed for non-performance. See also Goring v. Nash, 3 Atk. 186-7. Whatever may be the doctrine of the English Courts, in this State, bills have been sustained for the delivery of slaves. Wamburzee v. Kennedy, 4 Eq. Rep. 474; Brown v. Gilliland, 3 Eq. Rep. 541; Chick v. Smith, Harp. Eq. Rep. 298. And specific performance of contracts for the sale of slaves has been decreed in Kentucky and North-Carolina. 4 Bibb, 186; 2 Bibb, 410; 2 Murphy, 74. Farley v. Farley, is not directly opposed to such a bill being sustained. The bill in that case was dismissed because the proper parties were not before the Court. It ought, however, to be reviewed.

The want of mutuality is no objection. There is the same want of it in every contract between an adult and a minor, where one is bound and the other not; and as to Sims' insolvency, the defendant has the security in his own hands—the Court will take care that the money shall be paid.

As to the inadequacy of price, it is not pretended that there was any fraud in the transaction. Stevens was certainly not overreached; but, actuated by benevolent motives,

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consented to forego a *speculation, on being reimbursed what he had paid. Nor is there any thing in the objection, that there was no offer to perform on the part of the plaintiffs. Nathan Sims was their next friend in the bill; he was notoriously acting on their behalf—the answer in this part is not distinct, and the evidence is satisfactory.

HARPER, J. I shall first consider that which perhaps constitutes the only difficult or material subject of investigation in the case—the question, whether the bill for the specific performance of this contract can be maintained in this Court, which constitutes the sixth ground of the appeal. The cases of Pusey v. Pusey, 1 Vern. 273; of Duke of Somerset v. Cookson, 3 Pr. Wms. 390; Buxton v. Lister, 3 Atk. 383; Fells v. Read, 3 Ves. 70; Loyd v. Loaring, 6 Ves. 778; Lowther v. Lowther, 13 Ves. 95; and Macclesfield v. Davis, 3 Ves. & B. 16, put it out of the question that a bill will lie in many cases for the specific delivery of a chattle.

It seems to have been a matter of some uncertainty in our own decisions, whether a bill may be maintained for the specific delivery of a slave, and in what cases; and it is desirable that we should come to some specific conclusion on the subject. The general principle on which the decisions go is, that where damages will not be an adequate compensation, the party is not entitled to relief in Equity. But the principle might perhaps be more broadly stated. The method of relief on contracts in Equity, is to carry them into specific execution, and it is laid down in the text of Fonblanque, B. 1, Ch. iii. sec. 1, that "where the contract is good at law, Equity will carry it into execution." The commentator on Fonblanque, ib. n. c. observes, "this proposition is too generally stat-

ed; for though Equity will enforce the specific performance of fair and reasonable contracts, where the party wants the thing in specie and cannot have it in any other way; yet, if the breach of the contract can be, or was intended to be compensated in damages, Courts of Equity will not interpose." In general, where the contract related to personalty, the party was not supposed to want a specific execution, and no doubt very much for the reason assigned in the same chapter, "that chattels were of little value at the common law, when personal property was but small."

The principle may be illustrated by the cases in which specific performance of such contracts has been refused. In Cud v. Rutter, 1 Pr. Wms. 570, where the contract was

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for the transfer of stock, *the reasoning of the Chancellor was, "that a Court of Equity ought not to execute any of these agreements, but to leave them to law where the party is to recover damages, and with the money may, if he pleases, buy the quantity of stock agreed to be transferred to him: for there can be no difference between one man's stock and another's. It is true, one parcel of land may vary from and be more commodious, pleasant or convenient than another parcel of land, but £1000 South Sea stock, whether it be A B or C's, is the same thing, and in no sort variant." Yet, in Colt v. Nettervill, 2 Pr. Wms. 304, where the bill was to have a transfer of stock which was rising rapidly in value, the Chancellor seemed to doubt whether justice did not require the transfer to be decreed. In Errington v. Aynesly, 2 Br. C. C. 343, the Master of the rolls, refusing specific performance of an agreement to build a bridge, says, "there is no case of a specific performance of an agreement to build a house, because, if A will not do it, B may. A specific performance is only decreed where the party wants the thing in specie, and cannot have it in any other way."

In the cases of the Pusey horn, of the antique altar piece which had been long in the family, of the ornamented silver tobacco box, the property of a club, and some others, it was only the feelings and imagination of the owners, giving the articles a peculiar value to them, which a jury, fixing the market value, could not be supposed to estimate, that was held to entitle them to relief. In Fells v. Read, the Chancellor remarks in relation to those cases: "It was not to be cast to the estimation of people who have not those feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it." In Buxton v. Lister, a different class of cases is considered. The case of Taylor v. Neville is referred to:

"That was for a performance of articles for sale of eight hundred tons of iron, to be paid by instalments, and a specific performance was decreed."

"There are several circumstances which may concur."

"A man may contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber."

"On the part of the seller, suppose a man

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wants to clear his *land, in order to turn it to a particular sort of husbandry, here nothing can answer the justice of the case, but the performance of the contract in specie."

"In the case of John, Duke of Buckinghamshire v. Ward, a bill was brought for the specific performance of a lease relating to Alum Works and the trade thereof, which would be greatly damaged if the covenant was not performed on the part of Ward."

"The covenants lay there in damages, and yet the Court considered if they did not make such a decree, an action afterwards would not answer the justice of the case."

The general principle is, that the Court will execute any fair and reasonable agreement, unless it appears that full justice may be done by a compensation in damages. Now, if these numerous and uncontradicted decisions are evidence of the law, then it is certain that there may be some cases in which a bill will lie for the specific delivery of a slave. Suppose the case, which I have known, of a slave accustomed to wait on a deaf and dumb person, and from long habit able to communicate ideas with him. This would add nothing to his market value, though rendering him inestimable to his owner. Many similar cases may be conceived. A slave may have been the nurse of her master's children, or may have saved the life of one of his master's family. In such cases, what mockery would it be to tell the master that he might have full compensation by damages for the loss of the slave? And unless there be something very perverse in the disposition of the master or the slave, in every instance where a slave has been reared in a family there exists a mutual attachment between the members of it and himself. The tie of master and slave is one of the most intimate relations of society. In every age the distinction has been recognized between the slave brought up in his master's household and one casually acquired. And it may be said, that such an one is actually of more value to the master than he would be to a stranger. The owner better understands his qualities, and what he is capable of performing, and the slave will be more likely to serve with cheerfulness and fidelity. These considerations are greatly strengthened by that of humanity to the slave himself.—Are

not such feelings worthy of more regard than the taste which would covet an antique altar-piece or a picture of Titian? We have the principle from the English decisions, but an infinitely stronger case in which to apply it.

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*In the case before us, it appears that the slaves in question were brought up in the family of the plaintiffs, and according to the view I have taken, this makes the case in which a bill may be maintained. But it is argued that this may lead to very extensive consequences. Though not strictly born and reared in the master's family, yet there may be the same attachment and the same circumstances to give a peculiar value, from a shorter ownership.—Slaves are moral and intellectual beings, having qualities infinitely diversified, and in every case where specific slaves are contracted for, it might be said that the contract was made with a view to those peculiar qualities. But I am not to shrink from enforcing a well-settled principle of law, because it may lead to unforeseen consequences. I believe these consequences will follow, and I am prepared to lay it down as a general rule, that a bill will lie for the specific delivery of slaves, as for the specific performance of a contract for the sale of land; and in saying this, I believe I am giving effect to the law, according to its true meaning.

We have seen that the principle is, that equity will enforce contracts specifically, unless it appear that there may be full compensation in damages. But this cannot appear in the case of slaves, any more than in a contract for the sale of land.

In case of the purchase of land, it is presumed that the party was induced by some particular liking, or some convenience in the particular land. But there is as great, and perhaps greater reason for supposing that a purchaser of specific slaves has a view to their peculiar qualities.

The objection at common law, that chattels were of little value, does not apply to these. They are a property no less permanent and valuable than the land itself. It is said in Buxton v. Lister, "As to cases of contracts for purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land and is quite a different thing from matters in the way of trade." Does not this apply equally to slaves? Can you say, as in the cases which relate to stock, that one man's slave is as good as another man's slave? It may chance to be so; as it might happen that a man might with the damages recovered for a breach of contract to sell land, buy other land equally convenient and agreeable; but this is not generally so, nor so to be presumed. The fair presumption is, that when a man contracts for particular slaves, he wants to have them in specie.

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*With us slaves are commonly employed on land. Suppose a man at the same time to contract for land and the slaves employed upon it: it would be nugatory, and defeat his object altogether, to give him the land, if he could not have the slaves. The cases are so many and various in which justice could only be done by a specific delivery, that it is best to have a general and certain rule. It is on such views I suppose, that the same doctrine has been established in other states where slavery exists. Cases to this effect were quoted from Kentucky and North Carolina—4 Bibb, 186; 2 Bibb, 410; 2 Murphy, 74.

There may be exceptions to the rule. If it appeared that the purchaser contracted for the slaves as merchandize to sell again, this, according to the expression in Buxton v. Lister, would be merely a matter in the way of trade, and in such case it is certain that complete justice might be done by a compensation in damages. But the general rule must be as I have stated.

This dispenses with the necessity of considering some of the other grounds on which the jurisdiction of the Court was attempted to be supported. The other grounds of appeal, as I have before observed, will require but slight notice.

The first and second may be considered together. They are founded upon a misconception of the practice of equity, arguing from analogy to proceedings at law. If a bill appear on the face of it to be prematurely filed, and advantage be taken of this by demurrer, the demurrer will be fatal. If there be no demurrer, and the cause be brought to a hearing before the time fixed for the performance of the contract, there might be reason to contend that the bill should be dismissed. But if no advantage be taken by demurrer, and it be not brought to a hearing till the proper time of performance has elapsed, the Court would not do so nugatory a thing as to dismiss the bill in order to compel the party immediately to file another bill for the very same purpose. Equity can do full justice to the parties by preventing surprise and imposing costs on the parties by whose fault they were prematurely and unnecessarily incurred. But this bill was not prematurely filed with respect to the object which the parties then had in view—the preventing of the sale of slaves. Coming for this purpose, as the time of performance was on the eve of arriving, it was proper that all the matters in controversy should be brought forward to prevent multiplicity of litigation. The leave to amend was matter of discretion, and we think it was properly exercised.

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*There is nothing in the third ground as respects either the law or the fact: the agreement was received in evidence, without any

objection (so far as appears from the report of the Judge) to the proof of its execution. No doubt seems to have been seriously entertained of the fact of its execution by Reuben Sims, and if there were any such casual omission, as is supposed, we should certainly send the cause back that the defect might be supplied.

The fourth and fifth grounds may be taken together. The objection seems to be, that it does not appear that Nathan Sims, who is alleged to have offered payment of the money, was the authorized agent of the plaintiffs. There was no need of any such proof. Any one who would offer to pay the money in their behalf was agent enough, and they might adopt his act. Besides, most of the plaintiffs were infants, incapable of appointing an agent, and no other agent than such a voluntary one could have been contemplated by the agreement.

With respect to the fact of the money having been offered, it was matter of evidence for the Chancellor. Even at law, if a debtor has the money ready, and informs his creditor that he is ready to pay him, and the creditor declares beforehand that he will not receive it, there is no need to prove a formal tender. It is argued that the answer denies the offer, and that it is only proved (and that imperfectly) by the testimony of a single witness, Boyce. I think the answer is equivocal, and so far from contradicting, supports the testimony of Boyce. The defendant denies "that the said Reuben Sims and his children, or either of them, did, at the time that the said contract was to be performed, offer to perform their part of the same, according to the promise thereof. This defendant not knowing that there was any agent of the said children, or who he was, neither does he believe that there was any such person legally to act for the said children, &c." He plainly appears to rest his denial that Reuben Sims, or his children, offered performance, on his own conclusion that there was no person legally authorized to offer performance on their behalf. Such a method of answering cannot be too strongly censured. It is generally an attempt to gain the benefit of falsehood, without being subject to the direct charge of it.

With respect to the seventh ground, the Chancellor's reasoning is entirely satisfactory. The Court refuses to enforce the specific performance of agreements, on the

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grounds of inadequacy of con*sideration, because it infers that there must be hardship, injustice or mistake. But if the testator, having purchased the property of plaintiffs' father, at a low price, chooses out of humanity to give them the benefit of it, upon being reimbursed what he has paid with interest, the whole doctrine is inapplicable. As the hire stipulated to be paid after the 1st of January, 1828, exceeds the interest to be received by the estate of Stevens, in order to make out an enormous inadequacy, calculations were entered into for the purpose of shewing that if the period of performance should be deferred for some time, the debt to Stevens' estate will be extinguished by that excess; so that, in fact, the estate of Stevens will receive nothing. But this also is founded in misconception. If the estate pays hire, it receives the service of the slaves, and we must suppose the one to be equivalent to the other. Then, if this be so, though the debt should be entirely extinguished, all that we can say is, that it has been paid in the services of slaves, instead of money. If the services be in fact equivalent to the hire, the estate will be in no worse condition than if the contract had been performed at the day. If the defendants be entitled to the performance of the contract, they have been deprived of the services of the slaves from that day.

Under the eighth ground, the want of mutuality in the contract is relied on; that is to say, that defendant's testator could not have enforced performance against the plaintiffs, who were no parties to the contract. There can be no doubt but that Reuben Sims and the testator were bound at law. In Lowther v. Carrill, 1 Vern. 221, it was held to be sufficient if the writing be signed by the party, who sought to be charged by the bill, and such is said to have been the case of Hatton v. Grey, 2 Ch. Ca. 164. This was denied, however, by Lord Redesdale, in Lawrenson v. Butler, 1 Sch. & Lef. 20, and in Shannon v. Bradstreet, ib. 58: in which he holds that both parties must be bound, or the Court will not enforce the performance. But he makes the exception expressly in the case of infants. "It is the peculiar privilege of infants for their protection, that though they are not bound, yet those who enter into contracts with them, shall be bound, if it be prejudicial to the infant to rescind the contract." See also Campbell v. Leach, Amb. 747, quoting Holt v. Ward, Fitz. 275. Most of the plaintiffs were infants at the time of the contract, and under the exception entitled to performance. But the contract is one and entire, and must be performed entirely or not at all.

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*The ninth ground is also misconceived. As between Reuben Sims and defendant's testator the remedy was only at law, and at law there would be no question of solvency or insolvency, with reference to the validity of the contract. In Equity, there have been some cases in which the Court has refused to enforce specific performance of a contract for a lease, on the ground of the tenant's insolvency. Buckland v. Hall, 8 Ves. 92; O'Herlihy v. Hedges, 1 Sch. & Lef. 123. This was on the ground that the insolvency of the tenant might endanger the future payments of rent; and more specially where money was to be laid out by the tenant in repairs or improvements. But it is distinguished from the

case of a contract to purchase, because, in such case, it is said, the bill tenders the purchase money, and the Court will not decree a title to be made, until the purchase money is paid or secured to be paid. The insolvency of the vendee is therefore immaterial. But in this case, by the terms of the contract, the slaves are not to be transferred until the money is paid, and if it were not so, the Court would take care that it should be paid or secured.

With respect to the uncertainty which is supposed to render the contract void, it may be sufficient to observe that there is no uncertainty in the contract in which the plaintiffs are concerned.—The terms on which the slaves are to be transferred to them, are perfectly certain: but there is a distinct stipulation, entirely independent of this contract, by which Reuben Sims covenants "to pay the said E. Stevens for his trouble and expense for attending to a law suit, what any two or three good disinterested men shall say it is worth." This is the personal undertaking of Reuben Sims, on which the remedy could only be at law. No doubt separate contracts may be contained in the same instrument, and this may be so regarded. Certainly it is no part of the contract with the plaintiffs. The Chancellor's decree is affirmed.

JOHNSON, J., and O'NEALL, J., concurred.

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2 Hill, Eq. 140

ALEXANDER DAVIDSON, Surviving Executor of George Neely, v. JOHN RUFF, Administrator, and Others.

(Columbia. Jan., 1835.)

[*Perpetuities* ⇐4; *Wills* ⇐684.]

Testator directed his estate to be sold and the interest of the fund arising thence to be paid to his son S. annually, and the principal to be equally divided amongst the lawful issue of S. as they came of age or married; "and in default of such heirs to go to his next of kin to be equally divided amongst them at the death of S." S. died without issue. *Held* 1. That the limitation over to the next of kin, was not too remote: 2. That S. was entitled to the interest on the whole sum annually during his life; and his administrator to the interest which accrued in the year he died, up to the time of his death.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 28; Dec. Dig. ⇐4; Wills, Cent. Dig. § 1626; Dec. Dig. ⇐684.]

George Neely died, leaving of force his last will and testament, in which, after giving his

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whole estate to his wife for life, he de*vises and bequeaths as follows: "It is my will and desire that at the death of my said wife, that all the above-named property (or what remains of the same) shall be sold, and the interest arising from the amount of the said sale shall be annually, or as soon as it can be collected, paid to my said son Samuel, and the principal or amount of said sale to remain in the hands or care of my executors hereinafter named, to be equally divided amongst the lawful issue of my aforesaid son Samuel, (if any,) as they come to the age of twenty-one or marry, and in default of such heirs, to go to his next of kin, to be equally divided amongst them at the expiration or death of my aforesaid son Samuel Neely."

On the death of the widow, the executors sold the property according to the directions of the will, and annually, up to January 1833, paid to Samuel Neely, the interest on the amount of the sale. Samuel Neely died in September 1833, unmarried, without issue and intestate, and the defendant, Ruff, administered on his estate.

This was a bill of interpleader, filed by the plaintiff, as surviving executor of George Neely, stating that soon after the death of Samuel, he was notified by Mary Neely and Margaret Brown, that they claimed the funds in his hands as next of kin to Samuel Neely, the one as his paternal, and the other, as his maternal aunt; and a like notice from the defendant, Ruff, claiming the whole as administrator. And the bill prays, that these claimants be brought before the Court, and their rights adjudicated.

Chancellor Johnston. The defendant, Ruff, contends—

1. That he is entitled to the whole capital and interest left at his intestate's death. If he fail here, he insists—

2. That he is entitled to the interest of the entire year, in which Samuel Neely died. Failing in this, he claims—

3. The interest of that year up to the time Samuel Neely died.

His claim to the whole capital and interest is founded on an assumption that the limitation to the next of kin to Samuel Neely is too remote. Assuming this, he insists that the bequest reverted to the testator.

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*The Court of Appeals has, to be sure, decided that there may be a reverter of personalty.(a) But if this bequest did revert, it became distributable as intestate property. The right to distribution vested in the testator's widow and son, and this defendant as the son's administrator, could receive only two thirds of it. To recover the widow's third, administration to her must be taken out.

But I am satisfied that the limitation is good. It is not necessary to refer to authorities for the doctrine that a limitation is valid if it is to take effect at the termination of existing lives or a fixed period beyond them, which it is unimportant to mention here. Although the limitation is upon failure of issue, to whom there is a prior bequest; yet, if there be expressions showing that the testator did not mean an indefinite

(a) Geiger v. Brown.

failure of issue, but a failure within the period I have mentioned, or if that be necessarily inferrible from the period fixed for the limitation to take effect, the limitation is not too remote.

Here the previous bequest is to the lawful issue of Samuel Neely, in default of such issue, then to his next of kin, to be devided among them at his death.

The limitation is to be carried into execution at Samuel Neely's death, which shows that the testator contemplated that the failure of issue, upon which it was to depend, should exist at that time; that is, he intended to limit not on an indefinite failure of issue, but upon a failure at Samuel Neely's death.

I have proceeded on the supposition that the limitation over, does not in terms vest the legacy in the next of kin upon Samuel's death, but vests it in them indefinitely and merely fixes that as the time for executing the trust by dividing it among them. I am convinced that pointing that period out as the time for delivering the legacy to the next of kin, is sufficient evidence that the testator, by "failure of issue," meant a failure at that time.

But by barely including the words "to be equally divided among them," in a parenthesis, the limitation will be turned into a legacy, the right to which vested at Samuel's death.

With respect to the interest, I feel little difficulty. The testator could not intend that the capital should be apportioned among the issue of Samuel as they should come of age, if that should happen during Samuel's life. The direction is that it be apportioned equally among them. Until his death, it could not be ascertained how many there would be of them; nor, of course, what the equal

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*share of each should be. As none of the capital therefore was to become divisible till Samuel's death, and as the executors were directed to pay him the interest annually, it follows that he was entitled to the interest on the whole sum, annually, during his whole life. That is, that all the interest was given to him until the capital should go over according to the terms of the will. But he was paid the interest up to the beginning of the year in which he died. Whether his administrator is entitled to the whole interest of that year, or the interest up to his death merely, is concluded in my opinion by Fronty v. Wagner, in which it was held there should be an apportionment.

The plaintiff had good cause for filing his bill; and is entitled to his costs and reasonable expenses of suit out of the fund.

It is decreed that the defendant, Ruff, as administrator of Samuel Neely, is entitled to the interest of the fund which accrued in the year of his intestate's death, up to the time of said death, and that he may have a reference to ascertain the same.

That the defendants, Mary Neely and Margaret Brown, as next of kin to Samuel Neely, in equal degree are entitled share and share alike, to the residue of the fund in controversy, after deducting therefrom the costs and reasonable expenses of the plaintiff in this suit; and they may have a reference to ascertain the balance coming to them respectively. The plaintiff's costs and expenses to be paid out of this fund.

That the other parties pay their own costs. Ruff's to be allowed him out of his intestate's estate, if it extend so far.

The defendant, Ruff, now moved to reverse this decree, on the grounds:

1. Because the limitation over to the next of kin is too remote, and the estate vested absolutely in Samuel Neely.—Or,

2. The limitation being too remote, the estate reverted to the right heirs of George Neely, of whom the defendants' intestate was one, and entitled to two-thirds thereof, and the Chancellor should have decreed accordingly. Failing on these grounds, he will insist—

3. That the Chancellor should have decreed to him the interest for the whole year in which his intestate died.

Summer, for the appellant, in support of these grounds, cited Butterfield v. Butterfield, 1 Ves. sen. 153–4. Fearne, 461–4–5.

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*Earl of Chatham's case, 2 Bro. Ch. Rep. 33. 127. Robertson v. Fitzherbert, Fearne, 480–1; 1 Cond. Eng. Ch. Rep. 547; 5 Ib. 42; Bell v. Pritchard, 1 Russ. Ch. Rep. 213. Forth v. Chapman, 1 P. W. 693. Adams v. Chaplin, 1 Hill Ch. 265.

Fair & J. J. Caldwell, contra, cited Fearne on Ex. Dev. Ch. 3, § 9. 12, § 11. 45-6-8. Cordes v. Ardrian, 1 Hill Ch. 154.

HARPER, J. We concur entirely with the Chancellor on both the points involved in the case. Fearne in his treatise on contingent remainders and executory devises, 471, says what has been so often repeated, that "with respect to executory devises of terms for years, or other personal estates, the Court of Chancery has very much inclined to lay hold of any word in the will to tie up the generality of the expression of dying without issue, and confine it to dying without issue, living at the time of the person's decease."

Such is the case of Forth and Chapman and others, where property is given to one and his issue, and limited over in the event of the legatee's dying without leaving issue. But surely the words are stronger in the present case, where the direction is explicit that the property shall be divided, in default of issue, at the death of the legatee for life. They are stronger than in the case of Nichols v. Hooper, 1 P. W. 198, quoted by Fearne,

at the page before referred to, where the bequest was of £100, if the legatee should die without issue to be paid within six months after the death; or in Pinbury v. Elkin, 1 P. W. 563, where the bequest was, if the wife should die without issue by the testator, then after her decease to the testator's brother. The words "then after," were taken to mean immediately after, and consequently to restrain the dying without issue to the time of the death. The case also might come within the reason of the decision in Keily v. Fowler, Fearne 482, there being a personal trust to the executors to retain the fund and pay over the interest during the son's life, and then to divide the fund.

We agree also with the Chancellor in respect to the apportionment of the interest; and such, I believe, was the common rule, independently of the decision referred to by the Chancellor. The cases in which it was said that there should be no apportionment between the tenant for life and remainder man, were those of rent, payable on certain days, Jenner v. Morgan, 1 P. W. 392, which

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*was remedied by statute, 11 Geo. 2, C. 19; that of money in the public funds, on which the dividends are payable on certain days, Rashleigh v. Masters, 3 Br. Ch. Ca. 99; and that of annuities, Pearly v. Smith, 3 Atk. 260. But, as is said in the case last referred to, interest is regarded as accruing from day to day, and therefore apportioned. Edwards v. Countess of Warwick; Wilson v. Harman, 2 Ves. 67; 2 P. W. 176. And this was done where the interest was reserved on a bond by half yearly payments. So, where under a marriage settlement, a certain yearly sum was to be paid on certain days half yearly, for maintenance, this was apportioned, maintenance being favored. In the case before us, the interest is directed to be paid annually, or as soon as collected, and plainly for the son's maintenance.

Decree affirmed.

JOHNSON, J., and O'NEALL, J., concurred.

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2 Hill, Eq. 145

JAMES JORDAN v. JAMES HUNT.

(Columbia. Jan., 1835.)

[*Trusts* ⇐219.]

Mode of stating accounts against trustees.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 316; Dec. Dig. ⇐219.]

Spartanburgh—June 1834.

Bill by a ward against his guardian for an account. The appeal was from the decision of Chancellor De Saussure on the Commissioner's report, as to the mode of stating the account.

O'NEALL, J. In charging an executor, administrator, guardian or trustee with interest, it is to be charged on annual balances. The mode of making up the account has been repeatedly explained; but in order to guide the Commissioner, I will, from his own report, give him a practical application of the rule laid down in Foote v. Van Ranst, [1 Hill, Eq. 185,] Jones v. West, [2 Hill, 561, note,] Harper v. Ardis, and Davis v. Wright, 2 Hill, 560.

I perceive throughout the report, that the defendant received funds for his ward in the course of each current year, and that the Commissioner has charged him with interest from the day he received such funds respectively. According to the cases which I have cited, he is entitled to hold a fund thus re-

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ceived until the end *of the year in which it was received, free of interest. It is then brought into the account, and whatever balance is in the defendant's hands, after deducting his expenditures, constitutes an interest-bearing fund for the succeeding year, the interest of which is to be applied to the payment of expenditures in it; and if less than them, the balance is deducted from the principal: if the interest, however, exceed the expenditures, any balance left is kept in a separate column, so as not to be compounded.

For example, the defendant, in May 1821, received $350.43; this sum he was entitled to hold free of interest until the 1st of January, 1822; from it was to be deducted his payments for 1821, $23.62, leaving a balance of $326.81, on which interest is computed for 1822, and amounts to $22.87, which is to be applied to the payment of the expenditures of the ward which exceed the interest of $24.00,—which is to be deducted from the principal; but in that year the guardian received for his ward $119.50, which is to be brought into the account at the end of the year, and being added to the balance of 1821, $326.81, makes an aggregate of the ward's funds in 1822, of $446.31, from which is to be deducted the balance of the expenditures for 1822, after extinguishing the current interest, $24.00, leaving a balance of $422.31, on which interest is to be computed for 1823. The same mode of making up the accounts can be carried on through all the succeeding years.

The Chancellor's decree with these explanations, is affirmed.

JOHNSON, J., and HARPER, J., concurred.

Henry, for the appellant,
Bobo, contra.

2 Hill, Eq. 146

JOHN CHESNUT and Wife, and Others, v. JAMES STRONG and ROBERT STRONG, Executors of John Maybin.

(Columbia. Jan., 1835.)

[*Executors and Administrators* ⟸506.]

Parol evidence admissible to rebut an equity against executions arising out of their obligations to vest funds so as to make interest. (See S. C. 1 Hill, Eq. 122.)

[Ed. Note.—Cited in Duncan v. Dent, 5 Rich. Eq. 12, 14.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2169–2177; Dec. Dig. ⟸ 506.]

[*Executors and Administrators* ⟸506.]

Where an executor is excused from making interest, or permitted to retain funds in his hands without being charged with interest,—generally the burden is cast on the other side to show that he has made interest or used the funds himself—In such cases, it seems that the answer of the executor should deny that he has made interest or used the funds.

[Ed. Note.—Cited in Duncan v. Dent, 5 Rich. Eq. 10, 13.

For other cases, see Executors and Administrators, Cent. Dig. § 2175; Dec. Dig. ⟸506.]

[*Executors and Administrators* ⟸506.]

In the absence of proof, the legal presumption is, that the notes given to the executor at his sale, were paid at maturity.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2169; Dec. Dig. 506.]

[*Executors and Administrators* ⟸313.]

Pending suit against him, the executor, after tender to one of the legatees, deposited the amount due with the Commissioner, with instructions not to pay it over: the legatee afterwards demanded it: *Held*, that he was entitled to interest from the time of demand.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1271½; Dec. Dig. ⟸313.]

[*Vendor and Purchaser* ⟸240.]

[Cited in Cummings v. Coleman, 7 Rich. Eq. 520, 62 Am. Dec. 402, to the point that lack of notice as a defense must be explicitly alleged on oath.]

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 601, 602; Dec. Dig. ⟸240.]

Bill by legatees against executors for an account. This case was brought before the Court of Appeals in January 1833, (1 Hill, Eq. 122,) and the Court then determined that parol evidence was admissible, to "show that the executors retained the legacies in

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*their hands without making interest, in consequence of an agreement or understanding with the testator, that they should not be bound to invest the fund or make interest, nor be chargeable with interest upon failure so to do, and that they accepted the trust on that condition," and ordered the case to be remanded to the Circuit Court, for the purpose of receiving the evidence and being heard and determined.

The case came on before Chancellor Johnston, July 1833, who received the parol evidence, though against his own opinion of its admissibility, and besides he regarded it as unnecessary, the words of the will, in his opinion, amounting to a bequest of the interest to the executors. He dismissed the bill with costs, as to the plaintiffs, (Thompson and wife,) who had given a receipt in full for their share; and decreed that the defendant, James Strong, (Robert Strong having died pending the bill,) account before the Commissioner touching the legacies of the other plaintiffs, together with their aliquot shares of the interest actually made thereon, proper credits to be allowed; and the consideration of the remaining costs and all other equities, to await the coming in of the Commissioner's report.

The Commissioner accordingly made up his report, in which he sets forth and examines the evidence, and then gives a statement of the amount of the estate, and of the interest proved to have been received by the executors. The result is, that there is a balance due to Chesnut and wife of $33.50, and to Garten and wife, $1066.25, which sums he recommends to be paid to them respectively.

The case came up before Chancellor De Saussure at Chester, July 1834, on exceptions to this report. Of the numerous exceptions, it is necessary to notice only the following:

The plaintiffs excepted:—Because interest should have been charged on the whole estate, except so much as the defendant showed he had not made interest on, and the onus of proof is put on the defendant.

On which the Chancellor remarks—"To support this exception, I suppose that part of the evidence is relied on, which states that several persons who wished to borrow money of the estate, were informed by the executors that they were not in funds to loan. This I consider too loose and inconclusive to establish the fact required to be proved, that the whole estate was out at

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interest. *These loose declarations might have been the resource of the executors to repel the importunities of persons anxious to borrow; or they might at that time have loaned the money out to confidential friends without security or interest, knowing that at all events they would be liable for the principal. By the decretal order, it would seem, too, as if the onus of proof is put upon the plaintiffs, to show what interest had been actually made; which has not been done to the extent claimed. It does not therefore appear to me that the Commissioner has done wrong. This exception is therefore overruled."

Another exception on the part of the plaintiff was,—Because the Commissioner has not allowed interest on the share of Garten and wife from 1830, when the demand was made,

nor even since the filing of the bill; although the defendants refused to let the plaintiffs have the money which was left with the Commissioner. On which the Chancellor says: "At the time of the legatee's (Mrs. Garten) coming of age, the executors were bound to pay the legacy. At all events, they should have been ready when the demand was made, and still more when the bill was filed. The very ground of resistance to paying interest was, that they were at liberty to keep the money in their hands until the legatees came of age. It must therefore be assumed that they were in funds to pay, (except as to such of the funds as were proved to have been loaned out and bore interest,) and being so bound and not paying, the executors are chargeable with interest at least from the time of the demand. As to the payment into the hands of the Commissioner, that made no difference; for the executors forbade the payment of the money over to Garten and wife; so that the money might as well have been kept in their hands. This exception must therefore be sustained, and the interest allowed from the time of demand; and if that is not proved, from the filing of the bill."

Both parties appealed. The plaintiffs, because the Chancellor overruled the first of these exceptions, and the defendant, because he sustained the last.

Williams, for the plaintiffs.
Clarke & M'Dowall, for the defendant.

So much only of the opinion of this Court is given as relates to the foregoing questions.

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*HARPER, J. The principal question is that made on the part of the plaintiffs, respecting the liability of the defendant generally for interest on the amount of the estate in his hands. The former decree of this Court established that the defendants might exempt themselves from liability to pay interest on the funds in their hands, by shewing that they had kept them locked up without making interest, and that this was in consequence of an agreement or understanding with the testator that they might so retain them, and should not be responsible for interest. I had thought it sufficiently explained that parol testimony was not to be admitted to contradict, explain, or in any degree control the operation of the will, but to rebut an equity attaching on the executors, not by any direction of the will, but by the course and practice of this Court, imposing on them an obligation to vest the funds so as to make interest for the legatees. If interest were made or charged, it must go as an accessory of the principal, and its disposition must be determined by the will alone. Chancellor Johnston, on the hearing of the case before him, received the parol testimony, and has reported his opinion of the effect of it—that "it shows clearly an understanding and agreement between the testator and the executors, that the latter were not to be charged with interest." The Chancellor comes to the conclusion, however, that the words of the will alone are sufficient to excuse the executors from the making of interest. I do not think it necessary to enter upon a re-examination of this part of the case, as we concur with the Chancellor upon the effect of the testimony.

The Chancellor adds "I think the weight of the testimony goes to establish more: that the executors were to be at liberty to make such profit as they could by the use or loan of the money;" and upon this it is argued, that the effect of the testimony is not to show that the executors were excused from making interest, but that they were to take it for themselves; for which purpose we have determined the testimony not to be admissible. But if the understanding was that they might use the fund without accounting for interest, it involves a fortiori, that they might retain it unemployed in their hands without being so accountable. And if they did so retain it, from the belief that interest, if made, would be their own, this is a no less valid excuse.

The chief argument on the part of the plaintiffs is, that the burden of proof was on the defendant, to show that he did retain the

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*fund unemployed in his hands; that such are the terms of the decree of this Court, and that he has failed to do this; on the contrary, it appears that he did, in some instances, and for aught that appears, may have done so (with a trifling exception) on the whole estate. It may be remarked, that if the defendant did retain the money in his actual possession, this was a fact not strictly susceptible of proof. It would involve the proof of the negative—that at no time had he lent or otherwise disposed of the money. If he had lived near a Bank, it might be said that he could have made a deposit of the money, and this might have been proved. But this is not the ordinary course of dealing of persons living in the country at a distance from Banks. I should be at a loss for the authority on which I would say that the defendant was bound to deposit in Bank. In the various cases in which an executor has been held excused from making interest, on account of the exigencies of the estate requiring him to retain funds in his hands, (as to meet probable demands,) which I have lately had occasion to examine, proof was not required that the funds were deposited or actually retained. Upon its being shown that the exigencies did in fact exist, it seems to have been taken for granted on the part of the executor that he did retain the funds to meet those exigencies, and the burden was thrown on the other side, to show that the executor did make use of the funds

himself, or otherwise dispose of them. Perhaps it would have been better that a stricter rule had been adopted, but I am not at liberty to make one. If the executor had not the funds ready when properly called upon for them, this might be evidence enough that he did use the funds himself; but in this case, the defendant seems to have been always ready when properly called upon. When the want of notice is relied upon as a defence, the defendant is required to deny it explicitly on oath, and then, as this is a negative not strictly susceptible of proof, the denial is held sufficient to throw on the other party the burden of proving the notice. So, by parity of reasoning, I should say that the party alleging he has not made interest, should in like manner deny in his answer. If the answer be clear, consistent and explicit, with nothing to contradict or discredit it, then the burden of proof must rest on the plaintiff. I think the answer sufficiently clear and positive in the denial of having received interest beyond a certain specified amount, nor do I perceive anything in the whole case to discredit the answer. To a

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certain ex*tent it is supported. The defendant is shown in one instance, to have lent the money of the estate without interest. One witness who states that he paid him interest, states also that he accepted it unwillingly, and did not receive the full amount of interest. The witness, John Strong, the brother of the executors, and who may be supposed to have had an opportunity of knowing states that "the executors generally had the money in hand." Further proof than this it would be hardly practicable to make. But the effect of the testimony was rather for the determination of the Chancellor than for this Court. These views dispose of the plaintiffs' ground of appeal.

It is argued that the notes given for the property of the estate when sold, would bear interest from the expiration of the year's credit; that it is not shown when these notes were paid; that we cannot suppose them paid at the moment of maturity, and if not, that the executors must in fact have received interest. The executors charged themselves with the amount of the sale bill, as of the time it became due, and this in conformity to the practice of this Court. If this practice be correct, then the legal presumption is, that such notes are paid at maturity, and it is for those who allege otherwise to furnish the proof. It would be difficult to imagine any other rule. Such proof seems to have been furnished to a certain extent in the instance of M'Clarkin, and the defendant is charged accordingly; but in another instance, a large payment seems to have been made before it was due. If executors are subject to the disadvantages which may result from their being charged in this manner, they ought, on the other hand, to have the benefits which may result from it.

It was the fault of the plaintiff, Garten, that he did not receive his legacy when it became due. The defendant offered to pay him the principal, and to account on oath for all the interest he had actually made, and we have determined that this is all he was entitled to. He was offered more than has now been established in his favor, defendant offering to give up his commissions. But it was admitted in argument by the defendant's counsel, that some time in 1833 or 1834, Garten, repenting his refusal, demanded the amount which had been deposited with the Commissioner in Equity, and that the defendant then refused to let him have it. Defendant then put himself in the wrong by detaining what he admitted to be due, and from

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that time we think he must pay inter*est. The precise date of this demand was not fixed, but it may be ascertained by the Commissioner.

Decree accordingly.

JOHNSON, J., and O'NEALL, J., concurred.

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2 Hill, Eq. 152

WILLIAM T. SPANN and TYRE JENNINGS v. TYRE J. SPANN.

(Columbia. Jan., 1835.)

[*Equity* ⇐437.]

Although a Chancellor has no authority to set aside a previous order of Court final in its nature, he may, either in the Court or at chambers, suspend its execution, on the ground of subsequent matter that would render its execution oppressive or iniquitous.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1053; Dec. Dig. ⇐437.]

Sumter—

This bill was filed for an account by the plaintiffs, as late copartners against the third partner, and for the appointment of a receiver in place of defendant, who, by the copartnership concern, was appointed agent to settle the affairs of the firm. The Court refused to substitute a receiver in place of the defendant. An account was taken, and at Feb. Term, 1833, a report was made by the Commissioner, of the several sums in which each of the copartners was individually indebted to the concern, and a statement of the demands due by the concern. The report was finally confirmed. At February Term, 1834, on motion of the plaintiffs' solicitor, Chancellor De Saussure granted the following order, to wit:

"On motion it is ordered that each of the copartners in this case do pay up into the hands of the Commissioner the amounts reported to be due by each of them respectively.

And that the Commissioner do apply the amounts when received, first, to the payment of the costs of this suit, and secondly, to the payment of the debts due by the copartnership as reported by him; and that the Commissioner do issue executions, either against the persons or property of the said copartners, to compel the payment of the amounts due by them. Copartnership property in the hands of either of the copartners, or their agents, to be charged with the debts.

"It is further ordered that the copartnership property in the hands of either of the copartners be produced and delivered to the Commissioner to be by him sold for payment of the debts of the copartnership, and that he do sell the same on sale day in April next."

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*From this order there was an appeal. In conformity to the order, attachments were lodged with the sheriff against each of the copartners (separately) for the sums as established by the report to be due by each. William T. Spann was arrested and held in custody by the sheriff. On the 5th August, 1834, his honor Chancellor De Saussure, at chambers, on the application of William T. Spann and his solicitor, suspended the attachment against said William T. Spann, and directed him to be discharged from custody by the following order, to wit:

"William T. Spann & T. Jennings v. Tyre J. Spann. The motion before the Court is to set aside an attachment issued in this case against William T. Spann; and also to have it referred to the Commissioner to ascertain what sums of money the said William T. Spann has paid to the debts of the copartnership, and that he be allowed credit for what he has already paid, or may hereafter pay to the debts of the copartnership, on the amount reported against him in this case. The attachment in question was issued by the Commissioner under a decretal order made in this case in February 1834, at the instance of the plaintiffs, and by consent of parties. The order directed that each of the copartners in this case do pay up into the hands of the Commissioner the amounts reported to be due by each of them respectively, and that the Commissioner do apply the amounts when received—first, to the payment of the debts due by the copartnership as reported by him; that the Commissioner do issue execution, either against the persons or property of the said copartners, to compel the payment of the amount due by their copartnership property, in the hands of either of the copartners or their agents, to be charged with the debts; and that the copartnership property in the hands of either of the copartners be produced and delivered to the Commissioner, to be by him sold for payment of debts of the copartnership, and that he do sell the same on sale day in April then next ensuing.

"In pursuance of that decretal order, made at the instance of the parties themselves, the attachment was issued by the Commissioner, and the body of William T. Spann has been taken and is now in custody. The first object of the motion is to be relieved from the attachment. It appears that the creditors of the parties in question are not parties in the suit and did not move for the attachment; but they have judgements and executions against them individually and as copartners. Some of the copartnership debts

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*stood in the name of the individual copartners, as appears by the report of the Commissioner in February 1833. These executions have been enforced in part against the property of William T. Spann, and steps are taking to give them further effect against the individual property of said William T. Spann. It appears further, that Tyre J. Spann, the defendant in this suit, has left the State, and carried off great part of his property, so that his person and his property are out of the reach of the process of the Court. The motion to dissolve the attachment and to discharge the defendant, William T. Spann, from custody, is opposed on the grounds, that this cannot be done at chambers, or even by a single Judge, as it is, in fact, an appeal from the decree of the Circuit Court, which can be made only to the Court of Appeals. This, however, is not a correct view of the case. The motion does not seek to set aside the decree of the Court made by consent of the parties, but to discharge the defendant from the arrest, on the grounds which have arisen since the order.

"The creditors not being parties to the suit or the order made, cannot oppose it. By whom is it then opposed? By the defendant, Tyre J. Spann, the copartner of the plaintiff, William T. Spann. With what grace a brother resists the enlargement of a brother from prison is not for the Court to enquire. But the enquiry is proper. What did these persons intend by consenting to a decretal order that execution might be issued against either of them, no creditors being in Court to require the same?

"The bill was for the settlement of accounts between these copartners, who had lost all confidence in each other, and were willing to give a control to each other over their persons and effects, to compel a just settlement with their creditors and each other. It was a mutual agreement to operate on each of them. This mutuality is defeated by the conduct of the defendant T. J. Spann.

"He has gone beyond the jurisdiction of the Court, and cannot be made liable personally to the order of the Court to which he consented. Yet he requires, and he only (for I repeat, that the creditors are not parties to this suit, or to the decretal order,) that

his copartner should be held in custody whilst he evades the effect of the order on himself. This cannot be allowed. It is therefore ordered that the order for the attachment be rescinded, and the party, William T. Spann, be discharged from custody. The creditors, of course, are at liberty to act on their executions.

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*"This is the only part of the case before me; consequently the only part requiring my decision. But it is proper to grant the other part of the motion. It is therefore ordered, that the Commissioner do examine and report what sums of money the said Wm. T. Spann has paid to the debts of the copartnership, and what amounts have been paid by the other copartners; and that each of them be allowed credit for what he has paid, or may hereafter pay to the debts of the copartnership, on the amount reported against him in this case."

A notice of appeal from this order, by the defendant's solicitor, was immediately served on Wm. T. Spann, and the solicitor of the plaintiffs on the Chancellor and sheriff, on the grounds:

1. That the Chancellor had no authority at chambers, to rescind an order made during term time.

2. That his Honor erred in deciding that the application to discharge the party from arrest proceeded upon grounds which have arisen since the order of February 1834; as, in fact, no such grounds have so since arisen.

3. That the fact of T. J. Spann, who was bound in a "ne exeat bond," having left the State, did not appear on the application before the Chancellor; and if it had appeared, was no ground for the rescision of the order.

4. That by the order of February Term 1834, made on application of Wm. T. Spann, the copartners themselves have assented that the creditors reported as such, should have the remedy of attachment for their demands, and the right to enforce it as against the copartners—the Chancellor being mistaken in the fact that the creditors have judgement and executions against the parties individually and as copartners.

5. That by the order of Feb. 1834, the Commissioner was authorized to issue the attachment for the costs of the case.

6. That the copartnership concern had a right, under the order of February 1834, to the attachment for the amount due by said Wm. T. Spann, to said concern, in said case. And no conduct of either of the copartners, either before or since the order, (even if appearing,) could give the Chancellor the right at chambers to reverse the order.

On the 21st August 1834, Chancellor De

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Saussure made the *following additional order, on application of said Wm. T. Spann and his solicitor, to wit:

"Wm. T. Spann and T. Jennings, v. T. J. Spann—motion for order on the sheriff of Sumter district, to discharge Wm. T. Spann from custody."

"On motion of Mr. Mayrant, solicitor for the plaintiff, Wm. T. Spann, after hearing the argument, it is ordered that the said sheriff do forthwith discharge the said Wm. T. Spann from custody, in pursuance of the former order in this case, on the 5th August instant, notwithstanding the notice of appeal from that order, given by said Tyre J. Spann; provided, that before such discharge be made, the said Wm. T. Spann do enter into bond with good security, in the penalty of three thousand dollars, payable to the Commissioner of the Court, conditioned that he will pay to the Commissioner, or to the creditors, his share of the debts of the copartnership, as soon as the same is ascertained and reported by the Commissioner, and that this condition be regarded as a part of the said order of the 5th August, instant."

Moses, the defendant's solicitor, in conformity to the notice served on the Chancellor and the parties, now submitted his motion to the Appeal Court to reverse the said order made by the Chancellor, on the grounds therein stated.

JOHNSON, J.—The order of the 21st February, 1834, was made on the application of the plaintiffs themselves, and is in its nature final, and not interlocutory. It awards execution against the parties, and if erroneous, was the subject of appeal. I am therefore clearly of opinion that the Chancellor had no authority to set it aside, on account of any supposed error in point of fact or law. But it is equally clear that the Courts, both of Law and Equity, or a Judge or Chancellor at chambers, have the power and daily exercise it, of suspending the execution of even final process on account of subsequent matter which would render the execution of it oppressive or iniquitous. Thus, when the amount due on a fi. fa. or ca. sa. had been paid to the plaintiff, and satisfaction not entered, or where there were mutual judgements which might be set off against each other, and one of the parties should be taken in execution. In these and such like cases at common law, it is the daily practice to obtain an order at chambers in vacation, to stay the proceedings until term

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time, when the matters of dispute, *if there be any, can be determined according to the forms of law. And I would say, in general, that whenever subsequent occurrences would render the execution of a judgement or order of a Court, either of Law or Equity, oppressive or unjust, the execution of it ought to be restrained, and if this should happen in

vacation, it can only be done by an order at chambers.

In the application of this rule, it will be necessary to advert particularly to the circumstances of the case. The parties had been partners in trade, and the object of the bill was for an account and settlement of the concern. A report had been made by which it appeared that each of the parties were individually indebted to the concern. The debts of the concern were to be provided for out of this fund, and it was the interest of all, as well as their duty, to make this fund available as promptly as possible, and hence the application and order for final process against them individually, for the sums severally due by them. In this there was a perfect equality; the parties and their effects were in the power of the Court, and acceptable to its process, when the order was made; but the defendant afterwards removed with his property without the reach of the process of the Court, and by that act destroyed that equality of benefit and of burthen, which was the foundation of the order, and now asks through his solicitor that it shall be enforced against the plaintiffs. This will not be tolerated.

It is said that creditors are interested in the execution of this order. They are not parties to the bill, and cannot be heard.—If there be creditors, the Courts of justice are open to them, and will afford relief when they apply for it. There is certainly nothing in the order itself, nor in the proceedings, which shows that it was made at the instance of the creditors, or for their security, nor is it pretended that the arrest of Wm. T. Spann was made at their instance.

The claims of the officers of the Court stand precisely upon the footing of the claims of the creditors: the object of the order, as before observed, was intended solely for the benefit and security of the parties themselves, and not for the officers of Court, and must be governed by the same rule. The payment of the costs was dependent on the payment of the fund into Court, and that having been defeated, the payment of costs must be postponed until the final determination of the case, or until some substantive order shall be made for their payment.

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*Upon the whole, we think the Chancellor has put the case upon the true grounds, and concur with him in opinion.

Motion dismissed.

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2 Hill, Eq. 158

MICHAEL LEVER v. WILLIAM LEVER, Executor of George Lever, deceased.

(Columbia. Jan., 1835.)

[*Evidence* ⇐220.]

Where the items in an ac't book were read over to the party charged, who objected to a few items only, the book may be received in evidence as his admission.

[Ed. Note.—Cited in Rowland v. Martindale's Ex'rs, Bailey, Eq. 226; Wells v. Hays, 93 S. C. 172, 76 S. E. 195, 42 L. R. A. (N. S.) 727.

For other cases, see Evidence, Cent. Dig. § 780; Dec. Dig. ⇐220.]

[*Principal and Agent* ⇐78.]

Unless the books of an agent purport to contain an acc't of all payments to and for his principal, he will not be confined to them in discharging himself.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 173; Dec. Dig. ⇐78.]

[*Parent and Child* ⇐8.]

Where one acted as general agent in the management of another's estate, with an understanding that he should receive all monies, defray debts and expenses, and if required before his death, pay over the balance and if not so required, continue to act till his death, when the unexpended balance should be paid over: *Held* that the agent is not liable for interest until after demand; nor would using the money make him so liable, unless he had actually made interest, or failed to pay the debts and expenses, to the prejudice of his principal.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 110; Dec. Dig. ⇐8.]

[*Principal and Agent* ⇐81.]

A private agent is not entitled to commissions unless by contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 197; Dec. Dig. ⇐81.]

[This case is also cited in Jeter v. Tucker, 1 S. C. 253, without specific application.]

The bill in this case was filed by the plaintiff, for an account from the estate of his father, George Lever, alleging that by reason of the plaintiff's "mental imbecility and want of education," the said George had for many years acted as his general agent and trustee—received large sums of money and the proceeds of his crops, for which he had not accounted.

On appeal from the decree of Chancellor Johnston, the Appeal Court, in January 1833, decided the points then made, and directed issues at law to enquire whether a judgment obtained by George Lever against the plaintiff was founded on any and what consideration, or was voluntary; and to try the plea of final account and settlement.—(See 1 Hill, Eq. 62.)

On these issues the jury found in favor of the judgment, and against the plea of final account and settlement; and thereupon the Court of Appeals, at May Term 1834, ordered a reference before the Commissioner of Newberry, "who should examine and report upon the accounts between the parties, charging George Lever with all monies by him received on account of Michael Lever, and which are embraced in the account sought by the bill; and crediting the said George with such sums as he may have properly expended for the said Michael, and also with such debts as the said Michael may owe to the said George, including therein the judg-

ment so found by the jury to be bona fide; and generally with all suitable and proper allowances." The case came up again before Chancellor Johnston, at Newberry, July 1834, on exceptions by both parties to the Commissioner's report, and he overruled all the exceptions and confirmed the report.

From this decree both parties appealed, on the ground of error in the Chancellor, in overruling the exceptions respectively taken.

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*Most of the numerous exceptions taken depend entirely on the facts. The following are all which need be noticed:—

On the part of the plaintiffs—

3. That the Commissioner allowed the books of George Lever to be given in evidence, not only to prove necessaries furnished to the plaintiff, but cash advanced and spirits sold.

7. That the Commissioner, after having received the books of George Lever, to prove monies advanced to the plaintiff, ought not to have permitted the defendant to have shewn payments in any other way.

By the defendant—

4. That the Commissioner charged the defendant with interest on the monies received from the time at which they were supposed to have been received: whereas the defendant contends—1. That he is not chargeable with interest at all.—2. If at all, only from the filing of the bill.—3. At all events only on annual balances.

5. That the Commissioner has not allowed defendant commissions on receiving and paying away monies.

The facts relating to these several exceptions, are fully stated in the opinion of this Court.

Caldwell & Fair, for the plaintiff.

Pope & Summer, for the defendant.

O'NEALL, J., delivered the opinion of the Court.

3d. The objection to the admissibility of George Lever's books, to prove cash advanced and spirits sold, vanishes when we look to the proof on which they were received in evidence. It appears that the items were read over to the plaintiff, and he was requested if he had any objection to make to any of them to state it. He objected to a few items, but not to the rest. In this point of view, the books were admissible to shew what items he admitted by not objecting to them, when he selected others as improper and objected to them. In another respect too, credit was given to the books by the plaintiff. He stated that he had only received of his money $365, and the charges on the books for money advanced to him corresponds, as the plaintiff's counsel stated, within a very small sum. So I think, under the proof, the books were admissible; but not as falling exactly within the case of Sinclair and Kiddle v.

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Price, decided at Co*lumbia, December Term, 1832.(a) There the book received in evidence was the journal of an agent managing a country store for his principal, who lived at a distance. It contained regular entries of cash remitted, expenses paid, cotton remitted, and services rendered. Both principal and agent were dead, and nine tenths of the items had been established by other proof. It was held that the journal was the best evidence of which the nature of the case was susceptible, and was therefore admitted. We are still satisfied of the correctness of that decision, but we are not disposed to extend it beyond the case to which it applies. In this case the plaintiff is alive and the defendant may have his discovery, as he has

(a) SINCLAIR AND KIDDLE, Assignees of George Keenan, v. Administrators of THOMAS PRICE.

[*Evidence* ⟸354.]

On a bill for an account against an agent, his books, if the entries are made in the usual course of business, are admissible against the principal; especially when both parties are dead and there is strong corroborating evidence of the correctness of the books.

[Ed. Note.—Cited in Rowland v. Martindale's Ex'rs, Bailey, Eq. 226, 227; Poag v. Poag, 1 Hill, Eq. 287; Lever v. Lever, 2 Hill, Eq. 159; Williams v. Gregg, 2 Strob. Eq. 315; Wells v. Hays, 93 S. C. 172, 76 S. E. 195, 42 L. R. A. (N. S.) 727. For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. ⟸354.]

[*Estoppel* ⟸88.]

Where the books of an agent profess to contain an account of all receipts, paym'ts and services, on account of the agency, and are offered in evidence by the agent, he shall not be allowed any other charges than those there contained.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 235-241; Dec. Dig. ⟸88.]

The plaintiffs, as the assignees of George Keenan, filed their bill for an account against the defendants, as administrators of Thomas Price, alleging that Keenan, who resided in Charleston, furnished goods to a large amount to Price, living in Spartanburg, to be retailed by Price, as his agent. The defendants, in their answer, admit the agency, but state that they are unable, from any books of their intestate, to say what amount of goods he received, or on what advance he sold. They set out, however, the credit and cash sales, and the stock of goods on hand. They further state that Price kept a journal of his remittances and disbursements to and on account of Keenan, the amount of which is $8748.

On the reference which was ordered to make up the accounts, the defendants offered Price's journal in evidence, after having first proved, by other evidence, the items contained in it, to the amount of $7404, of the $8748 set out therein. The Commissioner rejected the journal as evidence. On appeal to this Court, on this point, the following opinion of the Court was delivered:—

O'NEALL, J. Ought the journal or cash-book of the defendant's intestate to be received, as evidence of the remittances and disbursements contained in it? This question is one of great novelty. The affirmative of it is an extension of the principle "that merchant's books, from necessity, are evidence of the delivery of goods," to all transactions between principal and agent, when the books of the latter are regularly kept. To this extent, perhaps, the rule ought never to

had the benefit of an equivalent in his admission; and this constitutes one reason why we will not decide this case on the authority of that. Another reason is, the books do not purport to be entries in the discharge of the agency.

7th. The 7th exception must have been sustained on the authority of the decision in the case of Sinclair and Kiddle v. Price, decided at December Term, 1833, and reported in part, in 1 Hill's Eq. Rep. 431, if in this case, as in that, the books had purported

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*to contain an account of all the monies paid to or for the plaintiff. The answer here does not state as that in the case of Sinclair and Kiddle v. Price did, that the books contained an account of all payments to or for the plaintiff. The answer here states "that the said George would let the said Michael have small sums of money, but states that the said George would charge him with the same in his account against the said Michael." The preceding parts of the answer stated that the said George had paid away all the money which he received for the plaintiff. There is therefore nothing in the answer which would confine the defendant to the books. There is in this case, by allowing the books and other proofs of payments to be adduced, no danger that the plaintiff will be twice charged for the same thing; for we have by this opinion excluded the charges which were or might have been paid by Michael out of the money received by him from the defendant's testator. In Sinclair and Kiddle v. Price, it was manifest that this double charging had occurred. This exception derives therefore no authority from that case; and there is nothing in this case which makes it proper to confine the defendant in discharging himself to the entries on his testator's books.

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*4th. The defendant's 4th exception presents a very important legal question.

I will proceed to state the views which I have taken of the subject. The defendant's testator was the agent of the plaintiff under very peculiar circumstances. The relation of father and son would seem to exclude an intention to commit wrong on the part of the former. So, too, the fact of the defendant's imbecility, would have furnished, ordinarily, a powerful inducement to his father, not only to see that others treated him rightly, but also to make him careful not to do him any wrong. I know Mr. Lever well, and I think it is due to him that I should say here, that I am satisfied that he had too much Dutch honesty and integrity to take a willful advantage of any one, much less his own child.

The bill drawn according to the plaintiff's statement, and I have no doubt, according to the truth, (for it is an old saying that children and fools will tell the truth,) states the nature and extent of the testator's agency for the plaintiff in the following terms,

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be laid down. But with some qualifications, I think, the books of the agent ought to be received. If the entries are made in the usual course of business, then, I apprehend, they are evidence.—1 Stark. on Ev. 73. What was the usual course of business in the case before us? The defendant's intestate was to sell, defray expences, and remit, in cash or produce, the pro-

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ceeds *of the sales. It is both usual and proper, that he should keep an account of sales, disbursements and remittances. Between two honest men, this account would always constitute the guide to a settlement. If the principal is not disposed to admit it from necessity, it appears to me it should be at least evidence in favor of the agent, until there is some shewing by which a doubt of its correctness can be raised. For, in a transaction between principal and agent, it is not to be expected that a witness can be produced to prove every dollar paid for the expenses of the business, or for every sum remitted. Here then exists the same necessity to receive the books of the agent in evidence, as in the case of merchants and shopkeepers. There is, however, another consideration, of great weight, growing out of the relative situation of the parties.—The principal holds out his agent to the world as a man in whom he pleases such trust and confidence, that he is willing to be bound by all of his acts done within the agency committed to him. This is at least a legal good character given to the agent by the principal, as to all acts between them. It is saying, on his part, he is trustworthy, and with that character, his books ought to be evidence against his principal until it appears he has forfeited it by abusing the confidence reposed in him. But, in the case before us, a still stronger circumstance may be adduced why the books of the agent should be received against the principal. It will be recolleeted that he sold goods on credit for the use of his principal. His books would have been evidence for his principal, against every one who bought goods at the store. Could the principal be allowed to say: "I will charge A. by the books of my agent; and yet, (when he is called on to account to me,) I will reject the books of the same agent, as not trustworthy, against me?" I should think not. The principle that the books of the agent, if the entries are made in the usual course of business, are evidence against the principal, is, I think, well sustained by the case of the Union Bank

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v. Knapp, 3 Piek. Rep. 96, which I *have taken from a note to 1 Stark. on Ev. 73. In that case, which was for money had and received by the bank against a depositor, who had overdrawn, it was held that the books of the bank were competent evidence to show receipts and payments of money; and that if the clerk who made the entries be dead, or insane, his handwriting may be proved. From this case, I extract two principles, on which the decision turned: 1st. That the entries were in the usual course of business; and 2d. That the bank was the agent of the depositor to receive and pay out his deposits. Both of these are applicable to the case under consideration. Other circumstances, however, in this case, go to support the book of the defendant's intestate. In an early stage of the case, this book was directed by a decretal order to be excluded. It contained charges during several years, for disbursements and remittances to the amount of $8748.-75; the defendants succeeded, by other proof, in establishing $7404 out of this sum. This is strong corroborating evidence of the general correctness of the book; and when both the principal and agent are dead, furnishes at least

to wit: "That George Lever, late of, &c. the father of your orator during his life, from the time your orator arrived at the age of twenty-one, assumed and exercised the entire control

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and manage*ment of your orator's estate, both real and personal, in the character and capacity of a trustee, (or rather as his natural guardian) alledging as a reason for so doing, that your orator was of so weak and imbecile mind as not to be capable of managing his estate for himself, which, your orator being conscious of his liability to be imposed upon by the frauds and devices of designing persons, as well from a want of education as from a weakness of intellect, and reposing most implicit confidence in his father, always permitted him so to do, with the express understanding between them, at the time your orator arrived of full age, and during the continuance of that relationship, that he, the said George, would keep a regular account of the receipts and expenditures thereof, and should the circumstances of your orator's situation require the funds in his hands to be paid over before his death, he, the said George, would come to a full, fair, and final accounting and settlement with your orator, and pay over whatever balance might be in his hands; but should no settlement take place between them before the death of the said George, he would continue to act in the capacity aforesaid, until the time of his death, at which time your orator should be paid over such balance as might be remaining in his hands at that time." This statement was, in legal effect, an agency or legal trust, to

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keep the money of the *plaintiff and defray his debts and expenditures, and pay over the balance unexpended before or after his death, on demand. In the former opinion of this Court, in this case, it was held, that until a demand made on the defendant's testator, to pay over the funds in his hands, and a refusal to do so, that the statute of limitations did not commence to run; and that there being no demand alleged, or proved to be made until after the testator's death, that the statute of limitations could not run. 1 Hill's Eq. Rep. 62. The case under these views would seem to have no pretence to claim interest as of course. For the funds in the hands of the defendant's testator are to be regarded as a mere deposit, upon which the plaintiff was at liberty to draw as he needed. It was no part of the duty of the defendant's testator to let the money out to interest, and thus make interest. This is a trust between parties, who regulate it for themselves. The law prescribes no duty to the agent beyond the discharge of his trust according to the terms of his contract. In the cases of executors, administrators, guardians, and trustees, appointed by law, it is their duty generally to make interest; and hence from this, but more especially from the fact of being required to make up their accounts annually, they are held to be generally liable for interest on annual balances. Cases, therefore, charging them with interest, have no application to this question.

Being an agency or trust ending only with the life of George Lever, unless a demand had been sooner made for an account or settlement, I think that interest can only be allowed from a demand made on the executor for an account and settlement after the death of Mr. Lever; or, if no such demand can be proved, then from the filing of this bill.

In the case of Wright v. Hamilton, 2 Bail. 51 [21 Am. Dec. 513], which was an action against a sheriff, who had been out of office for several years, for money collected as sheriff, it was held that until a demand made the plaintiff was not entitled to interest. That decision proceeded upon the very footing that this case must occupy. The defendant

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such reasonable evidence of the correctness of the charges as to authorize the Commissioner to receive it in evidence, and give it such weight as on a careful examination of the entries he may think it entitled to. If, upon such examination, he should find nothing in the book, or find evidence aliunde to discredit it, then the defendants should be allowed the balance of the disbursements and remittances contained in it, amounting to $1344.75, and which they were unable otherwise to prove.

The case was again brought before this Court in January 1834, on the question, among many others, whether the defendants should be al-

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lowed any other charges than *those contained in the journal. On which Mr. Justice O'NEALL delivered the following opinion of the Court:—

In another part of our opinion, we decided that the defendants should be allowed credit for all the charges contained in the journal of Price. It is now insisted, by the plaintiffs, that the defendants should not be allowed to make any other charges: and I am satisfied that this is the correct mode of allowing the defendants credit for disbursements and remittances made, and services rendered by their intestate on account of his agency. This journal, or cash-book, professes to be an account of all the debits against the store, for disbursements and remittances made and services rendered by the intestate. His charges were made while the transactions were fresh; it is not to be believed that he entered part, and omitted part. These were his memoranda, to enable him to settle with his principal; and it would be much more reasonable to conclude, that he had charged too much instead of too little. This view is sustained by the defendants, in their answer, for they say, "that the said Price likewise left a book, in which he kept an account of all his remittances and disbursements to, and on account of said Keenan, including his wages for his own services." After allowing the book as evidence of every charge contained in it, it would be giving to the defendants a great and unconscientious advantage, (and one which I know they have not asked, and would not, under any circumstances, ask to be allowed,) to permit them to gather up every charge, which, from the recollection of witnesses, might slightly vary from Price's entries, and allow such in addition. The allowance, however, of the book, as evidence of the charges contained in it, excludes necessarily all other evidence on these subjects.

was guilty of no default until he refused to pay over the money.

But it is contended, as I understand, that the use of the money by the defendant's testator makes him liable for interest. This argument at first struck my mind with great force, and I was inclined to think it would govern the case. But I am satisfied, from subsequent examination and reflection, that

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unless the defendant's tes*tator actually made interest upon the plaintiff's funds by loaning them out, or failed to pay during his life time the debts or expences of Michael, to his injury or prejudice, he would not be liable for interest.

In the case of Williams v. Storrs, 6 John. C. R. 353, the defendant was the agent for parties residing out of the state of New York. He received their funds, and did not keep them separate from the funds which he was receiving and paying away as agent. It was held that he was not liable for interest. Chancellor Kent said, "it was sufficient if he kept the money safely, and paid it according to the request of the party entitled to demand and receive." In the case under consideration, this observation of the Chancellor has a direct application, as will be seen by observing that George Lever must have kept, during his life time, the money of the plaintiff safely, for he paid all his debts and expenses as he requested. I don't mean to say that he kept the plaintiff's money locked up, but that he was ready to pay as the plaintiff needed, which was exactly according to the terms of the agency.

The case of Lord Salisbury v. Wilkison, 8 Ves. Jr. 48, as stated by Lord Eldon, in the case of Lord Chedworth v. Edwards, is a direct authority for the defendant. In that case Lord Thurlow held, "that under the circumstances, the defendant could not be affected by a demand of interest of the money he had in his hands, even supposing he employed it." The circumstances of the case were, that the defendant, the steward of Lord Salisbury, had informed him from time to time of the sums of money in his hands, and had undertaken that there should be always a large sum in his hands, for which he would be responsible from time to time. In this case, the plaintiff knew of the funds received by his father as he received them; and from the statement in his bill, the defendant was to be always ready, if the plaintiff's situation should require it, to pay over the balance in his hands. The cases, in their circumstances controlling the allowance of interest, are almost identical.

There is another view of this part of the case. This was a debt payable on demand, and according to Schmidt v. Limehouse, 2 Bail. 276, interest was not recoverable until demand made. I call it a debt, notwithstanding it is recoverable in equity; for the defendant's testator was liable for the balance left after auditing and allowing his accounts, as for so much money received to the use of the plaintiff. In connection with this view,

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I would re*mark, that the plaintiff in setting out the agency, does not pretend that interest was to be paid; if it was to be paid in testator's life time, the testator was to "pay over whatever balance might be in his hands;" if not paid during his life time, the plaintiff was to be paid at his death, "such balance as might be remaining in his hands at that time." Under either of these statements of the agency, it is plain that, according to the terms of it, the balance of the money received was to be paid over. On the authority of the case of the Earle of Hardwicke v. Vernon, 14 Ves. 510, 511, I think under this statement of his case, the plaintiff cannot claim interest sooner than a demand of payment from the executor after the death of George Lever. We think therefore that this exception must be sustained and the report re-modelled by striking out the interest in favor of both the plaintiff and the defendant, until a demand was made after the death of George Lever, or the filing of the bill. From one or the other of these times, the plaintiff is entitled to interest on the balance in hand at the death of George Lever.

5th. The defendant's 5th exception is untenable. In the case of Cripps v. The Assignees of Charles Pinckney, cited and stated in Muckenfuss v. Heath, 1 Hill's Eq. Rep. 182–3, the Court, speaking of the claim of commissions, says, "but the private agent or assignee of an individual is not entitled to any such claim, unless he makes it part of his contract." This decides the point before us, and when it is recollected that the defendant's testator accounts without interest, there can be no hardship in requiring him to do the business of a weak minded son, without compensation by way of commissions.

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT CHARLESTON, IN FEBRUARY AND MARCH 1835.

JUDGES PRESENT.

HON. DAVID JOHNSON, President.
" J. B. O'NEALL.
" WM. HARPER.

2 Hill, Eq. *167

*JOHN WELSH v. PATRICK USHER and Others, His Attaching Creditors.

(Charleston. Feb., 1835.)

[*Principal and Agent* ⟸126.]

Where one, by power of attorney, authorized another to sell and convey a ship, and the attorney sold and received payment, but by mistake or ignorance executed the bill of sale in his own name, instead of his principal's, in consequence of which it was declared void at law: *Held*, that altho' the bill of sale could not operate as a conveyance at law, it was such an agreement as a Court of Equity will carry into effect against creditors of the vendor who had subsequently obtained legal liens.

[Ed. Note.—Cited in Peiper v. Shahid, 101 S. C. 366, 85 S. E. 905.

For other cases, see Principal and Agent, Cent. Dig. § 443; Dec. Dig. ⟸126.]

[*Sales* ⟸303.]

An endorsement on a ship's register at the time of sale, that "the vessel should not be sold until the notes given for the purchase money were paid," constitutes an equitable mortgage, especially when the ship's register was left with the vendor.

[Ed. Note.—Cited in Maybin v. Kirby, 4 Rich. Eq. 113; Parker & Co. v. Jacobs, 14 S. C. 117, 37 Am. Rep. 724; Hutzler Bros. v. Phillips, 26 S. C. 148, 1 S. E. 502, 4 Am. St. Rep. 687.

For other cases, see Sales, Cent. Dig. § 859; Dec. Dig. ⟸303.]

The plaintiff, Welsh, sold to Patrick Usher the brig Junietta, and, at the time of sale, an endorsement was made on her register that "the vessel should not be sold until the notes given for the purchase money were paid;" and the register was left in Welsh's possession. Some time after, Patrick Usher gave to his brother, Wm. Usher, a power of attorney, authorizing him to sell his property; and he accordingly executed a bill of sale for the Junietta to the plaintiff, John Welsh, and in payment received the notes given for the original purchase money. In the bill of sale, he used the words "I, Wm. Usher, attorney in fact of Patrick Usher, owner of the brig Junietta, &c. do grant, bargain and sell," and he signed "Wm. Usher, attorney for Patrick Usher." The vessel was at sea at the time, and on her arrival at port in Charleston, she was attached by the creditors of Patrick Usher, as his property. The plaintiff, Welsh, then

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interposed his claim, upon the *grounds: 1. That by the endorsement on the register, he retained a lien on the vessel, for the purchase money. 2. That by his bill of sale he was the owner; and that the attaching creditors had no rights superior to the debtor, Patrick Usher. This claim was resisted by the creditors on the grounds: 1. That the endorsement on the register was a mere agreement not to sell, and did not amount to a lien. 2. That the bill of sale was not the deed of Patrick Usher, because it was executed in the name of Wm. Usher, and not in that of his principal; it was therefore void. The case was tried at law, and taken to the Court of Appeals, where these positions of the creditors were sustained: [Welsh v. Parish] 1 Hill, 155. The present bill was then filed, setting forth these facts, and insisting:—1 That although the bill of sale was void at law, as the deed of Patrick Usher, it was his agreement, entered into by his authorized agent, who having received the payment, his principal was bound; and such agreement being valid, a Court of Equity would supply the defective execution, and compel Patrick Usher now to execute a perfect conveyance. 2. That the endorsement was intended as a lien, and should be supported by the Court as an equitable mortgage against the party, or his creditors,—

and prayed that Patrick Usher be decreed to perfect the title to the brig; that the endorsement be decreed a mortgage, and that the attaching creditors be perpetually enjoined at law from prosecuting their claims.

The cause was heard in Charleston, before Chancellor De Saussure, who refused the injunction and dismissed the bill: and from his decree the plaintiff appealed.

Hunt & Thomson, for the plaintiff.
Petigru & Dunkin, for the creditors.

HARPER, J.—I am of opinion, that the deed executed by William Usher, though it could not, as has been decided, operate at law as the conveyance of Patrick Usher, must be executed in Equity as the agreement of Patrick Usher; certainly it is such an one as the Court would execute as against Patrick Usher himself, and his legal representatives. This is not a reforming of the instrument, but goes on the familiar Equity

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principle, that when *property is attempted to be transferred by deed, and there are circumstances to prevent its operating as a conveyance, Equity will give it effect as an agreement; as in the case of Colman v. Sarrell, 1 Vesey, Jr. p. 49—3 Bro. C. C. 12, where Bank Stock, which could only be transferred legally on the books of the Bank, was attempted to be by deed, there is no question but that the Court would have executed it as an agreement, if there had been a sufficient consideration; and in Wadsworth v. Wendell, 5 Johns. C. R. 224, where land was attempted to be conveyed by an instrument having in other respects the form of a conveyance, but, in consequence of "mistake or ignorance," as the Chancellor expresses it, without a seal. The rule is laid down generally in Morse v. Faulkner, 1 Anst. 11, that an agreement to convey, or a deficient conveyance, will bind the lands in the hands of the grantor or his heirs.

Now, there is no doubt that William Usher had authority to convey this vessel. He attempted to convey by deed, but, by mistake or ignorance, executed the deed in his own name. If an agent contracts in his own name, without disclosing his principal, the general rule of law is, that the principal, if afterwards discovered, is liable on that contract: Waring v. Favenck, 1 Campbell's N. P. R. 85; Rymer v. Suwererapp, Ib. 109, Railton v. Hodgson, 4 Taunt. 576. If William Usher, therefore, had only agreed to convey in his own name, and without reference to his principal, it follows that the principal would have been bound: but he does refer to his principal. The terms of the deed are, "I, Wm. Usher, junior, attorney in fact, of Patrick Usher, owner of the brig Junietta," &c. From a technical legal principle, and from the manner in which the deed is signed, this cannot operate as a conveyance at law; but can there be any doubt as to what was meant? and what is there to prevent Equity giving effect to that intention? The words "attorney in fact of Patrick Usher," are regarded at law as terms of description and surplusage; and, when an executor sells the goods of his testator, and takes a bond payable to himself, as executor, at law this is regarded as his personal debt, and the term "executor" as a word of description. But is there any doubt that in Equity this signifies the trust, and that the bond will be regarded as assets of the estate? I cannot conceive a case in which Equity ought to aid a defective conveyance, if not in this.

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*I think, also, with the deference which I always feel towards the judgment of the Chancellor who pronounced the decree, that the endorsement on the ship's register constituted an equitable mortgage, and gave an equitable lien: Lord Hardwicke, in Lowthall v. Tonkins, 2 Eq. Ca. Ab. 381, explains what is meant by goods being bound by an execution: that is, he described the lien of an execution, "that, if the defendant makes an assignment of his goods, unless in market overt, the sheriff may take them in execution." To say, then, that the vendee shall not have power to sell, is in terms to say that the vendor shall have a lien. This could not operate as a mortgage at law, because it did not change the property, and it would therefore be regarded as nothing else than a personal contract; but so to regard it in Equity, would be to render it absolutely nugatory and unmeaning. The vendor had already all the security that the personal liability of the vendee could give him. This construction is aided by the circumstance of the vessel's register being left in Welsh's possession. I need not refer to the cases in which the deposit of title deeds is held, to constitute an equitable mortgage, to which this seems very analogous.

This equity, though existing, could not prevail against a subsequent purchaser for valuable consideration, without notice. The only matter on which it struck me there might be a doubt, was whether it could prevail against creditors who had subsequently obtained legal liens. But a reference to authorities puts this out of question. In Burgh v. Francis, referred to in Taylor v. Wheeler, 2 Vernon, 564, the defect of livery in making a mortgage, was supplied against judgment creditors. In Finch v. the Earl of Winchelsea, 1 P. W. 277, it was held that an agreement to convey, on adequate consideration, would be good against a subsequent judgment. In Burn v. Burn, 3 Vesey, 582, the case of Sir Simeon Stuart is referred to, in which an incomplete agreement to mortgage was made good against a judgment. To the same effect were our own decisions, in Read v. Simons, 2 Desaus.

Eq. Rep. 554, and Menude v. Delaire, 2 Desaus. Eq. Rep. 565. In Taylor v. Wheeler, the defect of a surrender in a mortgage of copyhold was supplied against the assignees of the bankrupt mortgagor; here the complete legal title was in the trustees of the creditors. The Chancellor at first doubted, but said that the creditors would be entitled to no more than was properly the bankrupt's. I need hardly observe, that there is

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*no question of notice or want of notice to creditors, where fraud, arising out of the possession of the mortgagor or vendor, is relied on. I do not find the precise case of an attachment, but there cannot be a doubt that it must be governed by the same principles. Its lien cannot be of a higher nature than that of a judgment and execution. It holds the property that it may be rendered liable to execution. It could not take the property against the lien of an older execution, against which, however, the equitable claim would prevail. Still stronger is the case of the bankrupt's assignees. It was a ground of the decision at law, that if any equitable lien existed, the remedy was in Equity, and the plaintiff cannot be repelled, now that he comes into Equity to seek it. It is therefore ordered and decreed, that the Chancellor's decree, refusing the injunction, be reversed, and that the defendants, attaching creditors of Patrick Usher, be enjoined from proceeding against the Junietta.

JOHNSON, J., and O'NEALL, J., concurred.

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2 Hill, Eq. 171

WM. BARTLETT and Wife, Adm'r. and Adm'x. of Thos. Wurtz v. WM. THYNES.

(Charleston, Feb., 1835.)

[*Release* ⇐15.]

A release given by a weak man, to his general agent on final settlement, under the circumstances sustained in bar to a bill for an account.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 30; Dec. Dig. ⇐15.]

[*Chattel Mortgages* ⇐296.]

Where mortgaged negroes were by an agreement endorsed on the mortgage, left in possession of the mortgagee, & to continue there in lieu of interest until the debt is paid, no length of time will bar the right of redemption.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 583; Dec. Dig. ⇐296.]

[*Usury* ⇐34.]

Such an agreement is not usurious unless the value of the hire so far exceed the interest as to manifest a corrupt intent.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 87; Dec. Dig. ⇐34.]

Charleston—April, 1833.

De Saussure, Chancellor. It appears that the late Thomas Wurtz was a weak man and so habituated to intoxication as to render him incapable of managing his own affairs. The Honorable Wm. Johnson, Judge of the Supreme Court of the United States, for some time kindly took care of him and his affairs, and protected him from injury by others. It being inconvenient to him to continue this superintendence, which also required closer and more personal inspection than he could bestow, he gave it up, but advised that Mr. Wm. Thynes should be employed for the purpose. This being agreed to, Judge Johnson drew up an agreement, in his own hand writing, between Thomas Wurtz and Wm. Thynes, which bears date 9th August, 1816, and is duly executed under seal by both parties, Judge Johnson being a subscribing witness thereto. By this instrument it is stated that Thomas Wurtz was entitled to seventeen

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slaves and a sum of money for *the sale of some land on John's Island, and the hire of his slaves, and that being conscious of his inability to conduct a plantation without instruction and assistance, he thereupon agreed to constitute William Thynes his sole absolute agent and attorney, to transact his affairs in his name and for his use, and to allow him one half part of the profits arising from his property, in full compensation for his services; and William Thynes, on his part, agreed to negotiate on behalf of the said Thomas Wurtz, the purchase of a suitable tract of land, to be paid for out of the monies of the said Thomas, and to remove to the same and settle and plant thereon with the negroes of the said Thomas, and faithfully to account to him for the proceeds thereof; and, in the mean time, that the said Thomas should be boarded in the house of the said William, and be allowed reasonable lodging, board and clothing, and pocket money. The agreement to remain of force, and be irrevocable for and during the term of fourteen years, during which time the said William Thynes shall apply annually the dividends of the said Thomas, to the purchase of such property as may be deemed beneficial, and take parental care of him in sickness and in health.

In pursuance of this agreement, William Thynes took possession of the estate and effects of Thomas Wurtz, and managed the same; and on the 20th December, 1822, they both executed a deed, or instrument of writing, by which they stated that they had an accounting settlement together, of and concerning the agency and management of the property of said Thomas Wurtz, had and exercised by the said William Thynes, under the power of attorney of 9th August, 1816, and that upon such accounting, the said Thomas Wurtz was found indebted to the said William Thynes in the sum of $675; whereupon it was agreed that the said power of attorney should be cancelled, and that the

said Thomas Wurtz should pay or secure to be paid to the said William Thynes, the said sum of $675: and the said William Thynes, in consideration of the said $675, (to be paid or secured,) relinquished all interest and benefit under the said power, and consented that the same should be cancelled, and Thomas Wurtz discharged from all further demands on account of said property; and Thomas Wurtz covenanted and agreed, and did exonerate and discharge the said Wm. Thynes from all and every other and further account, reckoning, claim, or demand, of what claim or nature whatsoever, which he

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*had or might have by reason of his agency aforesaid, or for any other account whatever.

Attached to and forming part of this instrument, there was another paper signed by Wm. Thynes, under seal, dated 20th Dec. 1822, by which he acknowledged to have received of Thomas Wurtz a promissory note for $475, payable on 1st January, 1824, and that two slaves, little Jack and Hester, mortgaged to secure the payment thereof, were in his possession, where they were to continue in lieu of interest, until said note be paid; upon which payment he promised to deliver to the said Thomas Wurtz, his executors, administrators and assigns, the said slaves, with the issue and increase of the females, if any, without delay or default; the purport of which receipt is endorsed on the mortgage given to him, the said William Thynes. A copy of the mortgage thus referred to accompanied the proceedings, and is in the usual form, dated 20th December, 1822, by which Thomas Wurtz mortgaged the two slaves, little Jack and Hester, to William Thynes, to secure the payment of $475, due on his promissory note, with interest, payable 1st January, 1824, and in default of payment, the said slaves to be sold, and the surplus, if any, paid over to said Wurtz. Mr. Joseph Bennett, a practising attorney of reputation, appears to have drawn and witnessed these papers.

At the hearing of the cause, the deeds and instruments of writing were given in evidence. Mr. Robert Green, a witness, testified that he knew the negroes, Jack and Hester. Jack was likely and prime—was patroon of Thynes' boat for a year or two; also, worked on Thynes' farm—was good for any work. The general hire for boatmen is $12 or $14, per month—field slaves worth from 40 to $60 per year. Hester worked chiefly about the house—worth about as much as ordinary slaves. She had two children—both Hester and Jack in the prime of life. On his cross examination, he stated that when he first knew him, Jack was a boy—when Thynes first had him, hired him at seven dollars per month—he fed and clothed them. Wurtz left Thynes when he got married in 1819. The mortgage was in 1822. Witness did not know of any dealings between them. The two slaves were worth $100 per year, for the last five years. Common boat hands earn $12 per month. Wurtz was a weak man, the most foolish he ever knew.

Mr. Lance testified that he knew Wurtz; he was a very weak man, an imbecile, and almost an idiot. He forgot what he had done, —sometimes he spoke well and with some acuteness.

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*The pleadings in this case are not made up with the accustomed accuracy of the bar. There is no prayer to the bill, and it is stated to the Court, that the parties agreed the cause should come on, as if the common prayer was inserted.

Two questions were made in this case:—

1st. Whether the plaintiff is entitled to a general decree for an account, or was barred by the settlement and release in December, 1822.

2d. Supposing the release obligatory, is the demand of the plaintiff to redeem the mortgaged slaves on payment of the debt due by Wurtz to Thynes on note of hand well founded, or is the right to redeem barred?

There is no doubt that Wurtz was a weak man, incapable of much mental exertion, but not an idiot. Judge Johnson, who knew his infirmity, advised the contract and arrangement with Thynes, and actually drew up the agreement in his own hand writing, and of course knew and approved the terms. This proves that he, who was a most competent judge, did not consider Wurtz incapable of forming contracts which should be obligatory on him, and that he thought Thynes a good man, fit to be intrusted with such a charge and such a power as was confided to him by Wurtz. Until Wurtz's marriage in 1819, he appears to have lived contentedly with Thynes under the agreement. After that he went away and the difference of his situation rendered it difficult to carry the agreement regularly or satisfactorily into execution. Accordingly the parties came to a settlement in the year 1822. The power to Thynes was agreed to be cancelled, the parties had some accounting, and the balance of $675 was struck as due to Thynes. A release was executed by Wurtz, and he gave his note for the sum of $475, part of the said balance, with a mortgage of two slaves. It was this release which was attempted to be set aside. The bill, however, does not allege fraud in obtaining it. It does not allege false accounts or misrepresentations. It does not attempt even to surcharge and falsify. All, or most of this, would be necessary to induce the Court to open the accounts, much more to set aside the release. The settlement and release appear to have been made under the direction of Mr. Joseph Bennett, a gentleman of character and judgment. I believe the

release now before me is drawn up in his hand writing, and I am bound to believe that he did not permit Thynes to practise a fraud

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on the weak Wurtz, of which *there is no sufficient proof. There is no moral or technical ground on which I am at liberty to set aside this release.

The next question relates to the mortgage of the two slaves to secure the payment of the note of hand for $475. For it seems that $200 of the balance of $675 must have been settled in some other way, or given up voluntarily.

The deed, or instrument, bearing date 20th December, 1822, from Wurtz to Thynes, recites that the former was indebted to the latter by note, for $475, payable 1st January, 1824, and the better to secure the payment, conveyed to said Thynes the slaves little Jack and Hester, with proviso, that if the debt with the interest thereon be paid on or before 1st January, 1824, then the mortgage to be void; and in default of payment, Thynes was authorized to sell and dispose of the said slaves, and apply the proceeds to pay the said note, with interest, returning the surplus, if any, to Wurtz. Thynes, at the bottom of the mortgage, wrote an acknowledgment of the receipt of the slaves, and his possession of them, to be held in lieu of interest, until the note should be paid, on which payment he promises to deliver up said slaves and their issue, if any.

It appears to me to be unquestionable that this is a mortgage of the slaves named in the deed, but so qualified by the receipt of Thynes (which he cannot question) as to give it the character in some respects of a vivum vadium.

Two questions were made on the argument. What is due to the creditor?—Is not the owner of the slaves barred by the statute of limitations from recovering?

The mortgage stipulates that interest is to be paid on the note. The receipt of Thynes states that the slaves are to remain in his possession is lieu of interest. There is then a discrepancy between the two instruments. The Court prefers the plain, straight forward dealing for legal interest. In many cases the use of the property left in pledge is worth a great deal more than lawful interest. It is a temptation and a shelter to usury. The Court therefore leans against that construction which would produce those effects; and where the two papers speak a different language, will prefer that which is most in the usual course of business, and most likely to do justice between the parties; and it will consider and treat this case as a mortgage to pay a certain sum of money, with legal interest, and the defendant to account for the hire and labor of the slaves.

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*But, it is said for the defendant, that his possession of these slaves has been so long continued since the note was due, (1st January, 1824,) that he is protected by the statute of limitations. There is a difficulty certainly on this part of the case. For if the instrument be considered merely a common mortgage, mortuum vadium, then the statute of 1712 vests the estate in the mortgagee. But if the receipt of Thynes gives the instrument a qualified character, partaking of the vivum vadium, then the bar from the construction of the statute does not apply.

The cases are very numerous in which the Court has been obliged to give construction to deeds in order to decide what was the nature of the instrument, from the apparent intention of the parties, although the deeds themselves did not distinctly mark their own character. A pawner of goods, in nature of a vivum vadium, where no time is stipulated for a redemption of them, has his whole life to redeem; and if there be a time fixed to redeem, and that has elapsed, the pawner may still redeem until the thing pledged is sold. In the present case, the holder of the slaves might have sold when the time of payment arrived, (1st January, 1824,) but until the sale the debtor may redeem.

It is therefore ordered and decreed, that it be referred to the Commissioner, to ascertain how much is due by the estate of Wurtz, to Thynes, on the note, with interest thereon; and that an account be taken of how much should be allowed for the hire and labor of the two slaves, little Jack and Hester, and that the same shall be deducted from the amount of the said note and interest; and that the balance, if any, be paid by the representatives of Wurtz to Wm. Thynes; and if not paid, on report made and confirmed, that the said slaves be sold by the Commissioner, at public sale, for cash, and the surplus, if any, be paid to the representatives of Wurtz. Costs to be paid out of the sale of the slaves.

The defendant appealed on the following grounds:—

1. That the agreement between the parties was fairly executed on good consideration, and is valid; and it expressly stipulates that there shall be no account for the labor of the negroes.

2. That if the agreement is not valid, the plaintiff is barred by the statute of limitations.

3. That the defendant being a mortgagee in possession for more than two years after the time fixed for payment, the right of redemption is barred by the act of 1712.

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*Memminger, for the appellant, contended that the Chancellor had, by his decree, made an agreement for the parties different from that they had entered into. From the time the release was executed, they stood indifferent to each other—their former relation ended: and it was then agreed that the mortgaged negroes should go into defendant's pos-

session, and their labor be in lieu of interest. If the mortgage and agreement be void, the plaintiff can bring trover, and this Court has no jurisdiction, and in such case the defendant would be protected by the statute of limitations. If they are valid, they constitute either a common or qualified mortgage; if the former, the plaintiff's right to redeem, after two years possession from the time of condition broken, is barred by the Act of 1712—1 Brev. Dig. 70. Mortgagee, after condition broken, may bring trover—Montgomery v. Kerr, 1 Hill, 291. Length of time by analogy to the statute of limitations is a bar—2 Atk. 362; 2 Ball & Beatty, 402. Regarding the transaction as a qualified mortgage, the interest must be set off against the labor of the slaves, and there is an end to the account. It cannot be usurious, for with the risk incurred the labor would not be more than an equivalent for common interest. But, if it were usurious, the doctrine of Equity is, that the principal and lawful interest shall be paid.—Stat. Rep. 408, 1 Ves. jr. 527.

Hunt, contra, insisted that the defendant is to be regarded as a trustee in possession, and dealing with his cestui que trust, (a weak man over whom he has great influence) for the trust property. Under such circumstances this Court will not sustain the mortgage and agreement, unless it be shown that the transaction was fair, just and reasonable. This, he argued from the value of the hire of the negroes, it was not; but, on the contrary, unconscientious and usurious. If usurious, the act of 1712 does not apply. But the agreement qualifies the mortgage, and gives the party an unlimited right of redemption.

JOHNSON, J. The questions growing out of the grounds of this motion, are:—

1. Whether the plaintiff's right to redeem the slaves, Jack and Hester, and for an account of their hire, is not barred by time.

2. Whether the defendant is, in any event, bound to account for their hire during the time he has had them in possession.

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*1. The defendant has been in possession of the slaves from 1822 down to the present time, and that provision of the act of 1712, Pub. Laws, 101–2–3, which limits the bringing of the action of trover to four years after the cause of action arose, and also that which limits the right of the mortgagor of slaves to redeem to two years after condition broken, when the mortgagee is in possession, are both relied on in support of the affirmation of the first proposition, but neither of them will sustain it. It is a familiar rule that the general provisions of the statute of limitations will not operate as a bar, unless the possession of the chattel is against the will, and adverse to the rights of the party claiming. Here the defendant's possession of the slaves commenced with the consent of the plaintiffs' intestate, and by the terms of the agreement endorsed on the mortgage he was to hold subject to the uses, and upon the terms therein expressed: so that the operation of the general provisions of the statute must be resolved, not according to the time when the defendant obtained the possession, but according to the legal effect of the mortgage and the agreement thereon endorsed. The time fixed by the mortgage for the payment of the money was the 1st of January, 1824, and the mortgagor not having redeemed within the two years prescribed by the act, the right to redeem, if that depended on the legal effect of the mortgage alone, would unquestionably have been barred, and it was so ruled in Montgomery v. Kerr, 1 Hill, 291. But I concur with the Chancellor that the legal effect of the mortgage, in this particular, is counteracted by the agreement endorsed upon it. —By this, the defendant acknowledges to have received the slaves mortgaged "in lieu of the interest" on the money owing, and that they were to continue in his possession "until the said notes be paid, upon which payment I promise and declare that I will deliver to the said Thomas (the plaintiffs' intestate) the said slaves, with the issue and increase, if any there should be, without delay or default." Without this agreement, defendant would have been bound, according to the legal effect of the mortgage, to have delivered up the slaves to the plaintiffs, or their intestate, on the payment of the money, at any time within two years after condition broken, and the agreement is an idle and useless repetition of the terms of the mortgage, unless it was intended to extend the time of redemption beyond the time limited by the act; and such is the necessary import of the terms used. The

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slaves were to con*tinue in possession of the defendant in lieu of interest "until the said notes be paid up, on which payment" he was to re-deliver them to plaintiffs' intestate, without reference to the time fixed by either the note or mortgage; and it is impossible to give it any effect, but by construing it into an agreement to permit the intestate to redeem without any limitation as to time: the limitation of two years provided for in the statute cannot therefore operate as a bar.

2. The agreement before referred to, expresses very clearly the intention of the parties that the services of the slaves should be received by the defendant for the interest of the money secured to be paid by the mortgage, and if that contract is valid, there can be no question that defendant is not bound to account for their hire. But a supposed inequality between the value of the services of the slaves and the amount of interest, is the foundation of an allegation on the part of the

plaintiffs that the contract was usurious and void, and therefore they are entitled to an account.

The statute against usury would avail but little, if it could be evaded by the substitution of something else than money for the interest, without regard to its value, and consequently all attempts of that sort have utterly failed. When the thing substituted is confessedly of greater value, or where, although the value is contingent, the probable result so far exceeds the amount of interest as to manifest a corrupt intent to secure a greater rate of interest than is allowed by law, the contract is usurious. Thus, if one lend £100 to have £120, at the year's end on a casualty; if the casualty goes to the interest only, and not to the principal, it is usury, for the party is sure of the principal, come what will of the interest; but if the principal and interest are both in jeopardy, it is not then usury—Per Dodridge J. Cro. Jac. 508; 5 Co. 79, as cited in Com. Dig. Usury, A; (see also Morse v. Wilson, 4 D. & E. 353.) So that if the value of the services of these slaves, so far exceeded the amount of interest as to authorize the conclusion that it was a device to avoid the statute against usury, the contract is unquestionably void. The evidence of the value of the hire at the date of the mortgage is not very clear. In his answer the defendant states that they were then mere children, eight or ten years old, and not worth the interest, and the only evidence on the point noticed in the decree, pointing directly to that period is, that Jack was then a boy; and although the same witness says, in connection with it, that he hired him at the rate of $7

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per month, he evi*dently referred to a subsequent period: so that the reasonable inference is, that during all the time intervening between the date of the mortgage and the time of payment, the value of hire did not exceed the amount of interest, not so far at any rate as to authorize the inference that there was an usurious intent, in substituting their services for the interest. The contract was therefore legal in its inception, and no subsequent adventitious circumstance superinduced by the neglect of the plaintiff's intestate to pay the money within the time limited in the mortgage, could render it illegal; and notwithstanding the apparent equity of requiring the defendant to account for the subsequent increased value of the hire, that would be to substitute a new contract between the parties—a power which this Court explicitly disclaims.

So much of the decree of the Circuit Court as directs an account of the hire of the slaves, is therefore reversed, and in all other respects it is affirmed.

O'NEALL, J., and HARPER, J., concurred.

2 Hill, Eq. 180

M'CARTNEY & GORDON and Others, v. JAS. FERGUSON, Trustee, and M. POGSON and Wife.

(Charleston. Feb., 1835.)

[*Husband and Wife* ⟸29.]

It is indispensably necessary by the act of 1792, that a marriage contract, should specify the property intended to be settled, or have a schedule annexed containing a description thereof, which schedule must be signed and subscribed by the witnesses to the contract: and therefore, when a marriage contract was signed with a schedule annexed, which was neither signed nor witnessed, and they were recorded within the legal period; and in conformity to the contract, a settlement was afterwards entered into, which was not recorded until after the time prescribed by law, it was held, that the contract and schedule were not a compliance with the act, and the settlement not being recorded in due time, the property was liable to the debts of the husband subsequent to marriage.

[Ed. Note.—Cited in Phillips v. Rivers, 1 S. C. 449.

For other cases, see Husband and Wife, Cent. Dig. §§ 160, 167; Dec. Dig. ⟸29.]

[This case is also cited in Fowke v. Woodward, Speers, Eq. 246, on the question of notice.]

Charleston.—Heard by Chancellor De Saussure.

Henrietta Wragg being possessed of some personal estate in her own right, and entitled to an undivided share of her father's estate, was about to intermarry with M. Pogson. In contemplation of this event, Mr. Pogson entered into a bond to the trustee on 6th Feb. 1805, in which after setting forth a statement of Miss Wragg's property, he covenants to settle the same on her, without liability for his debts. This bond was duly recorded in the office of the Secretary of State 15th April 1805. A schedule was annexed to the bond, but this was not signed by the parties, or subscribed by the witnesses to the bond. On the 24th April 1806, a settlement was executed, which was recorded in the Register's Office, 15th July 1806, but not in the office of Secretary of State, until 14th Oct. 1809.

In 1827, the plaintiffs sold Mr. Pogson some

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articles, proper for a *plantation, and took his note therefor, on which they afterwards obtained judgment. There being no property to satisfy it at law, they filed this bill to subject the trust estate to the payment of their demands. The Chancellor decreed, that the marriage contract of 6th Feb. 1805, was void as to creditors, because the schedule was not signed and witnessed, and the subsequent settlement not having been recorded within the legal time, afforded no protection to the property, and he subjected the income of the estate to the payment of the plaintiffs' demands.

The defendants appealed on the grounds:—

1. That the marriage contract of 6th Feb. 1805 was executed and recorded according to the provisions of law, and should have been sustained.

2. That the marriage contract having been properly executed and recorded, it was unnecessary to record the deed of settlement of the 24th April, 1806, except to protect the property from subsequent purchasers.

3. That by the provisions of the settlement, the property was not to be liable for the debts of the husband, and the demands of the plaintiffs being of that character, the bill should have been dismissed.

Dunkin, for the appellants.

O'NEALL, J. The act of 1792, 1st Faust 210, provides, "that all marriage contracts, deeds and settlements, to be made after the first day of June next, shall therein describe, specify and particularize the real and personal estate, thereby intended to be included, comprehended, conveyed, and passed, or shall have a schedule thereto annexed containing a description and the particulars of the real and personal estate intended to be conveyed and passed by such marriage contracts, deeds and settlements; which said schedule shall be thereunto annexed and signed, executed and delivered by the parties therein interested at the time of the signing, executing and delivering the said marriage contracts, deeds and settlements and be subscribed by the same witnesses, who subscribed the said marriage contracts, deeds or settlements, and shall be recorded therewith, otherwise, and in default of such schedule,

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and recording thereof *as aforesaid, the said marriage contracts, deeds and settlements, shall be, and are hereby deemed and declared to be fraudulent, and null and void, with respect to and against creditors, and bona fide purchasers and mortgagees: provided, that where any marriage settlement shall be made previous to marriage, nothing herein contained shall be construed to extend to make the property settled thereby liable in default of a schedule, or not being duly recorded to the payment of any debts contracted by any husband previous to such marriage, but only to such debts and contracts as shall have been incurred and made by the said husband subsequent to the marriage taking place." The result of the case under this legal provision, depends upon the question whether the marriage settlement bond, as it is called in the decree, was executed and recorded in conformity to the act, so as to make it a good and valid antenuptial marriage contract as against subsequent creditors. For the deed of marriage settlement, executed according to the stipulations of the bond, was not lodged to be recorded in the Secretary of State's office until long after the time limited by the act of '85, and is therefore void as against the creditors of the husband. So that it is necessary to look back to the marriage contract. It is in all respects well executed and recorded, except as to the schedule, which is annexed to the bond; but it is not signed by the parties, nor subscribed by the witnesses who subscribed the bond. These defects, according to the plain words of the act, render the contract void as against subsequent creditors. There is no room in the construction of the act to say that it has been substantially complied with and its ends answered, and therefore that the execution is sufficient. For the legislature have excluded all construction by a supposed intention, by the use of plain words, declaring that if the contract wanted any of these requisites it should be void. In the construction of a statute, I know no rule more safe than to adhere to the sense of the legislature as manifested by the plain and literal meaning of the words used. To adopt any other rule would be to legislate, not to construe. But if it be necessary to look beyond a plain reading of the act, and to give construction to it, by something else than the literal meaning of the words used, I think there will be no difficulty in arriving at the same conclusion by other means. I think with the Chancellor, that were it not for the act, that the annexation of the schedule to the bond and reference to it therein, would make it a part of it, and the execu-

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*tion of the bond would cover the schedule: the act excludes this construction, by not only directing it to be annexed, but also that it shall be signed, executed and delivered by the parties, and subscribed by the same witnesses who subscribe the contract. This shews that notwithstanding its annexation, the legislature regarded it as a separate and distinct instrument from that to which it was annexed. We are therefore not at liberty to make the execution and attestation of the bond, the execution and attestation of the schedule. However unreasonable this may appear on the first blush, yet, on reflection, it will be seen that the legislature may be very well justified in adopting such provisions. Their object was to prevent the possibility of frauds in the execution of marriage settlements. A schedule annexed by tape, or seals or wafers, might easily be removed and another substituted, if it had neither the signature of the parties, nor the attestation of the witnesses to identify it and to prevent substitution. Such a possibility most probably induced the legislation in this respect: and on some other occasion we may admire more this legislative forecast, than we are now disposed to condemn it as unnecessary and hard legislation.

I am hence satisfied that the marriage settlement bond or contract is void, and cannot protect the property attempted to be settled from the payment of the debts due by Mil-

ward Pogson to the plaintiffs. For, as the learned Chancellor thought, (although he suffered his sympathies for Mrs. Pogson and her children to lead him to a different conclusion,) it is a refinement not to be sustained, to contend, that notwithstanding the marriage contract is void, as against creditors, that yet being good between the parties, it will prevent the husband's marital rights from attaching on the property, and thus save it from being made liable to pay the husband's debts. The contract is void as against the creditors; as against them it is the same as if none existed, and the wife's property is, so far as they are concerned, in the possession of the husband, without any thing to prevent all his legal rights from arising in and attaching to it. Her real estate is his during coverture, and her personal property vests in him jure maritl. For the marriage contract cannot even be read against his creditors. These views would make the corpus of the estate liable to the plaintiffs' demands: but as they are content with the Chancellor's decree against the income, there is no necessity to give them any

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further remedy. It *is ordered and decreed that Chancellor De Saussure's decree be affirmed.

JOHNSON, J., and HARPER, J., concurred.

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2 Hill, Eq. 184

GEORGE EDWARDS, and Others, v. M. S. BARKSDALE, and Others.
HENRY BONA v. THE SAME.

(Charleston. Feb., 1835.)

[*Wills* ⇐594.]

Testator by his will directed, that his estate should accumulate for the benefit of his son and daughter, "then on either of them arriving of age, or on the marriage of my daughter prior to such period, that it be equally shared between them which they and their issue legally begotten, are to enjoy forever, but in case of the demise of my daughter that the negroes I got through her mother do revert to the children of P. S. L.; and likewise that such negroes I got by the mother of my son to revert to H. B:" and by another clause declared "that in case of the death of my daughter and son prior to their being of age, or having issue, that the whole of my estate be given to G. E. & E. E.:" *held* that the following is the true construction:—1st, if the daughter should die before marriage or maturity, that the negroes received by the testator from her mother should revert to the children of P. S. L: 2d, that if his son should die before the same event without children, the negroes received by his mother should go to H. B.: 3rd, that if both should die, the daughter before marriage or full age and the son under age and without issue, then that the whole remaining estate should go to G. E. & E. E.

[Ed. Note.—Cited in Edwards v. Edwards, 2 Strob. Eq. 104; Buist v. Dawes, 4 Rich. Eq. 424.

For other cases, see Wills, Cent. Dig. § 1310; Dec. Dig. ⇐594.]

[*Wills* ⇐466.]

"Or" construed "and."

[Ed. Note.—Cited in Shands v. Rogers, 7 Rich. Eq. 428.

For other cases, see Wills, Cent. Dig. § 985; Dec. Dig. ⇐466.]

[*Wills* ⇐602.]

The words of the devise to testator's son & daughter, will not create a fee conditional in the real estate—The doctrine of fees conditional considered.

[Ed. Note.—Cited in Edwards v. Edwards, 2 Strob. Eq. 104; Buist v. Dawes, 4 Rich. Eq. 423.

For other cases, see Wills, Cent. Dig. § 1354; Dec. Dig. ⇐602.]

[*Wills* ⇐603.]

[Cited in Buist v. Dawes, 4 Rich. Eq. 502, to the point that there can be no fee conditional where there is a good executory devise over.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351–1359; Dec. Dig. ⇐603.]

Coosawhatchie—Feb. 1833.

Harper, J. (sitting as Chancellor.) The will of George Barksdale executed in 1798, contains the following clauses:—

"Respecting my real and personal estate consisting of land and negroes, now in my possession, I desire that the whole be kept together and improved to the utmost of the abilities of my executors, for the mutual benefit of my daughter, Mary White Barksdale, and my son Thomas Henry Barksdale, (requesting that they may have the best education that possibly can be had in South Carolina,) then on either of them arriving of age, or on the marriage of my daughter, prior to such period, I direct that the said estate with all its accumulation, may be equally shared and divided between them, which they and their issue legally begotten, are to enjoy forever; but in case of the demise of my daughter, my will is, that all such negroes as I am possessed of through her mother, do revert to the children of Peter Samuel Letitt, of Savannah, to them and their heirs forever; and likewise that all such negroes as I am possessed of through the mother of my son, do revert to Henry Bona, to him and his heirs forever."

"Also in addition, it is farther my will, that in case of the death of my daughter Mary, and my son Thomas, prior to their being of age, or having issue, that the whole of my estate be given to George Edwards, and Eliza Edwards, his sister, to them and their heirs forever."

Mary White Barksdale died in 1808, under age, and without issue, not having been married.

Thomas Henry Barksdale came of age, and the executor surrendered to him the whole estate. He died in 1832, not having had any issue.

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*The plaintiff, George Edwards, claims in his own right, and he and the plaintiff, Mary Holbrook, as the brother and sister and next

of kin of Eliza Edwards, under the limitation of the will to them. They also claim as next of kin of Thomas Barksdale, in case the limitation fails.

Henry Bona, the plaintiff to the second bill, claims under the bequest to him, in case of the demise of Mary. He also claims the whole estate as next of kin of Thomas Barksdale, he being in equal degree with the other plaintiffs, and being of the whole, while they are of the half blood.

The first thing to be done is to discover, from the construction of the will, what dispositions the testator intended to make, and next, what effect the law will give to these dispositions.

The devise of the estate to Mary and Thomas Barksdale, "which they and their issue lawfully begotten are to enjoy forever," would certainly give them in England an estate tail in the lands, and in this country, gives them a fee simple conditional, and the personal estate absolutely.

The provision, "but in case of the demise of my daughter, my will is &c." if the words were taken alone, would seem to import, that at whatever period of her life she should die, whether with or without issue, the limitation should take effect. This would seem to restrict her interest to a life estate, and to be inconsistent with the previous limitation to her issue. The clause would also seem inconsistent with the subsequent limitation of the whole estate, to George and Eliza Edwards, in the event of the death of both children without issue. It is my duty to reconcile these inconsistencies if possible, so as to give effect to every part of the will; I find it difficult to do so, but perhaps it is not utterly impossible. The most I can make of it is this: the words "giving to Mary and her issue" are perfectly clear: when therefore we find a limitation once in the event of her death, it is natural to imply a death without issue. Looking over the whole will, and observing the terms which the testator has used in the subsequent clause, making a similar limitation, we may be justified in applying to the former disposition, the qualification which the testator has annexed to the latter, so as to make it read "in case of the demise of my daughter, prior to her being of age, or having issue." From the words immediately following the provision for a division of the estate, it is probable that the tes-

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tator contemplated the demise of *his daughter before the time of the division: as if he had said "if she shall be then dead." Then how is this consistent with the subsequent limitation of the whole estate to George and Eliza Edwards? I think these words must be taken subject to the previous disposition in favor of the children of Lefitt and Bona. In the event of the daughter's death, the negroes to go as directed. All the rest of the daughter's estate would go to the son, for the terms of the will are sufficient to create cross remainders, if he did not take it by law. Of those negroes, the testator had disposed definitively then; if the son should die also prior to being of age or having issue, the whole estate, that is, the whole estate in the hands of the son remaining to be disposed of, to go to George and Eliza Edwards. I cannot think of any other reasonable and consistent meaning to give to the provisions of the will. There would be no difficulty in applying the same construction if the daughter had lived longest.

Then we come to examine the goodness of the limitation, if the testator's children should die prior to being of age or having issue. With respect to the personal estate I have no doubt of the goodness of the limitation. The words do not import an indefinite failure of issue, less so than the common case, where the words are, "if he should die without leaving issue." And I should have as little doubt respecting the land, if it were not devised in fee. The limitation would be as clearly good as in Gulliver v. Wickett, Pells v. Brown, or Porcher v. Bradly. What I do doubt however, is whether these words, used after giving an estate tail, in England, would not be construed a remainder generally expectant on the estate tail. In Brownsword v. Edwards, 2 Ves. sen. 243, the devise was to trustees till John Brownsword should obtain the age of twenty-one years, and if he should live to obtain that age, or have issue, then to him and the heirs of his body; but if he should die under age and without issue, then to certain collateral branches of his family. John Brownsword lived to be of age, but afterwards died without having had issue. It was contended that this limitation was an executory devise, depending, according to the liberal import of the terms, on the event of his dying under age and without issue, and that having come of age, it could never take effect. But Lord Hardwicke held it to be a remainder after the estate tail. He adds however his belief, that if the devise had been to John and his heirs, the construction could not be made; and refers to the

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cases in *which, after a devise in fee, the limitation was on the event of the devisee's dying under age or without issue, in which, to effectuate the intention, 'or' was construed 'and.' The cases of Fairfield v. Morgan, 2 Bos. and Pul. N. R. 38, and Eastman v. Baker, 1 Taunt. 174, and others, in which such construction has been made, were all cases of devise in fee.

I had occasion to consider this subject in the case of Bailey v. Seabrook, decided by me in Charleston, and I have not yet been able to overcome the difficulty which I then experienced in giving effect to such a limitation. I have found no case in which such a limitation has had effect, except as a remainder after an estate tail; though Mr. Fearne,

whose suggestions are always entitled to respect, seems to intimate that there might be such an one. It may seem strange that the clear intention of a testator, which does not violate the policy of the law by its tendency to create a perpetuity, should, for technical reasons, fail of effect. Yet, how can I disregard the rule, so emphatically said in the cases to have always prevailed without any exception to the contrary, that "where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise." I will not say however, though technical difficulties interpose here also, that it may not be possible to give effect to such a limitation as a remainder after a life estate, which in fact it seems to be. Supposing however that this must be construed a general remainder after a fee conditional, I have, in the same case of Bailey v. Seabrook, given my reasons on the preponderance of authority for the opinion that a remainder cannot be limited after a fee simple conditional, and must be regarded as void.

But in the present case, I am of opinion that the testator's children took a fee simple absolute, not by the will, but by descent—and consequently that the limitation to George and Eliza Edwards may have effect as an executory devise of an estate, to arise on a future contingency. The testator's children were his heirs at law. In the case of Adams v. Chaplin, 1 Hill's Eq. 265, decided by me at Coosawhatchie, I had occasion to consider the effect of a devise to an heir at law, with a void limitation or no limitation, of the possibility of reverter. That case I believe is still before the Court of Appeals; at all events I am not aware of any decision upon it, and shall therefore throw out such additional ideas, as occur to

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me on *the subject. I have re-examined that opinion, with all the attention in my power, and have found nothing to alter it; I think that in case of such a devise, the fee conditional must be held to merge in the right of reverter; or, to speak more accurately, that the heir takes by descent and not by the devise. The case of Dunn v. Greene, 3 Pr. Wms. 10, is in point. A copy holder in tail accepted from the lord, a grant of the fee simple. The Chancellor said, that unless it were expressly found that the custom of the manor allowed of entails, this was a fee simple conditional, and plainly merged in the fee. I think this coincides with the rule which Mr. Hargrave, in his note Co. Lit. 12, lays down as the result of the cases to which he refers, "that whenever a devise gives to the heir, the same estate in quality as he would take by descent, he shall take by the latter." Now the authorities are clear, that the fee simple conditional is of the same quality as the fee simple absolute, though it may differ in quantity. Coke, in commenting on Littleton's text, "And note that a man cannot have a more large or greater estate of inheritance than fee simple," observes: "this doth extend as well to fee simple conditional, and qualified, as to fee simples pure and absolute; for our author speaketh here of the ampleness and greatness of the estate, and not of the perdurableness of the same. And he that hath a fee simple conditional and qualified, hath as ample and great an estate, as he that hath a fee simple absolute; so as the diversity appeareth between the quantity and quality of the estate."

In Clerk v. Smith, 2 Salk. 241, the testator devised to his heir at law, and his heir on condition, that he should pay £200 to such person as his mother should appoint, and it was held that he took by descent. I have not the means of referring to some of the authorities there quoted, but in Comyns Dig. Tit. Devise, R. it is said, referring to Lat. 798, that the heir takes by descent, "though it be devised to the heir, subject to a charge, for that does not make an alteration of the estate," "or subject to a contingency upon which another shall have it, for it descends in the mean time."

There is quoted from Cro. Car. 161, that he takes by devise, if the estate be given to an heir, "upon condition to pay debts, and for non payment to another." But in Clerk v. Smith, it is said, Treby, C. J. and Powell, J. denied this case to be law, and in Comyn is quoted "Court per Holt, for the heir takes by descent, and upon failure of payment, the

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other shall have it by way of execu*tory devise." In Bacon's abridgement Tit. Descent E. it is said, "if a man devises land to his eldest son and his heirs, paying £20 apiece to his younger children at their ages of twelve, and upon non payment of the legacies, devises the land to his younger children and their heirs, the eldest son is in by descent;" referring to Moore, 644, Cro. Eliz. 833, 919, 920. In all these instances, as in the case of the devise of the fee simple conditional, the fee is given with a possibility annexed, an estate defeasible on a contingency. This accords with the general rule of law, and can never defeat any valid disposition by way of executory devise, for it is of the definition of an executory devise, that by it an estate may be limited to arise in future, leaving the land in the mean time to descend to the heir.

The case of Goodright v. Sealle, 3 Wil. 29, does not disagree with this. In that case, testator devised to his heir at law, providing that if he should die without issue living at his death, the estate should go to his mother. It was perfectly immaterial whether the heir took by descent or not. On the authorities, I have referred to, I have no doubt but that he was in by descent, and there is nothing

in the case to contradict this. But this did not affect the validity of the executory devise to the mother. The person who took at his death without issue, took not as an heir of the testator, but as a purchaser under the will. But suppose the testator had devised to the heir upon condition of his having issue, without any limitation over in the event of a breach of the condition. The case of Whaley v. Cox. 2 Eq. Ca. Ab.—was one in which the testator gave to his heir on condition he should pay £500. It was clear he was in by descent, and the condition void, as none but the heir could take advantage of the condition. Or suppose the executory devise to have been void on account of the remoteness of the contingencies on which it was limited; is it not plain that the estate of the heir would have been an absolute indefeasible fee simple? Is there any doubt about the rule that the heir will take even against the intention, what is not effectually disposed of? Whatever estate is given to the heirs whether for life, or howsoever otherwise qualified, or whatever condition, contingency or possibility is annexed to it, yet if there be no effectual disposition, is it not manifest the heir must take absolutely and take by descent? Then if it be true that a remainder limited after a fee conditonal is void, does it not follow that the heir after

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a devise to *him of that estate, must take absolutely by descent? The passage in Bracton, "Item poterit pluribus fieri donatio per modum simul et succim," &c. does seem to shew, that in his opinion a remainder might be limited after an estate in fee simple conditional. Yet if that be the true construction, I think the authority is overruled by the whole current of more modern decisions.

I think error has arisen from some notion of an intention of the testator in favor of his blood, a more distant rather than intermediate heirs—which intention is to be favoured? This is unknown to the law, which regards every heir successively, as representing the ancestor, clothed with the same rights, and standing in the same relation. It is for this reason that even in the case of an estate tail which is said to be privileged from merger by construction from the statute, where the tenant in tail has the immediate right of reversion or remainder, he may bar it by fine without recovery. Harg. n. to Co. Lit. 121. Though the person claiming at the termination of the estate tail takes as the heir of the donor or first purchaser, yet he so takes through the intermediate heir, as to be estopped by his act. Mr. Hargrave says, "none can derive title to the estate, except as his privies or heirs, in which character his fine is an immediate bar to them."

The children of George Barksdale taking an absolute fee simple, I think there is a good executory devise to George and Eliza Edwards.

To the bill of Henry Bona, the lapse of time is relied on as a bar to his demand. The present plaintiff was not the legatee, but his father, of the same name. From the view I have taken, I think his right accrued upon the death of Mary White Barksdale in 1808, so that more than twenty years have elapsed from that time to the filing of the bill. If Henry Bona, the father, had lived to the present time, it would be a question between him and the executor, whether he was not barred by lapse of time. There may be a question too, whether Thomas Barksdale's possession was not adverse from the time of the estate's being surrendered to him, so as to mature his title by the statute of limitations. But the present plaintiff is an infant; though it is said his father was living at the death of Mary White Barksdale, yet it does not appear from any thing before me, at what time he died, nor does it appear at what time Thomas Barksdale took possession

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of the es*tate. I must direct an enquiry to ascertain these points, and reserve this part of the case for the coming in of the report.

The plaintiff, Bona, is not the proper person to sustain the bill. The legal representative of his father, executor or administrator, should be a party to it. Leave may be given however to amend the bill, making the proper party: and it is ordered accordingly.

It is ordered and decreed that the defendant Martha Sarah Barksdale, administratrix of Thomas Henry Barksdale, account before the Commissioner for the personal estate of her intestate, except such slaves as the testator, George Barksdale, derived from his marriage with the mother of his daughter Mary White Barksdale, and of his son, Thos. Henry Barksdale respectively; and that upon such accounts being had, she pay and deliver over to the plaintiffs, George Edwards, Daniel Holbrook and Mary, his wife, the whole of the estate which her said intestate derived from the will of his father, George Barksdale, as aforesaid, and that she also deliver to the said plaintiffs, all the muniments and evidences of the title of the real estate of her said intestate derived in like manner. The costs of the first bill stated, to be paid out of the said estate.

The defendants appealed from this decree. The cases were elaborately argued by Dunkin, Bailey and Hunt for the appellants: and Petigru and King, for the appellees.

The following authorities were cited and commented on by the counsel for the appellants: Adams v. Chaplin, 1 Hill's Ch. 265; Scanlan v. Porter, 1 Bail. 427; Bedon v. Bedon, 2 Bail. 231; 1 Hill's Ch. 39; 2 Cruise Dig. 461; 6 Ib. 183, Tit. 38, Chap. 9, Sec. 18, 24; 1 Taunt. 174; 2 Roper on Leg. 371, 291; 6 Ves. 341; 7 Ib. 454; Co. Lit. 20 a. 20, b. Prest. on Est. 263; 10 John. Rep. 19.

And the following on the part of the ap-

pellees: 3 Eq. Rep. 251; 2 Saund. 280; 2 Ves. sen'r. 243; 2 New. Rep. 38; 2 Vern. 388; Cro. Eliz. 525; 3 Cruise 461; 1 Russ. and Milne, 553; 2 Strange, 1251; 4 Ves. 160; 1 Bro. Ch. Rep. 393; Ray. 252; Cowp. 31, 797; 2 P. W. 69; 3 Ves. 536; 3 Bro. Ch. Rep. 465; 6 T. R. 30; 3 Ves. 450; 18 John. Rep. 368; 1 Hall, 184; 2 Mass. R. 554; 6 John. Rep. 54; 2 Bin. 252; Cro. Jac. 185.

O'NEALL, J. In these cases, as in Bedon v. Bedon, [2 Bailey, 231,] the question which decides the whole matter is, what estate did

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Thomas *Henry Barksdale take under the will of his father, George Barksdale, deceased. This, in its developement and decision, will require us to give consideration to the will. 1st. As to the bequest in favor of Henry Bona, and the executory devise to George and Eliza Edwards. 2d. If the last should fail, then as to the estate of Thomas Henry Barksdale in the land of the testator under his will, whether it be a fee conditional, or a fee simple.

1. A general rule of construction is, that the whole will should be construed together, so that we may arrive at the entire intention of the testator, not at unconnected parts of it. This rule applies where there are many clauses, unless indeed it should be the case that the same article of property is given by different clauses to different persons: in that case the last clause is regarded as the last disposition, revoking all which had gone before it. This will, however, it seems to me, is but one devise or bequest, contained in a single clause, and must, therefore, be more immediately under the operation of the general rule which I have stated, than it would have been if it had consisted of many clauses. In all parts and all its provisions, it has reference to the period of division which it fixes. The testator directs the whole estate to be kept together, and improved for the benefit of his daughter and son, until either should come of age, or until the marriage of his daughter before maturity, then he directs the whole estate to be shared and divided between them. This provided for his children during minority, and also for both, when they or the daughter only had entered upon the cares and responsibilities of a life unrestrained by a parent's, guardian's, or an executor's care. As would be natural, after making such a provision, the thought seems to have arisen in his mind —"one or both of my children may die without children before the time which I have fixed for the division; in either case, what is to be done?" The will proceeds to answer the question, by providing, 1st. If the daughter should die before marriage or maturity, then, that the negroes received by the testator in marriage with her mother, should revert to the children of Peter Samuel Lefilt, of Savannah: 2d. If his son should die before the same event, without children, then,

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that the negroes received by the tes*tator in marriage with the mother of his son, should revert to Henry Bona: 3d. If both should die, the daughter, before marriage or before attaining to full age, and the son under age and without issue, then that the whole remaining estate, should be given to Geo. Edwards and Eliza Edwards.

I have thus stated together the construction of the testator's will, according to my reading of it, and it seems to me so perfectly obvious, that it would be almost unnecessary to urge an argument in support of it. But the cases are of so much expectation to the parties, and may be of some importance to the profession in confirming previous decisions, that I will, as well as I am able, and as briefly as I can, state the legal reasons for the construction. On looking to the will, it will be seen that the testator, after directing the division, adds, "which they and their issue, legally begotten, are to enjoy forever; but in the case of the demise of my daughter, my will is that all such negroes as I am possessed of through her mother, do revert to the children of Peter Samuel Lefitt." The words preceding this contingent bequest, shew that the testator, in looking to the death of his daughter, contemplated the possibility that that event might take place without issue, and if so, and it took place before her marriage, then, that the negroes of her mother should go over. For it is obvious on reading this part of the will, in connection with that which preceded it, directing the division, that it was a mere provision for what might occur before it took place. If this was not so, the limitation over to the Lefitts would be on a general failure of issue, and would be void on account of its remoteness. The construction which I have resorted to in this respect is admissible, inasmuch as it sustains and does not defeat the bequest. If, however, the bequest could even take effect at the death of the daughter happening after marriage, and thus escape the objection for remoteness, then the result might be that the Lefitts would not find a single one of the negroes bequeathed to them in remainder in her possession. For, in the division the executors might have delivered these negroes to her brother; (the will imposes no restraint in this respect.) The Lefitts might, if the construction thus suggested was right, recover them from him, and he, under his father's will, not be entitled to her share of her father's estate. For the will only would give to him or her a cross-remainder in the event of her death before marriage or full age, or

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his death un*der age and without issue. This absurd consequence shews that such a construction cannot be given to the bequest over to the Lefitts, and that this, as well as the

other reasons already suggested, made their rights dependent on her death before marriage or full age. The same reasons apply to the bequest to Henry Bona, and make his rights dependent on the contingency of the death of the son, Thos. Henry, under age and without issue. For the testator intended the contingent bequests to the Lefitts and Bona to stand upon the same footing.

I have said that the cross remainder in favor of the son depended on the death of his sister before marriage or full age, and that in favor of the daughter, on the death of the son under age or without issue. This is, I think, the true reading of the will. For, notwithstanding in the latter part the testator speaks of both dying "under age or without issue," yet, I apprehend these words relate to the death of either before the period of division; and if so, my construction is the only one which can be given. For the division is to take place at the marriage of the daughter, or on either attaining to full age. That the words used in the latter part are intended to qualify and regulate the previous bequests at the time fixed for division, is obvious enough from the connection in which they are used. The testator says that they are additional to what had gone before, not that they are in place of the previous words. Read them as additional, and state the previous part of the will, with these additional words, thus—"The whole estate to be kept together for the benefit of my son and daughter, until either of them come of age, or the marriage of my daughter, then that it be divided between them; but if both die without issue, then that the estate be given to George and Eliza Edwards, except the negroes received in marriage with the mother of my daughter and son." When so stated, it is only necessary to read it, that it may be understood. The obvious propriety of this construction is thus made manifest, from placing the words to be construed in the juxta position which I have done.

If this view of the cross-remainders is correct, it defeats at once the devise over to George and Eliza Edwards. For it is then dependent on a contingency which has never happened—the death of the son under age, and without issue. But in relation to the executory devise in their favor, it is subject to some other views, which put an end to all possible claims on their part in this behalf.

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The *will provides—"In case of the death of my daughter Mary and my son Thomas, prior to their being of age, or having issue, that the whole of my estate be given to George and Eliza Edwards." Upon these words I remark that the words "be given" naturally imply that some person was to have the legal power to fulfill their meaning, by delivering over the estate to George and Eliza Edwards. If their estate was to be future and expectant, depending on a general failure of issue, it would have been too remote, and never could have had effect; if it depended on a failure of issue at the death of the first taker, then no one would have had the power of delivery contemplated by the will. For the executors' duty was discharged, and their power ended when they put the property into the possession of Thomas Henry Barksdale. But if the estate of George and Eliza Edwards depended upon the death of the daughter before marriage or maturity, and of the son under age without issue, then, as the estate would still be in the care of the executors, these words "be given," to George and Eliza Edwards, could be given effect to by a delivery. Straws, we are told, sometimes shew us the course which the wind blows, so here, these words, unimportant as they appear to be, plainly point to an act to be done by his executors, in fulfilment of his intentions in favor of the devisees in remainder, and that their rights were to attach, or be defeated at the time fixed by the will for the division of the testator's estate.

In the construction of this part of the will, I have taken it as true that "or" must be construed "and." I now proceed to assign the reasons why it is so. If I have been right in the construction that this provision points to the period of a division for its application, then there can be no doubt whatever that the word "or" was used by the testator in the sense and meaning of "and." For any other meaning would give effect to a dying without issue beyond that time, and might carry over the estate at the death of the devisee, no matter when it might take place.

But the case of Scanlan v. Porter, 1 Bail. 427, it seems to me, decides the very point. The words there, were—"Should any of my children die before they are of age, or have lawful issue." The words here are—"In case of the deaths of my daughter Mary and my son Thomas, prior to being of age or having issue." The provisions are almost in the same words; in substance they are identical; and I am unable to see any just ground

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upon which a dis*tinction may be drawn between the two cases. The reasons given for the judgement of the Court in Scanlan v. Porter, might be used and applied with equal force and propriety to this case. In construing such words in a will, the obvious and clear intention of the testator would, I freely admit, overreach and defeat any artificial rule of construction. But when that is not the case, it is wiser and safer to adhere to a rule of construction than to resort to a conjectural exposition of the meaning.

If the devise to the son or daughter had been a fee conditional, I do not perceive that that would have altered the construction; for, in such a case, the testator would be regarded as intending to qualify the previous fee conditional by creating an executory de-

vise over, to take effect on the contingency of the death of the tenants in fee conditional under age without issue; but if they live to that event, that then they should have the conditional fee with all its common law incidents. Perhaps the more correct remark upon such a disposition would be, that until twenty-one, or the death of the devisees before that age, leaving issue, the estate of both son and daughter would be a mere executory devise, which would, at twenty-one, or before twenty-one, if the devisees should die before that age, leaving issue, become a vested common law estate in fee conditional. These views dispose of the executory devise over to George and Eliza Edwards, and shew that it cannot take effect, for the best of all possible reasons, that the contingency has never happened, Thomas Henry Barksdale having lived beyond twenty-one.

2. This makes it necessary to enquire whether Thomas Henry Barksdale took the real estate in fee conditional, or absolutely.—The part of the will upon which this depends, is in the following words: "Respecting the lands and negroes now in my possession, I desire that the whole may be kept together and improved to the utmost of the abilities of my executors, for the mutual benefit of my daughter, Mary White Barksdale, and my son, Thomas Henry Barksdale, (requesting that they may have the best education that possibly can be had in South Carolina,) then on either arriving of age, or on the marriage of my daughter, prior to such period, I direct that the said estate, with all its accumulation, may be equally shared and divided between them, which they and their issue, legally begotten, are to enjoy forever." Notwithstanding I have said that this question depends upon the construe-

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tion of the part *of the will quoted, yet I do not mean to say that it is alone to be looked to in giving construction to it: indeed, it is manifest that other parts of the will must have a great effect upon this. As is said in Bedon v. Bedon, 2 Bail. 248, the devise under consideration could not be considered a fee conditional; "for that estate supposes a possibility of reverter." In the case before us, the testator has shewn that he never intended the estate to return, for the want of persons to take per formam doni; for he has at least in one event, death before marriage or maturity without issue, provided how the estate should go by his will, and not by operation of law. If the supposed estate of fee conditional, is however, regarded as vesting and commencing on marriage or attaining to maturity, then it may be fairly argued that the testator did not intend to create such an estate, from the fact that the persons who would, on the extinction of his lineal descendants, be his heirs and next of kin, George and Eliza Edwards, and be entitled to the reverter, were by the will only to take upon the death of the daughter and son before marriage or full age, without issue. Under the will, and according to our unanimous construction, the son and daughter have cross remainders in the portion of the estate to which each would have been entitled. This, it seems to me, is at war with the notion of each having a conditional fee, for it is admitted on all hands, that there can be no such a thing as a remainder after an estate in fee conditional; but if this objection could be avoided by rejecting the remainder and relying on the fee conditional alone, then the son and daughter, each, had a conditional fee in one half the real estate. Upon the death of the daughter, her half reverted, and as her brother was the only heir at law then surviving of the testator, he would come in under the reverter, and take her half of the estate absolutely. Such a result shews, as I conceive, the folly of attempting to make a conditional fee out of words which the testator never intended should have any such effect; but I hold there can be no such thing as a fee conditional where there is a good executory devise over. When the limitation is within a life or lives in being and twenty-one years after, it cuts down and destroys the effect of even a previous devise to one and the heirs of his body, by shewing that the testator did not look to an indefinite succession, and that he did not intend his devisee to have all the incidents of the common law estate of fee conditional, such as the power

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to alien or encumber the estate; for, in *such a devise, it is clear that his alienation, even after the birth of issue, would not bar the remainder man, if at the death of the devisee he had no issue then living. If the devise be to A. and the heirs of his body, and there are no words to restrain their indefinite import, then an executory devise over, after a failure of such heirs of the body, would be void for remoteness. In the first case which I have put, if it is not a conditional fee in the first taker during his life time, it cannot be so in his issue, for they must take through him and by descent. The words "heirs of the body," in such a case, must be regarded as merely marking the testator's intention, that if the devisee died without issue living at his death, that the estate should go over, otherwise it should not, and in this point of view the estate might be regarded as a fee simple defeasible. I am aware that this puts the doctrine in a point of view not altogether usual; it is, however, the only means of reconciling two rules of law: 1st. That a limitation over, after a fee conditional, is void; 2d. That a limitation over which is to take effect within a life or lives in being is good.

The words of the devise, however, which are supposed to make it a fee conditional, cannot, in my judgment, have that effect.—

The words "their issue legally begotten," are not necessary words upon which such an estate would arise at common law. According to it, as it stood before the statute de donis, the words "heirs of the body" seem to be the only words on which a conditional fee was allowed. Indeed, in the earlier days of judicial exposition of the common law, the word "issue" was held to be a word of purchase. Under the statute de donis, the word "issue" has, I admit, been held to be sufficient to imply an estate tail, and for a most obvious and just reason. Such an implication is in exact accordance with the intention of that statute, as expounded by the English Judges, when they divided the estate under it—1st, into a life estate in the first taker; 2d, the estate to the issue per formam doni, and 3d, the reversion. But this cannot aid the plaintiffs' (George, and the heirs of Eliza Edwards) argument here, for their estate must be judged of by the law, without the statute de donis. To constitute a fee conditional, the words must import inheritance and procreation; for the descendants of the tenant in fee conditional, take as heirs and heirs of the body. The term "issue" may include these as persons, but not as inheritors. To give them that effect, we must

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imply, that the testator intended that *they should come in by descent. I have denied, in Bedon v. Bedon, 2 Bail. 231, and Adams v. Chaplin, 1 Hill's Eq. 265, that a fee conditional can arise by implication, and I am perfectly satisfied of the correctness of the position, and prepared to carry it out and give it effect in all cases.

But I am persuaded, that in another point of view, the words before us cannot have the effect contended for by the plaintiffs, George, and the heirs of Eliza Edwards. They are not parts of the gift—it was complete without them. The words previously used, directing a division of the estate between the son and daughter, were enough (I should think) at common law to give them the fee; but, when they are construed under our act, there can be no question that the daughter's and son's respective estates, when the daughter married or attained to twenty-one, and the son was of full age, were fees simple absolute.—Bedon v. Bedon, 2 Bail. 231; Adams v. Chaplin, 1 Hill's Eq. Rep. 265. As Thomas Henry Barksdale attained that age, and was entitled on the previous words to that estate, were the subsequent words intended to change the legal character of it? I think not. They are more descriptive of the enjoyment of the estate which the testator thought would result to his son and daughter and their issue forever, from the division of it between them under the provisions of this will: as is said by my brother Johnson, in Manigault v. Deas, [Bailey Eq. 298,] they are used "as marking the quantity of the estate" which the devisees took. They were the mere expression of hope on the part of an anxious parent, that the estate would descend from generation to generation in his blood forever. But they were not used as restrictive of the previous estate; if any idea of their legal effect entered into the mind of the testator, it was that they would shew that the estate was in his children forever.

These views shew satisfactorily, at least to my mind, that the plaintiffs (George Edwards and the heirs of his sister, Eliza Edwards) cannot take under the executory devise over; nor as the heirs of the testator. So much of their bill as sets up these claims, ought to be dismissed; it ought however to be retained, so far as they claim as next of kin of the deceased, Thos. Henry Barksdale. So, too, so much of the bill of Henry Bona as claims, under the will of George Barksdale, the negroes which belonged to the mother of Thomas Henry Barksdale, ought to be dismissed; but so much as claims as next of kin of Thomas Henry Barksdale,

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*ought to be retained. The question of who are his next of kin, has not been tried; the cases must go back for the purpose of trying it, and of making partition between the widow and next of kin.

It is ordered and decreed, that the Circuit decree be reversed, and the causes remanded to the Circuit Court for the purpose of ascertaining the next of kin of Thos. Henry Barksdale, (deceased,) and making partition of his estate between them and the defendant, Mrs. M. S. Barksdale, his widow. The costs of both cases to be paid out of the estate.

JOHNSON, J., concurred.

2 Hill, Eq. 200

JOHN BOYKIN and Wife, v. LEWIS CIPLES and Wife, and F. A. DELESSELINE.

(Charleston, Feb., 1835.)

[*Husband and Wife* ⇐137, 210.]

A feme covert may sustain a suit for her separate estate, her husband being joined in the bill;—in such case she will not be estopped by his deed, made in his individual capacity.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 519, 782; Dec. Dig. ⇐ 137, 210.]

[*Husband and Wife* ⇐135.]

Where no trustee has been appointed, the husband will be regarded as trustee of his wife's separate estate; but on bill filed by husband and wife for such estate, the Court will appoint another trustee.

[Ed. Note.—Cited in Baskins v. Giles, Rice, Eq. 325; Trustees v. Bryson, 34 S. C. 413, 13 S. E. 619.

For other cases, see Husband and Wife, Cent. Dig. § 503; Dec. Dig. ⇐135.]

Charleston—May 1834.

This case arises under the will of John Adamson, of Camden, dated 21st January, 1814. The testator left two daughters—Sarah, who intermarried with the defendant, Lewis Ciples, and Amelia, now deceased, who intermarried with the defendant, F. A. Delesseline;—a grand-daughter, the plaintiff, Charlotte A. Boykin, formerly Adamson, who intermarried with the plaintiff, John Boykin; and three grand-sons, John, Alexander and William Adamson. By two clauses in said will he bequeathed, viz: "To each of my daughters, Sarah Ciples, wife of Lewis Ciples, and Amelia Adamson, and to my grand-daughter Charlotte Adamson Boykin, wife of John Boykin, during their natural lives, alone to their sole and separate use and benefit, without being in any manner subject to the debts, contracts or forfeitures of their husbands, and to the heirs of their respective bodies, who may be living at the time of their respective deaths, I give and bequeath fifty shares in the Union Bank, and fifty shares in the Planter's and Mechanic's Bank of this State, making in the whole three hundred shares. In case either of my daughters or grand-daughter should die without leaving such heirs of her body, her share shall go to the other or others of

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them, subject to the same *terms and limitations as her or their other bank shares. In case they should all die without leaving such heirs, the said bank shares shall go to my grand-sons above named, subject to the same terms as the bank shares bequeathed to them. To my daughter Amelia, during her natural life, alone and to her sole and separate use, without being in any manner subject to the debts, contracts or forfeitures of her husband, and after her death to the heirs of her body who may be living at the time of her death, I give and bequeath the following negro slaves with their increase from this day, that is to say—Molly, Aty, Fanny, Pat and her six children, John, his wife and her two children, old Nance and her six children, Bob, Dublin, London, and his wife and her child, making in all twenty-six slaves, subject to the same limitations over on her death without leaving such heirs, as are expressed respecting the bank stock herein before bequeathed to her."

After the date of the will, Amelia intermarried with Francis A. Delesseline. The testator died in May 1816, and in January 1817, the three husbands, Ciples, Boykin and Delesseline, with the consent and knowledge of their wives, executed mutual releases in the following manner:—

South-Carolina.

Whereas John Adamson, by his last will and testament made the following bequests to Sarah Ciples, wife of Lewis Ciples, Amelia Adamson, who has since married Francis A. Delesseline, and Charlotte A. Boykin, wife of John Boykin, with such limitations over as in the said will are expressed: that is to say, to the said Sarah Ciples, thirty-two slaves, in the said will named, to Amelia Delesseline, twenty-six slaves, and to Charlotte A. Boykin, twenty-six, in the said will named, and all the increase of the said slaves from the time of making the said will. And whereas it has been agreed by and between the said Lewis Ciples, F. A. Delesseline and John Boykin, to relinquish and secure to each other all the contingent interest which may enure to their respective wives and the heirs of their respective bodies, by such wives on the death of any of them, the said Sarah, Amelia, or Charlotte, without heirs of their respective bodies. Now know all men by these presents, that in consideration of the premises, and in consideration that the said Lewis Ciples has made to me a deed of the same import of these presents, and a further

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consi*deration of one dollar to me, the said John Boykin, in hand paid by the said Lewis Ciples, the receipt whereof is hereby acknowledged, have granted, bargained, sold and delivered, and by these presents do grant, bargain, sell and deliver to the said Lewis Ciples, all the said thirty-two negroes and their increase, so bequeathed to the said Sarah Ciples, to have and to hold the said negro slaves and their increase to the said Lewis Ciples, his executors, administrators and assigns, for ever.—And I do hereby bind myself, my heirs, executors and administrators, to warrant and for ever to defend the said negro slaves and their increase, to the said Lewis Ciples, his executors, administrators and assigns, against myself, my wife, and the heirs of the body of my wife, by me begotten, or any other person, by, through or under me or them, claiming or to claim the same or any part of the said slaves or

their increase, but not against the claims of any other person, or of any heirs of the body of the said Charlotte by any other husband begotten.

(Signed) Jno. Boykin.

Mrs. Delesseline died in July 1832, without having had issue; and Mr. & Mrs. Boykin, in May 1833, filed this bill against Ciples and wife, and Delesseline, to recover under the terms of the said will, their alleged proportion of the negroes bequeathed to Mrs. Delesseline.

The defendants contended that the plaintiffs were not entitled to recover—that Mrs. Boykin could not maintain the suit, and that Mr. Boykin was estopped by his deed of January 1817.

Johnston, Chancellor. The objection made to the manner in which Mrs. Boykin sues, if valid, comes too late. The slaves are expressly exempted from the contracts of the husbands. Of course the husbands' deeds are invalid, as respects the wives. I shall not, however, interfere with the legal liabilities of these three husbands and executors, to make good the warranties of the three interchangeable deeds, whereby they assumed rights they did not possess, nor had any reason to snppose they possessed, and that for the purpose of frustrating the provisions of a will, of which two of them were executors appointed by the testator, and which the other was bound by his marriage to execute. Let each take his remedy against the other at law, if he chooses. But

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the deeds *are declared inoperative, as regards the wives. It is further decreed that Mrs. Boykin is entitled to a partition with Mrs. Ciples, of the slaves left at Mrs. Delesseline's death—the share of each to be subject to the limitations of Mrs. Adamson's will. Let a writ issue for the partition. If either wishes security for the forthcoming of the property to answer the limitations over, an application, when made, will be heard. Let Lewis Ciples, Mr. Boykin and Mr. Delesseline, each, pay his own costs.

From this decree the defendants appealed on the grounds:—

1. That Mrs. Boykin cannot, in her own name, maintain a suit for the recovery of these negroes.

2. That Mr. Boykin is estopped by his deed.

3. That when the separate estate of the wife has been conveyed or released by the husband, the husband and wife cannot maintain a suit for its recovery.

King, for the appellants.
Petigru, contra.

HARPER, J. The only question necessary to be considered is, whether a married woman may sustain a suit for her separate property, her husband being joined in the bill. If she may, she certainly cannot be estopped by her husband's deed, made in his individnal capacity.

When property is settled to the separate use of a married woman, and no trustee is appointed, it is the known rule of the Court that the husband shall be made a trustee. Being such trustee, it should seem that he was a necessary party to a suit for the trust property, and being liable for costs, that any other prochein amy was unnecessary. It is true that it was said by Lord Hardwick, Pawlet v. Delaval, 2 Ves. sen. 663, if a bill be brought by husband and wife for the wife's property, it is the husband's bill; but in that case, for aught that appears, the suit was for the benefit of the husband.

He explains in Griffith v. Hood, ib. 453, that "where there is any thing for the separate use of the wife, a bill ought to be brought by her prochein amy for her, otherwise it is her husband's bill. However, there have been cases of such a bill by the husband and wife, and the Court has taken care of the wife, and ordered payment to some person for her."

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*This is, I suppose, what we are bound to do, if the bill be sustained. A husband, from necessity, is construed the trustee of the wife, but he is not the proper trustee. In general, the office of a trustee is to protect the property against the husband.

The Chancellor's decree is therefore affirmed, and it is ordered that it be referred to the Commissioner to report to the Court of Chancery at its next sitting, a proper person to be appointed the trustee of the plaintiff, Mrs. Boykin, and that upon such trustee's being appointed, the property allotted to Mrs. Boykin under the writ of partition, be delivered to him to be held to the uses of John Adamson's will.

JOHNSON, J., and O'NEALL, J., concurred.

2 Hill, Eq. 204

JAMES THOMPSON, and JANE, His Wife, and MICHAEL MURRAY, an Infant by His Next Friend the said JAMES THOMPSON, v. STEVENS PERRY, JAMES MURRAY, and ELIZABETH, His Wife, ROBERT W. SEYMOUR, and RICHARD CONNOLY.

(Charleston. March, 1835.)

[*Estoppel* ⟸90.]

What acts will estop a party from setting up a resulting trust.

[Ed. Note.—Cited in Steinmeyer v. Steinmeyer, 55 S. C. 31, 33 S. E. 15.

For other cases, see Estoppel, Cent. Dig. §§ 242–244, 248–256; Dec. Dig. ⟸90.]

[*Dower* ⟸12.]

Wife not dowable of an estate held by the husband as trustee.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 48; Dec. Dig. ⟸12.]

[*Fraudulent Conveyances* ⟸182.]

Contribution to remove a general lien on the whole property will not be allowed among volunteers, unless there was an inevitable necessity that part of the property should pay it: the necessity cannot exist where the donor is still solvent, for it seems then the creditor might in equity, be forced to exhaust the donor's estate before proceeding against the property conveyed.

[Ed. Note.—Cited in Steinmeyer v. Steinmeyer, 55 S. C. 31, 33 S. E. 15.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 568; Dec. Dig. ⟸182.]

[*Husband and Wife* ⟸70.]

Where real estate was conveyed in trust for a feme covert, and to such person as she, by will or deed, should apopint, her appointment by will is valid without the concurrence of her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 302; Dec. Dig. ⟸70.]

[This case is also cited in Williams v. Neel, 10 Rich. Eq. 339, 73 Am. Dec. 94, without specific application.]

The bill which was filed 27th March 1832, states, that on the 1st March 1823, John M. Murray, the former husband of the plaintiff, Jane Thompson, and father of the plaintiff Michael Murray, purchased a lot in Charleston at the corner of King Street and South Bay, for $2500. That on the 13th of the same month, the said John M. Murray by indenture of release for the nominal consideration of $1000, conveyed the lot to defendant Stevens Perry, in trust for Catharine Connoly, the wife of Richard Connoly; and in the release, a power of devising the lot notwithstanding coverture, was attempted to be given. That Catharine Connoly, who was the mother of the plaintiff, Jane, and of the defendant Elizabeth Murray, afterwards in reference to the supposed power, executed an instrument in the nature of a will, by which she devised the said lot to her daughter Elizabeth, (who has since intermarried with James Murray,) on condition that in seven years she pay to the plaintiff, Michael, one thousand dollars, and that defendant, Elizabeth, has, since the death of her mother, remained in possession thereof. That Richard

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Connoly, the husband of Cath*arine, having never, either before or after his marriage, given any power or authority to his said wife to dispose of property by will, or to acquire property to her separate use, her will is absolutely void, and the lot is subject to partition as the estate of the said Catharine: or the trusts of the release having terminated by the death of the said Catharine, the uses of the conveyance result to the grantor and his heirs, and the lot is now part of his estate; and by his will, he devised his whole estate to the plaintiff, Jane, for life, with remainder to his son Michael. The bill avers that the plaintiff, Jane, was at the time the release of her husband was executed under age, and being ignorant of the object of the parties, and supposing that some equitable family arrangement was intended, renounced her right of dower to the lot, which renunciation, under the circumstances, it is insisted is not binding: that the said lot has been conveyed by defendant, Elizabeth, to Robert W. Seymour and Richard Connoly as trustees, by way of settlement on the said Elizabeth and her husband. The bill further states, that on the 25th Sept. 1826, Richard Connoly executed two deeds of gifts, one to John M. Murray, the plaintiff's then husband, in trust for his daughter Jane, of two negro slaves; the other to Elizabeth Connoly, of three negroes: that one of the negroes so given to the plaintiff, Jane, has been levied on and sold to satisfy an execution against Connoly, and being insufficient, the other negro is threatened to be sold for the same purpose. The plaintiffs insist that Murray and wife stand in the same relation to the debtor as they do, and are bound to contribute equally with them to the payment of this execution.

The prayer is, that Murray and wife may be decreed to contribute to the payment of Connoly's debts, for which the negroes so given are liable: that partition of the lot be ordered, if, in the opinion of the Court, it is subject to partition as the estate of Catharine Connoly; or, if the Court should be of opinion that the lot is in Equity, the property of the estate of John M. Murray, that the defendants may be decreed to convey it according to the limitations of his will, and that in either case defendants account for the rents and profits.

The answer of Stevens Perry admits the purchase of the lot by John M. Murray—the release to himself as trustee for Mrs. Connoly, with power to devise, and the execution of the will in pursuance thereof. He does not

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know that Richard Connoly gave his *wife any authority to dispose of property by will or otherwise, but submits that such authority, or his consent may be implied from his knowl-

edge of the release, and requesting this defendant to act as trustee. He admits the execution of John M. Murray's will, but requires proof of the plaintiffs' (Jane's) nonage, when she renounced her dower, and submits that such renunciation is at all events effectual.

The answer of James Murray, and Elizabeth his wife, avers that Catharine Connoly paid John M. Murray $2750 for the lot conveyed to her by the release, she having funds separate from her husband: that Elizabeth held under the will of her mother until shortly before her marriage, when she conveyed the lot and the negroes given to her by deed of gift from her father to Mr. Seymour, in trust for the uses of the marriage settlement. They insist that Mrs. Connoly had full power to devise the lot by way of appointment—deny any right to contribution, and rely on the marriage settlement as a purchase for valuable consideration without notice of any equity or lien.

The answer of Richard Connoly—avers that the purchase of the lot by John M. Murray was made with his (Connoly's) funds, advanced by his wife to Murray without his knowledge, and with a view, as he believes, to secure the property to their family: that his wife executed her will without any authority from him, and without his knowledge or consent: and although he was a party to the marriage settlement between James Murray and his daughter, he did not thereby intend to waive any of his rights; and as the property was purchased with his funds, he prays that it may be decreed to be conveyed to him. That his wife loaned $1000 of his funds to John M. Murray without his knowledge, and he never knew of it until after his wife's death. He prays that in any decree which may be made, as the plaintiffs are the lawful representatives of John M. Murray, they may be decreed to account to him for this money. He denies that at the time the release was executed, the plaintiff, Jane, was under age; on the contrary, he believes she was then twenty-one.

Robert W. Seymour—answers that he is ignorant of the matters charged in the bill: as trustee to the marriage settlement between James Murray and his wife, he prays that in any decree which may be made, the interests of those concerned in the settlement, may be duly regarded and protected.

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*The cause came on for trial before Chancellor Johnston, at Charleston, January 1833.

The plaintiffs gave in evidence the conveyance for the lot from John M. Murray to Stevens Perry, (expressed to be in consideration of $1000) in trust for Catharine Connoly, and "to the use of such person or persons, for such estate or estates, and for such interest, and in such parts and proportions, and chargeable in such manner, either absolutely or conditionally, as the said Catharine at any time, by deed or instrument in writing, or by last will and testament to be sealed and delivered by her in the presence of two or more witnesses, shall direct, limit and appoint." On which is the renunciation of dower in common form by the plaintiff, Jane, then Murray's wife.

The will of Mrs. Connoly, dated 16th August, 1828, was produced by which, in reference to the power contained in the deed, she devises the lot to her daughter Elizabeth, on condition that within seven years she pay to the plaintiff, Michael Murray, one thousand dollars. As also the will of John M. Murray, dated 18th April 1829, in which he directs that his personal estate be sold to pay his debts, and if insufficient, that his real estate, to wit: "my three story brick house on South Bay, as also my two story wooden house, now occupied by me as a dwelling house, &c.," be sold; "and after the payment of debts, I give to my wife, Jane, my real and personal estate which may remain, during her natural life, and after her decease to my son Michael, &c."

Also, two bills of sale from Richard Connoly, to his daughters, Jane and Elizabeth, as stated in the bill, dated 23d Sept. 1826, with clauses of warranty "against all persons," the first purporting to be in consideration of $150, and the last of $100.

Certain judgments against Richard Connoly were given in evidence, on account of which it was proved, one of the negroes in the bill of sale to Jane was sold, leaving still unsatisfied balances.

The defendants gave in evidence, the deed of marriage settlement, dated 31st Dec. 1829, between James Murray of the first part, Elizabeth Connoly of the second, and Robert W. Seymour and Richard Connoly of the third; whereby, in consideration of a marriage intended between the two first, the said Elizabeth conveyed to the two last the said lot and negroes mentioned in the deed and bill of sale, in trust for the use and benefit of the said Elizabeth and James during her life, and to such person as she by will should appoint.

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*It was proved that John Murray came to Charleston a poor young man, about 1820, and worked as a tradesman at low wages until May 1821, when he married the plaintiff, Jane, and commenced merchandizing.

William Carter, of the firm of Bee & Carter, sworn. Was a broker in 1823. Was employed by Mrs. Beach and Mrs. Gilchrist to sell two lots, one at the corner of South Bay and King streets; the other adjoining it on King-street. Sold them Jan. 10, 1823, separately. At the sale, they were set down to John M. Murray, each at the sum of $2,500. Before the sale, John M. Murray and Richard Connoly came to witness, together, and gave him to understand that Connoly was to buy the corner lot, and Murray the other.

When titles came to be made, witness, recollecting this, remarked to them, upon finding that titles were to be made to Murray for both lots, that he was surprised at it. They replied, the matter was understood between them. John M. Murray always gave witness to understand, that the money paid for the corner lot was paid by Mrs. Connoly. Although the titles were made to Murray, yet there were two bonds and two title deeds, one for each lot. The bonds were for the same amount, drawn by the same obligors, and payable at the same time: but secured by separate mortgages, one for each lot. Mrs. Beach and Mrs. Gilchrist put both bonds into witness' hands. Murray paid part of the money to them before witness received them, and took loose receipts in general terms. After witness received them, he made partial payments, and took the same kind of receipts. Witness therefore had a right to enforce either mortgage for the balance left. But conceiving that the lot he considered Connoly's had been paid off by Mrs. Connoly, through Murray, he put Murray's bond in suit, and enforced the mortgage on his lot—that is, the lot on King-street.

Mrs. Murray sworn—objected to. Connoly and wife lived at the corner of King-street and South Bay. Had two children, Mrs. Thompson and witness. There were leased houses on the lots when sold by Bee & Carter. The houses belonged to different persons from those who owned the lots.

Witness knows that her mother paid $2,750 for the corner lot. Murray charged $250 for the difference in the value of the lots. Witness lived in the house, and knew of each payment when made. Her mother paid to John M. Murray, who came for the money to carry it to Carter.

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*Has heard Murray and her mother often in conversation about it: they always said the payments were made by her. He had not the means. He had not even the means to pay for his own lot when he bought it—had been keeping store and boarders but a short time.

Heard Murray often say he had not the means to begin with, but that her mother gave him $1000 for that purpose.

Her father and mother were in possession, before the purchase, of the corner house, and continued to live together there till 1826, when he went to his plantation, leaving her mother, &c. there. He was backwards and forwards after that time. There was a misunderstanding between her father and mother, which sprung up about that time.

Has never, to this hour, heard any one whatever say that her mother did not pay for the house.

Murray, in 1826, borrowed from her mother $1000, to aid him in buying a lot on South Bay. He promised to give a note for the loan—promised in witness' presence. The note was to be payable at two years. The loan was to be free of interest, for two years, and then to bear interest at five per cent. He bought the lot, which he owned at his death; but he never gave the note. Her mother repeatedly asked for it: his reply always was, that he would go and write the note, and bring it: but he never did so. Her father knew nothing of this loan. John M. Murray died in 1829, after witness' mother.

Just before her mother's death, she deposited a large sum in specie, in the United States Bank. Can't tell the amount.

Cross examined. Sometimes her mother delivered the money in payment of the corner lot to Murray's wife, who delivered it to her husband. She took no receipts. The money passed confidentially. Her mother was to have the bonds delivered to her when the last payment was made.

Presumes the money was saved by her from a store kept by her and her father, in which they did a pretty good business. No money came to her mother but from the store. The store was kept in her father's name.

The $2750, the $1000, and the other $1000 loaned, all came from the store. Her father knew of the profits of the store, but left it to his wife to take care of them.

The testimony going to show a resulting

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trust, given by Car*ter and Mrs. Murray, and the testimony as to the loan of the $1000 given by the latter, was objected to, on the ground that it was incompetent to prove the trust by parol; and on the further ground that the resulting trust and loan could only be set up by cross-bill. The evidence was received subject to the objections, in order to avoid a new trial.

Johnston, Chancellor. The first question, among those discussed, is whether the plaintiffs, Thompson and wife are entitled to contribution for the slave sold, and to have James Murray and wife decreed liable with respect to the slave threatened with sale. It is unnecessary to go into this matter at all, since this being a case of separate conveyances, unless there is something to make Richard Connoly liable to the plaintiffs, no one holding under him can be made responsible. If the bills of sale, in contradiction to their terms, be held mere gifts without warranty, then Richard Connoly, and of course other volunteers under him, holding by separate conveyances, are not responsible to these plaintiffs. If the bills of sale set forth the real terms of the transfer, then these plaintiffs have ample remedy if Richard Connoly be solvent; and there is no allegation in the bill of his insolvency. Besides, it is not alleged that the debts of Connoly existed, or bound the slaves, when conveyed by him.

The next point concerns the lot at the corner of King-street and South Bay.

The evidence satisfies me that the funds

with which the lot was purchased never belonged to John M. Murray, and that the title was never intended to vest in him. He was, therefore, really a trustee, and merely executed a trust when he conveyed to Perry. The conveyance carried the fee out of him; and his wife's dower was well renounced also, her allegation of infancy not being proved.

As, in reality, John M. Murray was a mere trustee, even if there had been a defective execution of the power of appointment by Mrs. Connoly, his legatees could not complain. The property might as well rest where it is, or in Perry's hands, as to be brought back, where it would be liable to a trust.

If any body could object, it would be Richard Connoly, with whose funds the lot was purchased, and to whom a trnst resulted.

But he cannot object. It appears from what he told Carter, that he consented to the investment, and to the titles going in the

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name *of Murray: and his becoming a party to the marriage settlement between his daughter, Elizabeth, and James Murray, closes his mouth, on the score of a resulting trust.

The only doubt that could exist in the matter was, whether the execution of the power of appointment by Mrs. Connoly was sufficient.

First, whether an interest was conveyed by Murray sufficient to extend to the estate which she appointed. I feel satisfied the objection is groundless, upon a due construction of the words of the deed. I am also satisfied, that the purpose for which the conveyance was made, would of itself extend the interest parted from by Murray as far as was necessary to cover the appointment provided for in the same instrument.

If Mrs. Connoly's appointment was invalid, it was not because the estate appointed was not out of Murray to the full extent of her appointment; nor because it was not rendered subject to her appointment to the extent to which she did appoint: but it must be because she was not competent to execute the power.

The objection is, that she was not competent either to receive or to execute the power without her husband's permission. If necessary, I should hold that she was: the power was a naked power of appointment, not coupled with a trust. In such case the husband was not responsible, as he would have been for the mal-execution of a trust; and therefore that control, which would be necessary to his protection in the latter case, is not given him in the former.

But I am satisfied from the evidence that her husband consented to the arrangement, of which this was a part, before the titles passed to Murray. Carter's evidence shews this. Again, his joining in the deed of settlement on James Murray's marriage, is evidence of his assent to the appointment.

John M. Murray's will is dated several months after Mrs. Connoly's was admitted to probate, and recorded; and by that will he acquiesces in everything done. He does not pretend to claim the lot. He specially describes all the real estate he has, using the words, "my real estate, to wit:—my three story brick house on South Bay, 'and' my dwelling house and grocery at the lower end of King-street." There is no residuary clause in the will. Here then he describes two lots as his whole real estate, one of which joins the one in question, but never intimates a claim to it.

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*As respects Thompson and wife, the bill must be dismissed. As respects Michael Murray, the time for his claiming the 1000 dollars has not rolled round; and, therefore, it must be dismissed as regards him also.

The 1000 dollars claimed by Richard Connoly cannot be recovered without a cross-bill, if with one. It looks like a legal demand. It is decreed that the bill be dismissed.

The plaintiffs appealed from this decree on the grounds:—

1. That the deed which empowered Mrs. Connoly to make a will, being a post-nuptial deed, is invalid to confer such power on a married woman; and that therefore the will itself is void and of no effect, being executed during her coverture, and that too without the knowledge of her husband.

2. That the claim of plaintiffs for contribution towards the amount of Connoly's debt, with which the negroes were chargeable, (both the sisters having the slaves as gifts from the father,) ought to have been allowed by the Chancellor, the same being a clearly equitable and just claim as among volunteers.

3. That Mrs. Thompson is at all events entitled to dower of the premises in dispute, she being in her minority when she renounced it.

4. That the decree is in other respects contrary to the laws of the land, and unsupported by the weight of testimony in the cause.

Bailey, for the appellants. On the first ground, cited Co. Lit. 12, a. Harg. n. 6; Co. Lit. 3, a; 2 Roper, H. & W. 108; 2 Rep. 57. As to the plea of a purchase for valuable consideration without notice, the instrument under which defendants claim gave notice.—2 Fonb. 151-66 § 3; Grimke v. Grimke, 1 Eq. Rep. 366; Stat. Eq. Rep. 292; 2 Bail. 332.

Dunkin, contra. As to the power of a feme covert to dispose of property by way of appointment, cited 4 Kent's Com. 319; 3 John, Ch. 549 Bradish v. Gibbes; Hearle v. Greenbank, 3 Atk. 696; Sugden, 330; 2 Ves. 191. Connoly may be estopped by being a party to the marriage settlement; if not, a trust results to him.

Lance, in reply. Cited 1 Cruise, 483; 2 Vern. 67; 1 Black, 447; 4 Com. Dig. Estates

by Grant, 8; 7 Bacon. Ab. 300, Tit. will; 2 Roper, 98, 100. As to contribution, 1 Mad. 233.

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*O'NEALL, J. Upon the plaintiff's third ground of appeal, it is only necessary to remark, that the Chancellor says that there was no proof of the infancy of the plaintiff, Mrs. Thompson, then Mrs. Murray, at the time she renounced her dower. This is a very sufficient answer to the ground. But without saying that even infancy would avoid her renunciation of dower, there is another view which would prevent her from being endowed of the premises. According to the proof, her husband (Murray) purchased the premises as a trustee for Mrs. Connolly, and paid for them with money furnished by her. His seizin was therefore entirely in trust, and of such an estate, it was held in the case of Plantt v. Payne, 2 Bail. Rep. 319, the wife could not be endowed.

As to the plaintiff's second ground, there can be as little difficulty; for let it be conceded that generally, as among volunteers, there ought to be contribution to remove a general lien attached upon the whole property conveyed; yet this case cannot have the benefit of such a rule. For contribution can never be asked for on account of the removal of a common burthen on property conveyed, unless there was an inevitable necessity that a part of the property conveyed should pay it. Screven v. Joyner, executor, and others; 1 Hill's Eq. Rep. 261, [26 Am. Dec. 199.] This inevitable necessity or compulsion to pay might exist among volunteers, where the donor had given to them his whole estate, and was thereby rendered insolvent, or had given to them a part of his estate, and had subsequently become insolvent. But such necessity or compulsion cannot exist when the donor is still solvent, and a creditor seizes and sells the property given, or the donee pays the donor's debts. For in such a case the creditor either has no right to sell the property at law, or in all events in equity, and would be forced, on a proper application to exhaust the donor's estate before he would be allowed to go against property which his debtor had given away. In this case it is not pretended that the donor is insolvent; and it hence follows that there cannot have been that inevitable necessity or compulsion to pay out of the property conveyed to the plaintiff, Mrs. Thompson, which is necessary to entitle her to contribution from the other donee. This view of the case is upon the supposition that the plaintiff, Mrs. Thompson, and her sister, Mrs. Murray, the defendant, had been shewn to be donees in possession at the time the sheriff sold the slave conveyed to Mrs. Thompson, and decides the case upon the most favorable footing on which the plaintiffs could put it.

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*The first ground of appeal makes the question, whether the deed from John M. Murray to Stevens Perry, the trustee, could empower Mrs. Connelly (a feme covert) to make a will? I am satisfied, both that the power could be conferred on a married woman, and also that it was well executed by her will, and that the express consent of the husband is wholly immaterial to the validity of either. For notwithstanding in general legal contemplation, the existence of the wife is merged in that of the husband during coverture, yet this rule is not of such universal application as to render every act of the wife void. It seems she may even purchase and hold real estate without the express consent of her husband—that her acquisition cannot be defeated by any one but him, so long as he may live. For in Coke, upon Littleton, 3, a. 122-3, it is said, "a feme covert cannot take anything of the gift of her husband, but is of capacity to purchase of others without the consent of her husband, and of this opinion was Littleton in our books and in this book, section 677; but her husband may disagree thereto and divest the whole estate; but, if he neither agree nor disagree, the purchase is good; but after his death, albeit her husband agreed thereto, yet she may, without cause to be alleged, waive the same, and so may her heirs also, if after the decease of her husband she herself agreed not thereunto." In this case neither the husband nor the heirs of the wife ask to set aside the conveyance to the wife: the plaintiffs regard the conveyance as good, but the power to appoint as void. But, if the wife could purchase, she might on any conditions, and under any limitations, and it is the privilege of the husband during coverture, of herself or her heirs after his death, to affirm or disaffirm the whole contract; a part cannot be taken and a part rejected—all or none must stand.

If however the wife was incompetent to execute the power conferred on her by the deed, then her will would be void, and the land must either revert to the grantor, Murray, or be distributed as her estate. It seems to be well settled "that every person capable of disposing of an estate actually vested in himself, may exercise a power or direct a conveyance of the land. The rule goes further, and even allows an infant to execute a power simply collateral and that only; and a feme covert may execute any kind of power, whether simply collateral, appendant or in gross, and it is immaterial whether it was given to her while sole or married. The concurrence of the husband is in no case necessary."(a) This is the language of one of the greatest chancery lawyers of the present

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*day, Chancellor Kent; and it cannot be nec-

(a) 4 Kent. Com. 318, 319.

essary to do more than refer to his clear statement of principles, by which this part of this case must be put at rest. It may be well however to look to the manner in which an appointment operates, to shew that no objection can in fact exist to an execution of it by a feme covert. The appointee is merely designated by the person making the appointment; his estate and rights are derived from the deed creating the power. As is said in Bradish v. Gibbs, 3 J. C. R., 550, the principle is well established that when a person takes by execution of a power, he takes under the authority of that power. The meaning is, as Lord Hardwicke expresses it, that the person takes in the same manner as if the power and instrument executing the power had been incorporated in one instrument, and as if all that was in the instrument executing had been expressed in that giving the power. This being the case, and the appointee taking nothing from the wife, but all from the person creating the power, there can be no reason to avoid her act on account of coverture, the disability of which is intended both for the protection of the husband and also for herself.

It is Ordered and decreed that Chancellor Johnston's decree be affirmed.

JOHNSON, J., and HARPER, J., concurred.

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2 Hill, Eq. 215

Ex parte JOB PALMER, Surviving Executor of Samuel Miller, deceased.

(Charleston. March, 1835.)

[*Life Estates* ⟸17.]

Tenant for life may be paid for improvements when he finishes buildings left unfinished.

[Ed. Note.—Cited in Dellet v. Whitner, Cheves, Eq. 230; Thurston v. Dickinson, 2 Rich. Eq. 318, 46 Am. Dec. 56; Corbett v. Laurens, 5 Rich. Eq. 316; Buck, Hefflebower & Neer v. Martin, 21 S. C. 593, 53 Am. Rep. 702; Shumate v. Harbin, 35 S. C. 529, 530, 15 S. E. 270; Trimmier v. Darden, 61 S. C. 234, 39 S. E. 373.

For other cases, see Life Estates, Cent. Dig. §§ 37, 38, 42; Dec. Dig. ⟸17.]

[*Executors and Administrators* ⟸132.]

An executor will be allowed compensation for improvements made by him on real estate, when they are such as the Court would have authorized; and whether they are such depends on the fact whether they are beneficial to all concerned.

[Ed. Note.—Cited in Dellet v. Whitner, Cheves, Eq. 230; Thurston v. Dickinson, 2 Rich. Eq. 318, 46 Am. Dec. 56; Corbett v. Laurens, 5 Rich. Eq. 316; Buck, Hefflebower & Neer v. Martin, 21 S. C. 593, 53 Am. Rep. 702; Shumate v. Harbin, 35 S. C. 529, 530, 15 S. E. 270; Trimmier v. Darden, 61 S. C. 234, 39 S. E. 373.

For other cases, see Executors and Administrators, Cent. Dig. § 437; Dec. Dig ⟸132.]

[*Guardian and Ward* ⟸68.]

[Cited in Bramlett v. Mathis, 71 S. C. 127, 50 S. E. 644, to the point that the measure of damages for improvements is the increased value of the property.]

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 264–282, 497; Dec. Dig. ⟸68.]

O'NEALL, J. In the case of Samuel W. Miller, legatee of S. Miller v. the executor and executrix of Samuel Miller and others, the decretal order was made out of which this application arises. In that case it was adjudged in the construction of the will of the petitioner's testator, that the estate for life by it devised to the widow, then the wife of the petitioner, did not commence until Job P. Miller, a son of the testator, attained to the age of twenty-one years. Before that event, in 1799, as appears by the same decree, the petitioner built the house

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on the unimproved lot devi*sed to the widow of the testator for her life. The petitioner was the executor of the testator's will, and at the time he erected the house, was the husband of the widow, and therefore tenant per auter vie in expectancy. There seems to be no doubt that he acted with an intention to benefit the estate; and at the same time not to prejudice himself by building without a chance of reimbursement. He was advised by the ordinary of Charleston District in 1798, to erect the building, "as it will greatly conduce to the benefit of the estate," and if upon the death of the tenant for life, "the executor should not be fully reimbursed for the expenses of the said building, the Court of Equity will compel the children to bear their proportion of the buildings so descending." I have thus stated such additional facts as did not appear in the decree upon the petition, and which may be material. It seems to me that there is no well founded objection to the proceeding by petition. The point now made was reserved in the former decree, and leave given to the petitioner to make application as he has done. The proceedings which may be had on the petition will be in the case of Miller v. the executor of Miller, deceased. That some of the party to that suit is dead, is no objection, if their representatives be made parties to this petition, as appears to be done.

After divesting the case of these preliminary objections, it will be necessary to examine the right of the petitioner to be reimbursed for the house and other buildings erected by him on the vacant lot, which, by his testator's will, after Job P. Miller became fully of age, was devised to the testator's widow, late the wife of the petitioner.

I agree with the Chancellor, that the former decree does not conclude the respondents from objecting to any allowance being made to the petitioner on that account: it

is true that it would seem that the Chancellor thought, when he drew the former decretal order, that the petitioner was entitled to compensation; but still there was no adjudication that he was so entitled. It was a mere reservation of the question until the life estate fell in, "and then all parties (says the decree) are to be at liberty to apply by petition to this Court to adjust the mode of settlement or compensation between Mr. Palmer, as owner of the house, and the owners of the lot." There is nothing in this direction which can operate to estop the parties from now making the question, whether the petitioner is entitled to be paid for his improvements? For, at the most, it cannot have any effect beyond a mere inter-

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locutory order; it does *not end the controversy between the parties, and hence is not a final decree, which could alone estop the parties from the question. It seems however to me that the opinion of the Chancellor, which he seems to have entertained in his former decree, was right, and that his present conclusion has resulted from not having the facts of the case so fully before him as they were when he pronounced his original decree. I agree that generally a tenant for life is not to be paid for improvements; but to that rule there may be exceptions, as is manifestly the case where a tenant for life goes on and finishes buildings left by the testator in an unfinished state. Hibbert v. Cook, 1 Sim. & St. 552. The reasons of that exception may be useful to us here. They certainly are two-fold, first, that it is beneficial to the remainder; and second, the implied intention of the testator from the state of the property, its unfinished condition, that it should be finished out of his estate in order to render it useful to both the tenant for life and the remainder men. In the case before us both of these reasons apply directly: it is alleged that the improvement was a beneficial one to all concerned; and it is manifest that the lot was most probably useless to the tenant for life unless it was improved. We should therefore, perhaps, (were it necessary to do so,) be authorized to presume that the testator's intention was that the lot should be improved, as well for the use of the tenant for life as of the remainder men.

But it is not necessary to resort to the doctrine between tenants for life and in remainder, in order to decide the question. For the house and other improvements were made in 1799, six years before the petitioner's wife's life estate commenced; he built as executor and under the advice of the ordinary. In Inwood v. Twyne, 2 Ed. 152, Lord Chancellor Northington stated the rule which always governs this Court in passing upon the acts of trustees. He said, "I can conceive many cases where a conversion of such estate (personal into real) might be made by trustees or guardians, and that this Court would support and approve their conduct; and it would be strange to say that trustees would be censured in this Court for doing what the Court would have ordered to have been done."

Under this rule the question is, were the improvements such as the Court would have authorized the executor to make? This would have depended upon the fact whether

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it would have been *beneficial to all concerned as devisees. On looking back to Mr. Miller's will, I perceive that he has directed all his estate, real and personal, (after payment of his debts,) to be kept together for the joint use and maintenance of his wife and children until his son, Job, arrived at the age of twenty-one years. This I think constitnted a strong reason for the improvement of the lot: while vacant it would be unproductive capital; when improved its rents or use might contribute to the purposes of the trust, for the widow and children. But the fact that it might have been such an improvement as the Court would have ordered, is a ground to retain the petition, and to submit the question to the examination of the Commissioner. In Myers v. Myers, 2 M'C. Eq. R. 265 [16 Am. Dec. 648] the defendant, an executor, was allowed for improvements on the trust estate, on the ground that it was for the benefit of the cestique trusts. The petitioner it seems to me is entitled to the benefit of the same rule. He made the improvements as executor, and if they were such as were beneficial to the estate, and such as a prudent man, the owner of such an estate as Mr. Miller's, would be willing to make, then the petitioner is entitled to compensation.

But he is not entitled to more than the present value of the improvements, to be ascertained by the enhanced value which the said improvements have given to the lot. If the income from the house and lot from its erection (as the former decree allowed Mr. Palmer to retain the whole without an account,) should on the reference appear to have been more than the interest on the sum of money expended by Mr. Palmer, in making improvements and the costs of necessary repairs, then such excess will be deducted from the present value of the improvements.

It is Ordered and decreed that Chancellor De Saussure's decree, sustaining the demurrer to this petition, be reversed, and that it be referred to the Commissioner to ascertain and report whether the said improvements were beneficial to and proper for the estate; and if so, then the amount to which the petitioner is entitled on account of the said improvements, on the principles and according to the directions contained in this opinion.

JOHNSON, J., and HARPER, J., concurred.

2 Hill, Eq. *219

*J. B. BARNWELL, and Others, v. JOHN PORTEUS, and Others.

(Charleston. March, 1835.)

[*Mortgages* ⟸174.]

Under the act of 1698, (P. L. 3) a deed recorded, altho' not within 6 months, (as required by the act of 1785,) acquires preference over a prior unrecorded mortgage.

[Ed. Note.—Cited in Youngblood v. Keadle, 1 Strob. 123, 126; Steele v. Mansell, 6 Rich. 442, 461; Boyce v. Boyce, Id., 306; McKnight v. Gordon, 13 Rich. Eq. 238, 239, 249, 94 Am. Dec. 164; McNamee & Co. v. Huckabee, 20 S. C. 196, 198.

For other cases, see Mortgages, Cent. Dig. § 413; Dec. Dig. ⟸174.]

[*Mortgages* ⟸175.]

A junior judgment creditor is not, under the act of 1785, entitled to preference over an unrecorded mortgage.

[Ed. Note.—Cited in Youngblood v. Keadle, 1 Strob. 126; McKnight v. Gordon, 13 Rich. Eq. 243, 249, 94 Am. Dec. 164; Carraway v. Carraway, 27 S. C. 580, 583, 5 S. E. 157.

For other cases, see Mortgages, Cent. Dig. § 418; Dec. Dig. ⟸175.]

[The Reporter not having been furnished with any other papers in this case, can present no other report than that contained in the following opinion of the Appeal Court.]

EVANS, J. (sitting for HARPER, J.) This case was decided by Harper, J., sitting for Chancellor De Saussure, at Coosawhatchie, in January 1833. On examining the decree, there is no ground for questioning its correctness, as to the defendants, John Porteus and Dr. Fuller; but so much of the decree as relates to the rights of the defendant, Arthur G. Rose, it is thought, is erroneous, and it is my duty to assign the reasons for that opinion. It is very clear, as the presiding Judge says in his decree, that the "case was very imperfectly presented on the Circuit;" an important feature in the case, and that which probably led to the error in the decree, was not brought to the view of the Judge, viz.: that the deed from the sheriff to Rose, was recorded in the Register's Office of Beaufort district. The bill was filed to foreclose a mortgage from John Porteus to E. W. Barnwell. The mortgage was never recorded. Subsequently to the date of the mortgage, the sheriff levied on a part of the mortgaged premises, and sold the same under a fieri facias to the defendant, A. G. Rose, who being the oldest judgment creditor, did not pay the money, but entered on his execution a credit for the amount of his bid. The deed from the sheriff to Rose was recorded in the Clerk's office of Beaufort district, but not until the expiration of six months. On this statement of facts two questions present themselves. 1st. Does the deed of the sheriff to Rose, being recorded, take precedence of the plaintiff's unrecorded mortgage. 2d. Has Rose's judgment against Porteus a preference to the plaintiff's mortgage, under the 45th section of the Act of 1785.

Rose's deed not having been recorded within six months, can acquire no preference under the Act of 1785, commonly called the County Court Act. But by the Act of 1698, P. L. page 3, "that sale, conveyance or mortgage of lands or tenements which shall be first recorded in the Register's office in Charleston, shall be taken, deemed, adjudged, allowed of, and held to be the first sale, conveyance or mortgage, and be good, firm and substantial in all Courts of judicature within South Carolina." At the date of this Act,

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*Charleston was the principal settlement in the State. It was the seat of government, and the only place of judicature. This act speaks only of deeds recorded in Charleston, yet I apprehend when other offices for registering of deeds were established, the provisions of the act, apply to deeds recorded in such offices, as well as to those recorded in Charleston. By the 45th section of the County Court act, it is declared that "no conveyance of lands, tenements, or hereditaments shall pass, alter or change from one person to another, any estate of inheritance in fee simple, or any estate for life, or lives, nor shall any greater or higher estate be made, or take effect, in any person or persons, or any use thereof, by bargain sale, lease, and release, or other instrument, unless the same shall be made in writing, signed, sealed and recorded in the Clerk's office of the county where the land mentioned to be passed and granted shall be, in manner following, viz: If the persons who shall make and seal such instrument of writing, shall be resident within the State; then the same shall be recorded within six months from the signing, sealing and delivery." And if any deed shall not be recorded within the time mentioned in the act, "such deed or other conveyance shall be legal and valid only as to the parties themselves and their heirs, but shall be void and incapable of barring the rights of such persons, claiming as creditors, or under subsequent purchases, recorded in the manner prescribed by the act." Now, although by the Acts of the 12th and 17th of March, 1785, the whole State is laid off into counties, yet practically, those acts never went into operation in the districts of Georgetown, Charleston and Beaufort. But by the Act of 1789, P. L. 485, it was declared sufficient to record deeds in the Register's office where the land lay, and where County Courts were not established. It is manifest that neither the plaintiff nor Rose has complied with this act, and but for the Act of 1698, P. L. p. 3, the unrecorded mortgage would take precedence of Rose's deed; but as Rose has recorded his deed, he has acquired a preference in pursuance of the Act of 1698.

On the 2d. ground, it is contended that Rose, being a judgment creditor, is entitled to preference over the plaintiff's mortgage, under the clause of the Act of 1785, above recited. It is exceedingly difficult to say what creditors are meant by the act, whether all who come under that description, or only such as claim under some instrument of writing, which may be recorded. If this were

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*now a new question, I should have great difficulty in making up an opinion, but I am relieved by former adjudications from any difficulty on this point, so far as it relates to this case. In the case of Ash v. Ash, 1 Bay, 305, Chief Justice Rutledge, says, "a mortgage is not void by not being on record. The only risk the mortgagee ran, was the chance of another deed from the seller (Berwick) for the same land, being put on record first:" and accordingly in the case of Ashe v. Livingston 2 Bay, 80, the money arising from the sale, was recovered from the judgment creditor to whom it had been paid, in a suit brought by the executor of the mortgagee. It is true that the mortgage in this case was anterior to the Act of 1785, and it may be, was not within its provisions; yet the Court lay no stress on this circumstance, and the principle is laid down broadly, that as to a judgment creditor junior to the mortgage, the latter is good without recording. In the case of Pennman v. Hart, 2 Bay, 251, the Court appear to have decided on the grounds that the provisions of the County Court Act did not extend to cases arising in those parts of the State where the County Court system had never gone into practical operation; yet the case of Ash v. Ash is referred to, and its authority not questioned. So far as I have been able to ascertain, the principle of that case has been regarded as the settled law of the land for many years.—I speak from my own experience when I say twenty years at least. Deeds in fee simple rest on the same footing as mortgages in this particular, and if the latter are to be postponed in favor of creditors, so also must the former. If this doctrine were now reversed, there is no conjecturing the consequences in unsettling the titles of the people of this State to their lands. In Ravenel & Smith v. Smith, 1 M'C. Eq. Rep. 148, Judge Nott, speaking of the case of Ash v. Ash, says, "I must confess I never have been perfectly satisfied with that decision, but it has been received and acted on as the law for upwards of thirty years, and ought not to be questioned." Indeed, so well did I suppose the question to be settled, that an unrecorded mortgage or deed, if free from all taint of fraud, was good against one claiming as a creditor merely without prior lien, that I was somewhat startled when I heard the question gravely made and argued. If the principle be wrong, let it be altered for the future by the legislature; but it is at all times unsafe for a Court to reverse a decision, although it may have been wrongfully decided originally, which has been acted on so long as to become a rule of property.

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*It is therefore Ordered and decreed, that unless the said John Porteus shall, on or before the 1st Monday in October next, pay up the amount due on his said mortgage, the Commissioner shall, on the said day, or at some subsequent public sale day, sell all the land described in the mortgage mentioned in the bill, except so much thereof as is included in the sheriff's deed to A. G. Rose. The sale to be on a credit of six months, with a mortgage and personal security. The costs to be paid out of the proceeds of the sale, and the balance, or so much as will satisfy the mortgage, to be paid to the plaintiffs when collected.

JOHNSON, J., and O'NEALL, J., concurred.

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2 Hill, Eq. 222

THOMAS HARGROVES and SUSAN, His Wife, Formerly Susan Wheeler, v. EDWARD MERAY and SARAH A. MERAY, His Wife, and JOHN T. VAUSSE.

(Charleston. March, 1835.)

[*Executors and Administrators* ⇐56.]

Equity will entertain jurisdiction of a bill by the administratrix to make property conveyed in a voluntary deed of her intestate, liable to his debts, and to prevent it from being removed from the State.

[Ed. Note.—Cited in Wheeler v. Meray, Bailey, Eq. 508.

For other cases, see Executors and Administrators, Cent. Dig. § 308; Dec. Dig. ⇐56.]

[*Fraudulent Conveyances* ⇐95.]

When in a settlement by the husband for the separate maintenance of his wife, the trustee covenants to save the husband harmless against the wife's debts, this is regarded such a valuable consideration as will protect the property from the husband's debts.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 286; Dec. Dig. ⇐95.]

[*Fraudulent Conveyances* ⇐76.]

A deed from a man to a woman with whom he had lived in a state of adultery, held to be voluntary, and the property thereby conveyed, (after exhausting the assets at the death of the grantor,) decreed liable to his debts.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 196; Dec. Dig. ⇐76.]

[*Husband and Wife* ⇐12.]

Settlement on a wife, when decreed.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 58–67, 396; Dec. Dig. ⇐12.]

On the 5th of April, 1827, William Wheeler, a married man, gave by deed to Sarah A. Evans, a girl who was then with child by

him, seven negroes in the following manner, viz:

"South-Carolina, District of Charleston.—Know all men by these presents, that I, William Wheeler, of the above named parish, and in the said district, do hereby give and bequeath, and by these presents do give and bequeath unto Sarah A. Evans, daughter of Mary Evans, widow of John Evans, at present living and residing in the parish above mentioned, all that family of negroes, viz: April, Cæsar, Chloe, Betty, Nancy, Patty and Ellen, to hold and keep the said negroes, with the future issue and increase during life, and at the expiration of the life of the within named Sarah A. Evans, all that is herein bequeathed shall go to her heirs forever. But in case she has no heirs, and her brother, Elias Evans, be living at the time of her death, it is my will and desire that he may be fully empowered with authority to act, and by these presents under my hand and seal, he is considered by me, after the death of the within Sarah A. Evans, to be the sole owner of the within mentioned negroes,

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under the provisions already inserted in *the deed of gift. In witness whereof I have hereunto affixed my hand and seal, this 5th day of April, 1827." Signed and sealed in the presence of three witnesses.

On the 19th March, 1828, the plaintiff Susan, then Wheeler's wife, having separated from him, filed her bill for alimony, alleging the intercourse between him and Sarah A. Evans as the cause of separation. On the 20th May following, the bill for alimony was compromised by Wheeler's conveying by a deed of separation to a trustee, for his wife, the property that was her's before marriage. The deed was signed by all the parties, and the trustee covenants to save him harmless against his wife's debts. Sarah A. Evans married Meray, but left him and returned to Wheeler, with whom she continued to live. In July 1829, Wheeler died intestate; administration was committed to the plaintiff, the widow. Meray seized the negroes contained in the paper of 5th April, 1827, and with the assistance of the other defendant, Vausse, was carrying them off out of the State. The administratrix filed this bill for an injunction to prevent the negroes from being carried off; to have an account of Wheeler's debts, and directions for the payment of them, and the paper aforesaid, if fraudulently obtained, set aside or reduced, if it should be determined to come within the provisions of the Act of the Assembly respecting gifts, to the injury of wife and children; or the negroes disposed of as assets of Wheeler, if the paper should be declared a will—and for general relief.

The injunction was granted on the 18th September, 1829, and the defendants answered—Edward Meray insisting on his marital rights, Sarah Meray claiming her equity under the instrument, and Vausse claiming the negroes as the agent of Meray, and denying the jurisdiction of the Court as well as all fraud.

In January 1830, the cause was heard by Chancellor De Saussure upon the bill, answers and evidence.

His Honor ordered a reference to enquire into the amount of Wheeler's estate and his debts.

The defendant, Meray, appealed, and in April 1831, the Court of Appeals sustained the jurisdiction, and extended the order of reference to enquire whether the paper was intended as a deed or will, and to admit parol evidence on the point, reserving the question as to creditors for the coming in of the report. Susan Wheeler, the plaintiff, married with the other plaintiff, Hargroves,

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and the *suit was continued by a bill of revivor in their names. She rendered her account as administratrix, and the master reported the claims rendered against the estate. The plaintiff having elected to take her dower, the lands were sold, and all the estate of Wheeler is exhausted; the only assets to pay his debts are the negroes which he conveyed to defendant, Sarah, and the negroes and cattle which he conveyed to the plaintiff's trustee, as above mentioned. The Commissioner also took the evidence of Mary Evans, mother of the defendant. She stated that the defendant was put to live with Wheeler's wife, and was debauched by him when under fifteen years of age; her child was born before she was sixteen. That the paper of the 5th April, 1827, was handed to witness by Mrs. Wheeler, and Wheeler told her he had done wrong, and made over the negroes; and Mrs. Wheeler told her the negroes were intended as a compensation, and that she had selected them herself; the child was not then born. That Sarah went from Wheeler's house to a house on his plantation, and took one of the negroes with her. Witness had the paper recorded by the advice of Mr. Cordes. Mrs. Wheeler left her husband, as witness believes, by the advice of her friends, and Sarah went back to his house with her child. She executed a paper as witness believes, renouncing all right to the negroes during Wheeler's life. Meray was Wheeler's overseer, and married Sarah with his consent. A week before the marriage, Sarah left Wheeler and came to witness' house. Meray knew of the paper and promised to make a settlement, but Sarah would not wait for it. She was soon anxious to return to Wheeler and did so, which caused a separation. She was with Wheeler when he died, and refused after his death to return to Meray as she said she was afraid he would treat her child ill.

Mr. Broughton's letter (which by consent was received in evidence) states the particu-

lars respecting a deed he prepared at the request of Wheeler, and with the assent of Sarah Evans, to correct a mistake in the deed of April 1827, as the intention was to give the property after his death, which was executed. Neither this paper nor the paper of April 1827, can be found.

At January, 1834, the cause was heard by Chancellor De Saussure, who made his decree declaring the paper of April, 1827, a will, and the negroes only liable to creditors after the property conveyed to the use of the plaintiff, Susan, by the deed of separation.

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*From this decree the plaintiffs appealed, and insist that whether the paper of April 1827, be considered a deed or will, the property thereby disposed of is subject to the claims of Wheeler's creditors, and that between the deed to the plaintiff's trustee and the paper under which defendants claim, the plaintiffs are entitled to a preference, because—

1. The plaintiff, as an injured and innocent wife, was entitled to alimony; and the covenant of her trustee was an additional consideration, and the settlement was moderate and reasonable, consisting only of the property she brought to Wheeler on her marriage.

2. Because the provision for Sarah Meray is at best purely voluntary; and there is no ground for distinguishing her case from that of any other woman freely embracing a life of criminality, and accepting from a married man the reward of prostitution.

The defendant, Meray, also appealed, and now moved that the bill be dismissed—

1. Because the administratrix has shewn no equity to entitle her to sue in this Court; and if it be held that the negroes are part of Wheeler's estate, there is a plain and adequate remedy at law.

2. Because, if the paper is a deed, even if a life estate was reserved, as intended, to Wheeler, yet, on his death, the estate was absolute in Sarah A. Evans, and the marital rights of the husband attached by his reduction into possession.

3. Because, if the paper is a will, none but an executor or administrator with the will annexed can sue for the property.

O'NEALL, J. The plaintiffs have not insisted on regarding the paper under which the defendants claim as a will; and, as it appears it may be more beneficial to the defendant, the donee Sarah, to regard it as a deed, it will be so treated in this opinion. For it is beyond all doubt, that if it is a will, the property conveyed by it would be not only liable to debts, but also that only one-fourth part of the nett value of Wheeler's estate at his death, after payment of his debts, could pass under the said paper regarded as a will to the said Sarah.

It is first contended by the defendants, Meray and Vausse, that the Court has no jurisdiction of the case: that objection was met, answered and decided by the former opinion of this Court. But it may now be well enough to add some other views in rela-

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tion to *the jurisdiction of the Court over the case, in the aspect in which it is now to be regarded. For it seems now to be conceded that the paper in dispute, regarded as a deed, is not liable to any objection on account of its exceeding, at the time of its execution, the proportion of Wheeler's estate, which by law he could convey to a woman with whom he might be said to be then living in a state of adultery. This concession now removes the ground of jurisdiction on which the case was then rested.

It is still however (even if it was an open question) maintainable on other grounds. The bill was filed by the administratrix of Wheeler, to prevent Meray and Vausse from carrying the negroes beyond the jurisdiction of the Court. This she had the right to do, in order to test the question whether they were assets liable to the payment of her intestate's debts, and in the mean time to prevent them from being, by the act of the defendants, rendered unavailing. At law she would have no remedy; for if the deed to Sarah A. Evans (now Meray) was to be regarded, as we think it ought to be, as merely voluntary, she could not as administratrix, at law, have objected to it.

But there is no doubt that the property was liable to the debts, and in Equity the administratrix might well be allowed to take the necessary steps to preserve the property for, and keep it within the reach of creditors. When to this is added the fact that the creditors might have attempted to make liable the property settled upon her at the time of her separation from her husband, although it might not in fact be liable to their claims, yet this would be a good ground of coming into Equity, to have the property clearly liable to the payment of debts applied in exoneration of the property conveyed to her.

The question of jurisdiction being thus cleared from all difficulties, it remains to be considered and shewn (as I have already intimated) that the property conveyed to Sarah A. Evans is liable for the debts of the donor, William Wheeler, after exhausting the assets, real and personal, of which he died possessed. The conveyance to a trustee for the separate use of Mrs. Wheeler, now Mrs. Hargrove, was not only founded on a good, but also a valuable consideration. For the trustee covenanted to save the husband harmless against his wife's debts. This, in Equity, is regarded as such a valuable consideration, as will protect the property thus conveyed from the husband's debts. Ather-

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ley, in his treatise on *marriage settlements, p. 379, speaking of settlements by way of

separate maintenance, says, "with respect to the validity of such settlements, as against the husband's creditors, I may observe, that where the husband is indemnified against his wife's debts, that there there is no doubt of its validity." In this position he is certainly sustained and borne out by Stephens v. Olive, 2 B. C. C. 92, in which the Master of the Rolls (Sir Lloyd Kenyon) held that the covenants by the trustees, in the second settlement, to indemnify the husband against the debts which the wife might contract after separation, was a valuable consideration, and therefore that this settlement, although made after the debt due to the plaintiff was contracted, was also good against him." To the same effect is the decision of Mr. Justice Buller, (sitting for the Lord Chancellor,) in the case of Compton v. Collinson, 2 B. C. C. 386.

The case of St. John v. St. John, 11 Ves. Jr., 536, does not militate against this position. The property settled on the wife, as her separate maintenance, being thus entitled to be protected against the debts of the husband, it cannot be made liable by the fact that she delivered her husband's deed to Sarah A. Evans, to the mother of the said Sarah, and her statement that she had selected the negroes for her. This was the act and statement of a feme covert, and not binding on her after her discoverture.

It was no doubt done with a good intention, and with the hope that thus the unfortunate and guilty connection might terminate. But in this expectation she was deceived by the act of the said Sarah, as well as her husband; she cannot therefore now be blamed for insisting on her legal rights. The deed to Sarah A. Evans was preceded and succeeded by cohabitation with Wheeler; it cannot be considered as resting on a valuable consideration. It might have been difficult to sustain it at all, were it objected to as altogether invalid. In the case of Hill v. Spencer, Amb. 641, Lord Camden, however, allowed a bond to a common prostitute, for an annuity of £50 per year executed by a man who had kept her two years, to stand. He said, "in this case the bond was not given for a consideration, but was voluntary." This is, I think, the true view in which this conveyance must be regarded. As a voluntary conveyance, it is void against existing creditors, and being set aside for them, subsequent creditors would be entitled also to come in and be paid. There is however another view which makes it void against sub-

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sequent creditors, if there should *be no creditors now unpaid who were such at the execution of the deed. The donor retained possession during his life. This rendered the conveyance fraudulent against subsequent creditors.

This view of the case defeats the marital rights of Meray to the property, for until the debts are paid off, his wife has no legal estate in it; her right is a mere equity to have the balance which may be left, after payment of debts, delivered and paid to her. It is the duty of the Court, where the decree of the Court would be necessary, as it is in this case, to put the husband legally in possession of the wife's fortune to decree a settlement.

It is Ordered and decreed that the defendants do deliver the property conveyed to Sarah A. Evans, (now Meray,) by Wm. Wheeler, with the issue and increase thereof, if any, to the Commissioner of this Court, and that he do sell the same, on a credit of twelve months; that out of the proceeds he do pay such debts of William Wheeler as may remain unpaid, after exhausting the other assets of the deceased, and the costs of this suit, and that he do report the terms and trust of a settlement to be made of the balance of the said proceeds on the said Sarah A. Evans. It is also Ordered and decreed that the Commissioner do advertise for the creditors of William Wheeler to render in to him their demands within twelve months, and that he take an account of the assets of the intestate in the hands of the plaintiff.

JOHNSON, J., and HARPER, J., concurred.

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2 Hill, Eq. 228

JOHN B. BARNWELL, and Others, v. ROBERT W. BARNWELL, Executor of Wm. Hutson Wigg, and Wm. Hazzard Wigg.

(Charleston. March, 1835.)

[*Limitation of Actions* ⇐102.]

When a trustee does an act importing a termination of the trust, as a final settlement, the statute of limitations will run from that time; but a payment to the father of the cestuique trusts who had no authority to receive, is not to be regarded as such a termination of the trust as will allow the statute to run from that time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 505; Dec. Dig. ⇐ 102.]

[*Payment* ⇐66.]

Lapse of twenty years will raise the presumption of the payment of a legacy.

[Ed. Note.—Cited in Buchan v. James, Speers, Eq. 379, 382.

For other cases, see Payment, Cent. Dig. § 179; Dec. Dig. ⇐66.]

[*Payment* ⇐66.]

A lapse of nineteen years after one of the legatees coming of age, will create such presumption against him, where the legacy had been paid thirty-five years before to his father, and the executor was dead and his estate administered and disposed of.

[Ed. Note.—Cited in Buchan v. James, Speers, Eq. 382.

For other cases, see Payment, Cent. Dig. § 178; Dec. Dig. ⇐66.]

Tried before Chancellor De Saussure, at Coosawhatchie, April, 1834.

William Hazzard Wigg, by his will, dated day of 1798, after giving several pecuniary legacies to his widow and brothers, and particularly a legacy of £150 to his brother, James Cuthbert, bequeathed to the children of his sister, Jane Hay Barnwell, the sum of £100; and directed that the aforesaid legacies should be paid only when

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his executor "could make it *convenient to his estate, and that until they were paid, interest from his death should not be allowed on them; and that after his debts and legacies were paid, his estate should be kept together for five years, commencing from the last payment of his debts and legacies, and the crops in the mean time be divided between his son, William Hutson Wigg, and his sons-in-law." The testator, after providing for his daughter, gave at the expiration of the aforesaid five years, all the rest and residue of his estate, real and personal, to his son, William Hutson Wigg, with a limitation over, in case of his death before twenty-one years, and without leaving issue; and appointed him executor. William Hutson Wigg qualified, and acted under the will, and in the year 1822, upon a suit being brought against him, paid without opposition, or objection, to the representatives of James H. Cuthbert, the legacy of £150 and interest from the day of 1803. He died in the year 1827, possessed of the mass of his father's estate, and by his will merely appointed Robert W. Barnwell, the defendant, his executor, but made no disposition of his property, which descended, and is now in the possession of his only son and heir, William Hazzard Wigg, the other defendant. At the death of the testator, William Hazzard Wigg, his sister, Jane Hay Barnwell, was the wife of John B. Barnwell, sen'r. and her children were John B. Barnwell, jun., aged then about twenty years, Jane Barnwell aged eleven years, Edward W. Barnwell aged nine years, and Cuthbert Barnwell, aged three years. Jane Barnwell died in the year 1817, a feme covert.

This suit is brought by her representatives, and the surviving children of Jane Hay Barnwell, who allege that they were entirely ignorant of their uncle's will, and only discovered by accident recently that a legacy was thereby bequeathed to them.

The bill is for an account of the administration of the estate of William Hazzard Wigg, and to compel payment of the aforesaid legacy from the assets.

The executor denies by his answer ever having had notice of this claim; on the contrary says, that shortly after assuming the execution of the will of William Hutson Wigg, he advertised according to law, for all the creditors of the estate of his testator to present their demands; and after having applied the proceeds of the estate to the pay-

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ment of the debts, in about April, 1830, *delivered possession to William Hazzard Wigg, and relinquished all control over the property. That so long a period has elapsed since the death of the testator of his testator, William Hazzard Wigg, and so entirely has his estate been merged in the estate of William Hutson Wigg, that he had never seen or read the will of William Hazzard Wigg until the bringing of this suit; that if the plaintiffs have any cause of complaint against him, as executor of William Hutson Wigg, the same did accrue above four years before the commencement of this suit, and therefore, being a demand within the true reason of the Act of Assembly made for the limitation of actions and avoiding suits, should have been pursued, if at all, within that time. That from the copies of certain papers in his testator's hand writing, and other memoranda found in his possession, and which are brought into Court, as exhibits, he believes firmly, that the legacy was paid to the father of the plaintiff, who was then, and at the time of his death, possessed of a large estate, real and personal, which was afterwards distributed among his children; that the lapse of time, together with the presumption of payment from the above facts, ought to bar the plaintiffs, and that from the intimacy which existed for many years between the plaintiffs and his testator, William Hutson Wigg, and from the pecuniary circumstances of the plaintiffs, a demand for the payment of the legacy would long since have been made, had not the plaintiffs been convinced that the same was satisfied; and that their laches ought to preclude them from all claim to the aid of the Court.

The other defendant, William Hutson Wigg, answers to the same effect, and in nearly the same words. The exhibit filed with the bill, as a copy of the will, was admitted to be a correct copy, and the plaintiffs, to be the children of Jane H. Barnwell; their ages were also admitted as above stated, and the bill and orders, in the case of Mrs. Ann Cuthbert, administratrix of James H. Cuthbert v. William Hutson Wigg, executor, were produced as evidence. It was also admitted for the defendants that the plaintiffs have been for a long time in very necessitous circumstances. The exhibit, filed with the answer, as proved to have been taken out of the family bible of the Wigg family, is in the following words, viz:— "Made the following settlement this day with Mr. W. H. Wigg. He receipts all claims against me in favor of his father's estate; also on an order given him by D. Smith on

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me. *I gave him a final discharge on a legacy left my children in his father's will,

which I acknowledge for them to have received this day, 1st December, 1799.

(Signed) John B. Barnwell,
William H. Wigg.

Witnessed by Benjamin Wood.

The Chancellor decided against the claim of the plaintiffs, and ordered the bill to be dismissed, but without costs.

From this decree the plaintiffs appeal upon the following grounds:—

1. Because there is sufficient in the evidence, answers, and language of the will of the testator, William H. Wigg, to repel the presumption of payment to the plaintiff, and the payment to the father of the plaintiffs cannot be sustained on any principle of law or equity.

Treville, for the appellants, contended that presumption of payment arising from lapse of time, may be repelled, there being a distinction between such presumption and the statute of limitations.—6 Barn. & Cres. 603. The one is an absolute and unqualified legal bar, the other a legal presumption from a fact.—Blanch. on Lim. 79. The ignorance of the legatees of the legacy to them, repels the presumption of payment.—1 Fonb. 181; Ord v. Smith, Sel. Cha. Ca. 11. The executor is entrusted with the execution of the will; it was his duty to give notice to the legatees. He is not bound to prove the will.—Toll. 44–5. And if this presumption is to exist in all cases, he might conceal the will when he is the residuary legatee, (as is the case here,) and thus acquire gain to himself by defeating every other legacy. In no case will presumption of the payment of a legacy arise under twenty years.—2 Ves. Jr. 571. It cannot arise until the legatees are of full age, and entitled to receive; and the minority of the plaintiffs prevent it from arising against them, the youngest not having attained full age twenty years before the filing of the bill. If, however, such presumption does arise, the circumstances, he insisted, repelled it, to wit: the minority of the plaintiffs; their ignorance of the legacy; the admission of both the defendants that they have not paid it; the fact that Cuthbert's legacy was not paid till suit brought in 1822; and, above all, the shewing of the defendants that payment was made to

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the father of the plaintiffs, who was not *authorized to receive; and the inference is irresistible that the executor did not, before or after that time, pay the legatees.

Bailey, contra. In Moore v. Porcher (Charleston MS. cases) it was held, that when an act is done purporting to be in discharge of the trust, the statute of limitations begin to run. The payment to the plaintiffs' father, whether authorized or not, was so intended, and from that time the statute runs. In any event, lapse of time must be a bar upon the presumption of payment. Thirty-five years have elapsed since the plaintiffs were entitled to demand payment, and since it was made to their father. After such lapse of time, the Court will presume that the father had authority to receive, as guardian or otherwise—every thing will be presumed in favor of the defendants; and when there are other circumstances, less time than twenty years will create such presumption. He cited 1 Black. Com. 461, 462; 2 Atk. 371; Toller, 313; 1 Bail. 59; Rop. on Leg. 609; 2 Ves. Jr. 11.

JOHNSON, J. It is conceded that the statute of limitations will not bar a legacy, and such clearly is the general rule. But it appears from the evidence that the legacy claimed by the plaintiffs under the will of their grandfather, William H. Wigg, was paid by his executor to their father, John B. Barnwell, as long ago as 1799, and it is insisted that this was professedly intended as a payment of the legacy, and an execution of the trust imposed by law, and that therefore the statute would begin to run from that time. The cases of Starke & Starke, published in the Carolina Law Journal, p. 510, and Moore v. the Administrator of Porcher, decided at this place, I think at February Term, 1830, are relied on in support of this position. The principle is certainly a correct one, that when an executor or other person, acting in a fiduciary character, does an act importing a termination of the confidence or trust, as a final settlement and account with the legatee or cestuique trust, he will be protected by the statute against a subsequent account, unless he has been guilty of fraud, and even then the statute will run from the discovery of the fraud. But this case does not fall within that rule. The trust reposed in the executor was that he would pay the legacy to the plaintiffs, or, being minors, to someone who might be duly authorized to receive. In law, the father was not, as a general rule, entitled to receive it, and the payment to him can no more be re-

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garded as a fulfillment and *termination of the trust, than if he had paid it to a stranger. On the contrary it was in direct violation of it. The rule supposes that the legatee or cestuique trust has at least notice that the executor or trustee regards himself as having been discharged of the trust, and maintains that they are bound to insist on their rights within the period limited by the statute, but it cannot be supposed that they would be bound by an account with, or notice to a stranger.

No case has been cited at the bar to show that the payment of a legacy will be presumed after a lapse of twenty years, nor does my memory supply me with any particular case in which it has been ruled; yet the impression on my mind that the precise point has been ruled is so strong, that I can hardly be mistaken, and I think that upon referring to the unreported cases, more than one of the sort will be found. However that may be, the

universal tendency of our own decisions has been to cut down the time necessary to the legal presumption of facts from that established in the English Courts. The difference in the time necessary to bar an ejectment in England and in this State, as well as personal actions, laid the foundation for this diversity of rule, and has been made the foundation of a new rule. On this principle it was held in M'Elwee v. Hill, 2 Cons. Rep. 120, that a possession of twenty years was sufficient to authorize the presumption of a grant to land, thirty years being required according to the English rule; and still more strikingly analogous is the case of Wright v. Wright, 2 M'C. Eq. Rep. 197, where upon a bill filed against an executor for an account, it appeared that sixteen years before the executor had rendered an ex parte account to the ordinary, the accounts appearing regular, it was held that this was a protection against a further accounting. There is perhaps no case in which such a protection is more necessary, than in the cases of executors and administrators. Their duty is not limited to a particular transaction, which, from its magnitude and importance, would point out the propriety of preserving the evidence of it, but of those various, minute, and complicated details, each being of itself comparatively unimportant, and therefore the more likely to be neglected. Twenty years gives abundant time to settle the affairs of the most deranged and complicated estate, and the restless and migratory habits of our people, by which means proof per testes is every day rendered more and difficult of attaintment, is, I think, abun-

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dant reason for *cutting down the time to as short a period as may be consistent with sound policy. I take it therefore that twenty years is per se sufficient to authorize the presumption of the payment of a legacy. Starkie, in his treatise on Evidence, p. 1235–6, says, that this presumption is founded on an artificial rule, by which we arrive at a conclusion without the process of reasoning, and supplies the place of proof. There is also a natural presumption arising from lapse of time independently of the artificial rule, and although it does not necessarily lead to a conclusion, yet in weighing other circumstances, it enters largely into the account. "It is hard to prove old things, and therefore less proof will be required." Our confidence in history, and even Revelation, is in some degree built on this foundation.

About thirty-five years had elapsed between the death of the testator and the filing of the bill; and although the presumption of payment of the legacy to the plaintiffs during their minority, would not arise on account of their incompetency to receive, yet it does not follow that there was not some one duly authorized to receive it for them, and it may be well conceded that this length of time would greatly increase the difficulty of furnishing strict proof. More than twenty years had elapsed between the period at which some of the plaintiffs attained full age, and the filing of the bill, and with respect to them the legal presumption must operate. The legacy, although of a gross sum, was equally distributable amongst them, each was entitled to receive his own dividend on his attaining his majority, and the non-payment of one would not authorize the presumption that the other was not paid. Cuthbert Barnwell, the youngest of the plaintiffs, attained full age about nineteen years before the filing of the bill, and although in his case the artificial rule will not operate, yet considering the great length of time since the death of the testator, his neglect to prosecute his claim on his attaining full age, and taking it in connection with the circumstances summed up by the Chancellor, well warrants the conclusion at which he has arrived. More than the third of a century had elapsed, all the other concerns of the estate of the testator had been finally settled, the executor was dead, and his estate fully administered and disposed of accordingly, and plenary proof was not to be expected. The payment of the legacy to the plaintiffs' father by the executor, in 1799, is relied on as repelling the presumption of payment to the plaintiffs: but if there is any

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*thing in it, it leads to a directly opposite conclusion. Men do not ordinarily and voluntarily incur the responsibility of paying money on the one hand, or receiving it on the other, without authority; and in this case we have but to call in the aid of the legal presumption, to arrive at the conclusion that the father was legally authorized to receive the legacy. Again, let it be conceded that the payment was without the authority of law: —It was then a trust reposed by the executor in the father, to administer it for the benefit of the plaintiffs. Who was so much interested or so likely to employ it in the way best calculated to promote their interest? It is a slander on parents to suppose that they are indifferent to, or careless of, the interest of their children. Some are, but they are exceptions to the general rule. Is there not, then, independent of a legal presumption, much reason to believe that the father has discharged this trust faithfully, and that if he were now living, he would be able to show it satisfactorily? I have not adverted to the fact stated in the Circuit Court decree, that the plaintiffs have derived a considerable estate from their father, because I understand that it was made on a concession by the counsel on the trial below which he has since ascertained was not warranted by the fact. If that was so, the plaintiffs would be unquestionably liable to account to the defendant for the legacy received by their father, upon precisely the same principle that they seek to charge him; but from the view

before taken that matter has become unimportant.

Motion dismissed—and the decree of the Circuit Court is affirmed.

O'NEALL, J., and HARPER, J., concurred.

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2 Hill, Eq. 235

JOSEPH W. ALLSTON, and JOHN H. ALLSTON, v. THE BANK OF THE STATE OF SOUTH CAROLINA.

(Charleston. March, 1835.)

[*Husband and Wife* ⟸31.]

Settlement on husband and wife, to their joint use during coverture, and to the survivor; and power given to the trustee to sell and invest the proceeds, subject to the same trusts; the trustee sold, and the husband afterwards by deed, assigned his interest in the proceeds, to the trustee, giving him authority to re-invest for the benefit of his wife, in such way as she might direct; and the trustee accordingly re-invested to the sole and separate use of the wife during life, and if she died without leaving issue, then to the husband: *Held*, that the husband had the right to change the terms of the trust; and that the rights of creditors must be determined by the interest he took in the property last acquired.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 188; Dec. Dig. ⟸31.]

[*Judgment* ⟸780.]

What estates are subject to legal liens.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1341, 1343–1349; Dec. Dig. ⟸780.]

[*Assignments* ⟸9; *Judgment* ⟸780.]

A contingent remainder is not subject to the lien of a judgment; but an assignment of it for a valuable consideration will be supported in equity and specifically enforced, as an agreement: therefore where the remainder man against whom there were judgments before the contingency on which he took happened, assigned his interest, it was held, that the lien of the judgements must be subject to the equity of the assignment.

[Ed. Note.—Cited in Roundtree v. Roundtree, 26 S. C. 471, 2 S. E. 474; People's Loan & Exchange Bank v. Garlington, 54 S. C. 423, 32 S. E. 513, 71 Am. St. Rep. 800; Boykin v. Springs, 66 S. C. 371, 44 S. E. 934; Carr v. Mouzon, 86 S. C. 464, 68 S. E. 661, 662; Walker v. Alverson, 87 S. C. 57, 68 S. E. 966, 30 L. R. A. (N. S.) 115.

For other cases, see Assignments, Cent. Dig. § 14; Dec. Dig. ⟸9; Judgment, Cent. Dig. § 1348; Dec. Dig. ⟸780.]

John Adamson, the father of Amelia Delesseline, wife of Francis A. Delesseline, by his last will and testament, devised to his said daughter, amongst other things, certain

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lots in the town of *Camden, in fee simple; and on the 25th July, 1816, after the death of the testator, the said Francis A. Delesseline, and his said wife, joined in a conveyance of the said lots, to Lewis Ciples, but upon what consideration does not appear, nor is it material to the case. On the 17th May, 1817, the said Lewis Ciples by deed, reciting the conveyance above referred to, in consideration of five dollars, and in pursuance of the intention of the parties to the said deed, conveyed the said lots to Francis G. Delesseline, father of the said Francis A. Delesseline, in trust for the joint use and benefit of the said Francis A. Delesseline and his said wife, during their coverture, and from, and immediately after the decease of either of them, to the survivor forever; and authority is thereby given to the said trustee, with the consent of the said Francis A. Delesseline, and his said wife, to sell and dispose of the said premises, and to re-invest the proceeds in such property as they should direct, "which shall be subject in the hands of the said Francis G. Delesseline to the same trusts, conditions and limitations, which are declared of, and concerning the premises hereby conveyed." In December, 1827, the trustee, with the consent of the said Francis A. Delesseline, and his said wife, sold and conveyed the premises to Elizabeth Rogers, in consideration of the sum of $5000.

Francis G. Delesseline afterwards, on an application to the Court of Chancery, was permitted to resign his trust, and by an order of the Court, John G. Spidle, was substituted in his stead; and on the 2d July, 1830, the said Francis A. Delesseline, by deed, assigned to the said John G. Spidle, the trustee, all his interest in the sum of $4000, part of the proceeds of the sales to Elizabeth Rogers, then standing to the credit of the said trustee, in the Planters' & Mechanics' Bank, in trust for the sole and separate use of his said wife, without being subject to his debts or disposition, with power to invest the same, and the income or interest arising therefrom, "in such property, and with such limitations, and to such uses" as his said wife might direct and appoint. In pursuance of this authority, Spidle, the trustee, invested the fund in a house and lot, in Wentworth-street, Charleston, and Mr. Milliken, from whom he purchased, conveyed the same to him by deed, bearing date 5th July, 1830, wherein it is declared to be, in trust, for the sole and separate use of the said Amelia, during her natural life, without

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being subject to *the debts of her husband, and at her death, for her issue, if any; but if she died before her husband, without leaving issue, in trust for her husband, the said Francis A. Delesseline, in fee. In 1831, the plaintiffs indorsed a note for $500, for the accommodation of Francis A. Delesseline, which was discounted at the Branch Bank at Georgetown, and in consequence of his insolvency, the payment has devolved on the plaintiffs. To indemnify them against this liability, the said Francis A. Delesseline, on the 20th June, 1832, (his wife then being alive,) by deed assigned amongst other

things, all the right, title and interest which he then had, or might thereafter have in the house and lot in Wentworth-street above referred to; and Amelia Delesseline, the wife, died shortly after without issue.

Between the year 1823, and the 21st April, 1828, sundry judgments had been obtained, and entered up against Francis A. Delesseline, in Charleston district, and on the day last mentioned, the defendant, the Bank, obtained and entered up judgment against him, for $5050; and the estate limited over to Francis G. Delesseline, by the deed of Mr. Milliken to John G. Spidle, the trustee, having become vested in the said Francis A. Delesseline on the death of his wife without issue, executions founded on the judgments before mentioned, were levied on the house and lot in Wentworth-street, which was sold on the 5th of November, 1832, and purchased by the Bank for $3200; notice of the assignment of Francis A. Delesseline, to the plaintiffs, having been given at the time of the sale. Of this sum, it appears that about $800 were applied to the payment of older judgments, and the remainder to the judgment of the Bank.

The object of the bill is to charge the house and lot in Wentworth-street, or the funds arising from the sales thereof in the hands of the Bank, with the note indorsed by the plaintiffs for the said Francis A. Delesseline. The judgments against Delesseline, which have been paid off by the proceeds of the sheriff's sales, being older than the judgment of the Bank, were necessarily entitled to priority, and the remainder not being sufficient to pay both the Bank judgments and the note indorsed by the plaintiffs, and to secure which, Delesseline assigned to them his interest in this property—the question is, which of them is entitled to the precedenee. The Chancellor (De Saus-

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sure) being with the *defendant on this question, dismissed the plaintiffs' bill, and this is an appeal from that decision on the following grounds:

1. That the Camden estate being vested in Mrs. E. Rogers prior to the Bank's judgment, no lien attached thereon; and the Bank has no equitable claim to subject the property in Wentworth-street, to the same uses.

2. That the interest of F. A. Delesseline in the Wentworth-street property anterior to the death of his wife, was not subject to the lien of a judgment; and was well mortgaged or assigned to the Allstons, to indemnify them for their responsibility: and the decree should have either directed the notes to be paid, or have ordered a foreclosure for that purpose.

Dunkin, for the appellants. The sale of the Camden property was before the Bank obtained judgement; no lien therefore attached to that. It is true, that the original trust deed required that the proceeds of the property, if sold, should be to the same uses; and that the terms of the trust are changed by the deed of the Wentworth-street property. But who has the right to complain? not the Bank—it had no interest then—no one but Delesseline, the cestuique trust: and there can be no just reason why a party, for whose benefit a trust is created, may not waive or dispose of it.

Before the death of his wife, Delesseline's interest in the Wentworth street property was a contingent use, subject to the same rules which govern contingent remainders; and was not the subject of levy.—4 Kent. Com. 293. Prest. 301; Fearne, 365-6. Levy can only be made on a certain, vested and tangible interest, of which the sheriff can put the purchaser in possession; choses in action, claims purely equitable, and contingent interests, not partaking of this character, are not the subject of levy and sale.—1 Black. Rep. 30. Doe. v. Jones; 4 Com. Dig. 35, Tit. Estate; Harrison v. Maxwell, 2 N. & M'C. 350; Rabb v. Akin, 2 M'C. Ch. 125-6; 1 John. Ch. Rep. 52; 17 John. Rep. 350; 1 Pet. 442; 1 Bail. 237; 8 East. 484. Although the interest of Delesseline was not subject to the lien of the judgment, it was assignable by him, and the assignment or mortgage will be sustained and enforced in Equity as an agreement. Fearne, 550; Wright v. Wright, 1 Ves. jr. 409.

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*R. B. Smith, contra—Contended that the deed for the Wentworth-street property, varying in its terms the original trust, was fraudulent as against creditors; and that the interest of Delesseline, being a mere possibility, was not the subject of assignment. Cited 3 T. R. 88; 1 H. Black. 30; Eq. Ca. 30; 4 Com. 538; 1 Prest. on Estates, 75; 2 Vern. 563. As to the right of levy; 1 Yates, 427; 2 Bin. 80, 89; 8 Mass. Rep. 551.

Dunkin, in reply: A possibility cannot be assigned at law, but it may pass by way of agreement in Equity.

JOHNSON, J. (after making the foregoing statement.) There is no doubt, that under the deed from Lewis Ciples to Francis G. Delesseline, of the 17th May, 1817, Francis A. Delesseline had a vested interest in the Camden property to the extent of one half for life, with a remainder in fee of the whole upon the death of his wife without issue; and it seemed to be conceded on the argument, that the lien of the judgments due the Bank would have attached at least on his interest for life: and the power given to the trustee by that deed, to sell and dispose of that property, being limited to a re-investment of the proceeds in other property, to the "same trusts and conditions, and limitations" as are expressed in that deed, the Chancellor held, that Francis A. Delesseline had no authority to direct the

investments of it to other uses, or upon other conditions and limitations, and therefore directed that the trusts declared in the deed from Mr. Milliken to John G. Spidle, the trustee for the house and lot in Wentworth-street should be reformed in such a manner as to correspond with those on the deed from Lewis Ciples to Francis G. Delesseline; and the foundation of the Circuit Court decree is, that the deed thus reformed would give to Francis A. Delesseline an interest or estate in the house and lot in Wentworth-street, on which the lien of the judgment of the Bank would attach, and that being older than the assignment to the plaintiffs, was entitled to priority. As before remarked, the interest which Francis A. Delesseline took in the Camden property, under the deed from Lewis Ciples to Francis G. Delesseline, was one half for the joint lives of himself and his wife, with a remainder in fee of the whole, upon the contingency of the wife's dying before him without issue. This, by the sale to Elizabeth Rogers, was converted into money, and as between Francis A. Delesseline, and his wife, and their trustee, I cannot conceive of any possible legal obstruction to his making any

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dispo*sition of his interest in it that he might think proper, provided it did not operate to the prejudice of the wife. He was under no legal disability, nor was there any imposed on him by the deed: indeed I cannot conceive how it is possible for one, by his own act, to put it out of his power to dispose of that which belongs to him. His assignment of this fund to the trustee, Spidle, by the deed of 3d July, 1830, does not deprive the wife of any interest which she took under the deed from Lewis Ciples to Francis G. Delesseline; on the contrary, it confers on her the sole power of directing the investment of it, instead of sharing it with him—it gives her the whole, instead of a moiety during life—and as in the latter deed, limits over the remainder to her in fee, in the event of her surviving him; there cannot therefore be any question about the power of Francis A. Delesseline to have made this disposition of the funds. If the wife had survived, and this had been a bill to subject the property to the payment of the debts of Francis A. Delesseline, another and a very different question would have arisen; but her claims are now out of the way, and this is a contest between creditors for priority, and having shewn that the power of Francis A. Delesseline, over the fund in Bank to the extent of his interest, on which there could be no legal lien, was absolute, it follows that the rights of the creditors must be determined by the interest which he had in the house and lot in Wentworth-street under the deed from Milliken to Spidle. By referring to the dates, it will be seen that when the judgment of the Bank was obtained on the 21st April, 1828, the fund was in Bank, and that it was invested by the trustee in the house and lot in Wentworth-street, on the 5th July, 1830—that Francis A. Delesseline assigned his interest in it to the plaintiffs on the 20th June, 1832, and that the remainder became vested in Francis A. Delesseline, on the death of his wife shortly after—and out of this state of things the following questions arise.

1st. Whether Francis A. Delesseline had such an interest in the house and lot, as was subject to the lien of the judgment of the Bank.

2d. Whether if he had not, it was bound by the assignment made by him to the plaintiffs, for the payment of the money due them. By the terms of the deed from Milliken to Spidle, the trusts were limited to the use of Amelia Delesseline, the wife, for life, and at her death to her issue, and on her death without issue, over to Francis A. Delesseline in fee; so that all the interest which he had, was a fee simple dependent on the con-

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tingency of his wife dying *without issue, he surviving—an interest or estate, falling directly within Mr. Fearne's definition of a contingent remainder, as contra distinguished from a vested remainder—a remainder in an estate so limited, as to depend on an event or condition which may never happen or be performed.—Fearne on Rem. 1. And I feel some difficulty in demonstrating that this is not such an estate or interest as would be subject to the lien of a judgment, the proposition presenting itself to my mind as one which is self-evident. Wherever there is a lien, it follows necessarily, that the thing to which it attaches may be sold in satisfaction of the judgment; it must therefore have a present existence and visible form to enable the sheriff to take possession of, and transfer it to the purchaser, if it is capable of manual delivery. It is for this reason that choses in action are not the subject of levy and sale; they have in themselves no visible form, or tangible existence, and are the mere representatives of something more substantial, and are not within the reach of the sheriff, nor is he capable of transferring them. Hopeless indeed would be the condition of an unfortunate debtor, if not only what he had, but also what he might, by any possibility afterwards acquire, was the subject of execution and sale: purchasers would not readily put a high estimate on such possibilities, and the danger of sacrifices would itself oppose a strong reason for not subjecting them to sale. No case directly in point has been cited, either from the English or American authorities, and it is, I think, a reasonable inference, that it has been regarded as admitting of no doubt; indeed, I did not understand the counsel for the Bank, as relying

on the binding efficacy of their judgment, until the life estate of Mrs. Delesseline was terminated by her death. The case of Bozart v. Parry et al., 1 Johnson's Ch. Rep. 52, bears however some analogy to it. There A being seized of land, agreed to sell to B, and received a part of the consideration, and undertook to make titles to B, when he should pay the balance. Two years afterwards, the balance still being unpaid, B assigned A's contract to S, and it was held, that although S might have compelled the specific performance of the contract, yet his interest in the land was a mere equity, and not the subject of levy and sale under an execution against him at the suit of a third person: and that judgment was affirmed on an appeal to the Court of Errors. But Francis A. Delesseline could not, himself, have

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transferred this remainder by a *common law conveyance of lease and release, upon the principle that one cannot grant that which he does not possess. Fearne on Rem. 461, 537. And it follows necessarily, that the sheriff, the agent appointed by law to represent him in making the title to one who purchased under a sale by fieri facias, is incompetent to do so; the judgment could not therefore have had a lien, because it would have been inoperative. It seems however to be well settled, that although a contingent remainder is not transferable by the ordinary common law conveyance, yet an assignment of it for a valuable consideration will be supported in equity as an agreement, which will be specifically enforced. Of this, the case of Wright v. Wright, 1 Ves. 409, cited at the bar, will suffice as an example. There a testator devised lands to his two daughters and their heirs: but that if either of them should marry without the consent of his executors, the daughter so marrying should only have an estate for life therein, and if either of them should die unmarried, to his son, R. in fee, on his paying £500 to the surviving daughter. R., the son, in the life time of both the daughters, in consideration of love and affection, granted his interest to his youngest son, G.—R., the son, first died, and afterwards one of the daughters died unmarried, and upon a bill filed by the eldest son of R. claiming the estate, as heir at law to his father on the payment of the £500 to the surviving daughter, it was held by Lord Hardwicke, that he was bound by the assignment of the father to the youngest son, G: and he remarks, that the Court admits the contingent interest of a term for years to be disposed of for valuable consideration, though the law does not, and that there was no difference between allowing the assignment of the possibility of a chattel real, and the possibility of an inheritance.

There is nothing novel or extraordinary in the doctrine of this and other cases like it, several of which are collected by Fearne in his treatise on Executory devises, p. 439, 522 et. seq. All that is necessary to a valid contract is, that it should be made by parties competent to contract, that there should be a good consideration, and that the thing to be done or performed should be lawful and possible; and I cannot perceive why one may not bind himself to do, or perform an act, his power over which depends on a contingency, if that contingency should happen, as well to do or perform one at a future day, which he is competent to do at the time. If the contingency does happen, the moral

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obligation is precisely the *same, and it is not opposed by any rule of positive obligation, and Equity will enforce its execution precisely to the same extent. I am therefore very clearly of opinion, that Francis A. Delesseline was bound by his assignment to the plaintiffs, and that Equity would have enforced that contract against him.

But it has been insisted in the defence, that conceding the assignment of Delesseline to the plaintiffs to be valid, yet, being the assignment of a mere possibility, no lien would attach until the contingency on which it depended took place—that is to say, the death of Mrs. Delesseline without issue—that in the same instant the lien of the judgment attached, the remainder having become vested in Francis A. Delesseline, and being the oldest, ought to be preferred: and the defence has been made to rest principally on this ground. There is some plausibility in this argument, but it will not bear examination. It has been before shown, that the judgment had no lien on the property until the remainder vested in Francis A. Delesseline. It attached then, in virtue of the title in him, and that was burthened with the equity arising out of the assignment to the plaintiffs, a claim as meritorious as that of the Bank. Deriving their right from Delesseline, the Bank could not be in a better situation than he would have been. Suppose that in the instant the remainder vested, he had granted it to the Bank with notice of the prior assignment to the plaintiffs, would that have superseded the prior equity of the plaintiffs? Certainly not. And what magic is there in the lien of a judgment, in itself a mere equity, which gives a higher claim to the property on which it attaches than would a conveyance in fee simple?

It is therefore Ordered and decreed, that the decree of the Circuit Court be reversed, and that it be referred to the Master, to ascertain whether any, and what amount remains due on the note indorsed by the plaintiffs for Francis A. Delesseline, and discounted at the Branch Bank in Georgetown; and whether any, and what amount of principal or interest has been paid by the plaintiffs, on account of the said note; and that the plaintiffs be credited in the books of the said

Bank with the amount of the principal and interest, if any, which may remain due and owing thereon, and that the defendants do pay to the plaintiffs the amount, if any, which they may be found to have paid on account of the principal and interest of the said note—costs to be paid by the defendant.

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2 Hill, Eq. *244

*HENRY DEAS and Wife, v. ANN JULIA HORRY, CHARLES D. MANIGAULT and Wife, and EDWARD R. LAURENS and Wife.

(Charleston, March, 1835.)

[*Wills* ⟸622.]

A remainder cannot be limited after a fee conditional.

[Ed. Note.—Cited in Williams v. Caston, 1 Strob. 133; Buist v. Dawes, 4 Strob. Eq. 49, 51; Blount v. Walker, 31 S. C. 27, 9 S. E. 804; Powers v. Bullwinkle, 33 S. C. 302, 11 S. E. 971; DuPont v. DuBos, 52 S. C. Append. 608.

For other cases, see Wills, Cent. Dig. § 1442; Dec. Dig. ⟸622.]

[*Wills* ⟸602.]

Testator by his will devised an estate to his son, E. L., for life, and at his death to the first son of E. L., and the heirs of his body lawfully issuing, and in default of such issue, to the second, and every other son of E. L. successively and in the order of birth, and to the several heirs of their bodies, in like manner; and in default of sons, with like limitations to the first, second and every daughter of E. L. and successively in the order of their birth, and the several heirs of their bodies, &c: and died in 1785, leaving one son, E. L., and a daughter. His son, E. L., the tenant for life, had a son and three daughters; the son of E. L. died in 1797, without issue, and his father in 1831. *Held*, that the first son of E. L. took a fee conditional; that all the remainders after the devise to him, were void; and that on his death, in 1797, the fee reverted to the right heirs of the testator.

[Ed. Note.—Cited in Blount v. Walker, 31 S. C. 27, 9 S. E. 804; Vaughan v. Langford, 81 S. C. 285, 62 S. E. 316, 128 Am. St. Rep. 912; Crawford v. Masters, 98 S. C. 462, 82 S. E. 794.

For other cases, see Wills, Cent. Dig. § 1354; Dec. Dig. ⟸602.]

[*Wills* ⟸524.]

Although the testator died before the Act of 1791, abolishing the right of primogeniture, the reversion must go to those who were heirs at the time the fee conditional determined.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1122; Dec. Dig. ⟸524.]

[*Wills* ⟸7.]

A possibility of reverter is not devisable, (per Harper, J.)

[Ed. Note.—Cited in Williams v. Caston, 1 Strob. 133; Powers v. Bullwinkle, 33 S. C. 302, 11 S. E. 971; DuPont v. DuBos, 52 S. C. Append. 608.

For other cases, see Wills, Cent. Dig. § 11; Dec. Dig. ⟸7.]

Before Chancellor De Saussure, Charleston, January, 1834.

This bill was filed for partition between the plaintiffs and defendants, of a plantation called Hickory Hill, and for a moiety of the rents and profits, from the death of Elias Lynch Horry, in 1831.

In 1783, Elias Horry, the father of said Elias Lynch Horry, deceased, and of the plaintiff, Margaret Deas, made his last will and testament, duly executed, to pass real estate, containing the following clause:

"I give and devise unto my son, Elias Lynch Horry, for and during the term of his natural life, without impeachment of or for any manner of waste, all that (my) plantation or tract of land, situate in Prince George's Parish, in this State, called or known by the name of Bear Hill, [here the property is particularly described,] and from and after his decease, to the first son of the said Elias Lynch Horry, and the heirs of the body of such first son, lawfully issuing, and for default of such issue, then to the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every other, the son and sons of the said Elias Lynch Horry, severally and successively and in remainder, one after another as they and every of them shall be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such son and sons, lawfully issuing, the elder of such sons and the heirs of his body, lawfully issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing; and for default of such issue, then to the first daughter of the said Elias Lynch Horry, and the heirs of the body of such first daughter, lawfully issuing, and for default of such issue, then to the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every other the daughter and daughters of the said Elias Lynch Horry, severally and successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughter and

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*the heirs of her body, lawfully issuing, being always to be preferred and to take before the younger of such daughters and the heirs of her or their body or bodies issuing, subject nevertheless to the several limitations, conditions, restrictions and provisions hereinafter mentioned of and concerning the same"—and died in 1785, leaving the said will in full force. Elias Lynch Horry entered on the devised premises, married and had a son named Elias Lynch Horry, who died in the month of July, 1797, unmarried and without issue. Elias Lynch Horry, the father, died on or about the ——, 1831, leaving three daughters, Ann Julia Horry, Emma L., who intermarried with Charles D. Manigault, and Margaret H., who intermarried with Edward R. Laurens, his sole heirs at

law; and now the said Margaret Deas and the said three daughters of Elias Lynch Horry, are the sole heirs at law of the testator, Elias Horry.

The plantation named Bear Hill, in the said devise, has been exchanged for the plantation called Hickory Hill, and this latter is in all respects substituted in the place of the former. The plaintiffs contend, that under the facts stated, and the law of this State, Mrs. Deas is entitled to one moiety of the plantation, and of the rents and profits from the death of the tenant for life, Elias Lynch Horry. The defendants demurred to the bill.

The Chancellor sustained the demurrer and dismissed the bill, and from his decree the plaintiffs appeal on the grounds:—

1. That the fee conditional created by the will of the testator vested in the son of Elias Lynch Horry, and in becoming so vested, all the subsequent limitations were void.

2. That a fee cannot be limited after a fee, to take effect on an indefinite failure of issue.

3. That on the death, in July 1797, of the son of Elias Lynch Horry, the possibility of reverter of the fee conditional vested in the said Elias Lynch Horry, and the plaintiff, Mrs. Deas, as the sole heirs at law of the testator, Elias Horry, subject to the estate of the tenant for life, Elias Lynch Horry.

4. That on the death of Elias Lynch Horry, the plaintiff, Mrs. Deas became entitled to the possession of one moiety of the said plantation, and the defendants to the other moiety.

5. That the plaintiffs are entitled to a moiety of the rents and profits from the death of Elias Lynch Horry.

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*Petigru & King, for the appellants, cited and commented on the following authorities: Archer's case, 1 Co. 63; Fearne on Rem. 314, 514 n. I, Ib. 517; Adams v. Chaplin, 1 Hill's Ch. 265; 3 T. R. 489; 4 Ib. 39; 2 Bail. 248; 3 Cruise. 461, tit. 29, Ch. 4 s. 2. Fearne, 548; 1 Russ. & Milne, 117; 8 Wheat. 77; 1 Dom. 411; 4 Kent's Com. 258-9, 3 Ed; Fearne, 371-2; 1 Cruise, 19; 3 P. W. 372; Co. Lit. 426.

R. B. Smith & Dunkin, contra, cited the following: Bract. 2 book, sect. 6; Fearne, 383, 354; 2 Saund. 380; 2 Bl. Com. 110; Plow. 241; 2 Prest. 301; 1 Ves. 111; 1 Hill's Ch. 273, 298; 1 Co. Lit. 219, 255; 2 Atk. 282; Fearne, 378; 1 Prest. 75; 4 Kent's Com. 498; 4 Com. Dig. 148, tit. Est. K; 8 East. 568; 1 Taunt. 585-6, 604; 2 Prest. 204; 3 T. R. 88; 2 Bur. 1131; 1 W. Black. Rep. 251; 2 Eq. Rep. 111, 112; 3 Bos. & Pul. 665; Cruise tit. 29, sect. 16.

HARPER, J. There would be no question respecting this will in England. It would have given an estate for life to Elias Lynch Horry, the father, with remainder in tail to his first and other sons, and in default of sons, to his daughters, successively, in the order of birth, leaving the reversion in the testator's right heirs. On the birth of the son, the remainder in tail would have vested in him, and on his death, in 1797, would have vested in interest in the eldest daughter of Elias Lynch Horry the elder, and on his death, in 1831, would have vested in possession, leaving the reversion still in the right heirs of the testator.

In like manner with us, there is no doubt but that Elias Lynch Horry, the father, took an estate for life, and that on the birth of the son, a fee conditional in the land vested in him. The first question is as to the validity of any remainder limited after the first devise of the fee conditional. In the case of Mazyck v. Vanderhorst; [Bailey Eq. 48,] decided by this Court, it was determined that no remainder could be limited after a fee conditional. The same thing was determined by me, as Chancellor, upon full consideration in the case of Bailey v. Seabrook, [Rich. Eq. Cas. 419,] on the clear preponderance of the more modern authorities, notwithstanding the authorities of Bracton and Fleta, shewing the existence of a different rule in their times. The same point was again determined by me, in the case of Adams v. Chaplin, 1 Hill's Eq. R. 265, which determination was affirmed by this Court.

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*It is true that in the case of Bailey v. Seabrook, I threw out the suggestion, on the authority of the quotations from Bracton and Fleta, that before the statute de donis, there might have been a limitation of the fee conditional to several in succession, each taking the same qualified estate without having relation to the ultimate possibility of reverter; a sort of substitution not involving the power to limit the fee absolute; but, as said in that case, this is speculation too uncertain to found a conclusion upon. The passages referred to, import that the ultimate possibility or fee absolute may be limited. The whole current of English authorities is that no remainder can be limited after a grant of the fee simple conditional; and the reasoning of the cases illustrates this, because by the grant the first taker has the whole estate, so that there is nothing left in the grantor to be the subject of a further grant; and the further reason assigned in Willion and Berkley, Plowd. 235, 239, and other authorities, that before the statute, no formedon in remainder lay, so that such a remainder man would have been without remedy. This has certainly been the law of England since the time of Plowden—and should we be authorized to depart from it on our construction of the older authorities?

All remainders, then, after the devise to the first son of Elias Lynch Horry were void; and on his death in 1797, his estate was de-

termined, and the fee reverted to and vested in the right heirs of the testator, Elias Horry. Who were those right heirs? At the death of the testator, before the passing of the Act of 1791, abolishing the rights of primogeniture, his son, Elias Lynch Horry, was his heir at law; but at the death of his son in 1797, the father, Elias Lynch Horry, together with his sister, the plaintiff, Mrs. Deas, according to the provisions of that act, answered the description of the testator's heirs at law. The point was considered by me in Adams v. Chaplin, in which case also a fee conditional was devised by a testator who died before the Act of 1791, and the estate determined after the act. I refer to that case for the rule of the English law—"That where a person, entitled to an estate in remainder or reversion expectant on a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir, because he never had a seizin to render him the stock or root of an inheritance, but it will descend to the person who is heir to the first purchaser of such remainder or reversion, at the time when it

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comes into posses*sion"—and for the reasons which induced me—supposing the rule to be different with respect to a remainder or reversion under our statute of distributions, yet to conclude that with respect to a fee conditional, the estate must go to the person who can make himself heir to the grantor of the fee conditional, when that estate determines. It was argued that on the death of Elias Horry, the right of reverter descended on his son, Elias Lynch Horry, and it seemed to be thought that this right could not be divested by the act of the legislature. But why not? It belongs to the legislature to direct the course of descent, and declare who shall be heir. It is true that the right of reverter descended on Elias Lynch Horry in this sense, that if the fee conditional had determined at any time after the death of his father, and before the Act of 1791, he would have been the person then entitled to the benefit of it. But that right he could not have transmitted to his heir, if the Act of 1791 had never been passed. Such a right, according to the views before expressed, is not regarded as property, it is a mere possibility, analogous in some degree to an heir apparent's right of succession.

Besides, as was justly observed in argument, if the act of the legislature is not to have effect, it must be on the ground that it is opposed to those provisions of the constitution, which are intended for the protection of private property. There is no other restraint than the constitution on the legislature. But the constitution itself provides that the right of primogeniture shall be abolished, and in passing the Act of 1791, the legislature was only carrying the direction of the constitution into effect.

It was further argued that the right of reverter having descended on Elias Lynch Horry, the father, passed under the residuary clause of his will to his daughter. But this is a plain misconception. At the time of his death there was no possibility of reverter. The fee had long before vested in himself and his sister, Mrs. Deas, and he could not divest her interest by his will. But I do not hesitate to express my opinion that such a possibility of reverter is not devisable. An authority relied on was the note to Kent's Com. vol. 4 p. 498, n. d. "Mr. Preston doubts whether a mere possibility of reverter be devisable, but there seems to be no reason for doubt since the decision in Jones v. Roe." But with proper deference to that distinguished jurist, it does not appear to me that the case of Jones v. Roe (3 T. R. 88) con-

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cludes this mat*ter. What is determined in that case is, that an executory devise is devisable; that is, the interest which the devisee takes before the event on which it depends is determined. It is said that a possibility coupled with an interest is devisable. But I am persuaded that the right of reverter is not regarded as such a possibility. In the case of Goodright v. Forrester, 8 East, 552, subsequent to Jones v. Roe, it was determined that the right of entry could not be devised under the Stat. wills, 27 H. 8, C. 1, which provides that persons "having manors, lands, tenements or hereditaments," may dispose of them by will. It was argued on the terms of our statute of 1789, which authorizes any person having "right or title to any lands, tenements or hereditaments whatever," to dispose of them, that the possibility of reverter is an hereditament, being descendible, and is therefore devisable. The possibility of reverter is descendible in the sense I have before pointed out: and exactly in the same sense the right of entry is descendible; and there seems to be no substantial difference in the words of the two statutes. But what is a right of entry? The party has been divested of the estate by disseisin, but has the perfect present right of re-investing himself with the title by entry. Mr. Preston, in his elaborate argument of the case of Goodright v. Forrester, in the Exchequer Chamber, 1 Taunt, 603, (where it was finally determined on different grounds, without impugning the decision of the Court of King's Bench on the point,) admits the authority of Jones v. Roe, but argues that, in point of law, though it is otherwise in point of fact, a right or title of entry is no interest; at least no interest for the purpose of disposition, though it is an interest which may be released, it is merely a naked possibility. But he who has the possibility of reverter, has no present interest, either in law or in fact, and the presumption is, that he will never have any, the whole estate, according to the cases, is in the tenant in fee conditional. Is this less a na-

ked possibility?—The only decree which can be made at present is, that the decree of the Chancellor be reversed, and the demurrer overruled, and it is Ordered and decreed accordingly.

JOHNSON, J., and O'NEALL, J., concurred.

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2 Hill, Eq. *250

*JOHN KLINCK, Administrator of Michael Keckley, v. EDWARD KECKLEY, Executor of George Keckley.

(Charleston. March, 1835.)

[*Dower* ⟸53.]

A renunciation of dower on a mortgage cannot operate beyond the estate conveyed so as to have the effect of a perpetual bar—it can only postpone the claim of dower to the satisfaction of the lien, and the land stands as a security for the debts secured by the mortgage unincumbered by the wife's right; the other creditors have no right to the aid of the wife's dower for the payment of their debts:—therefore where the wife had renounced her dower on mortgages by her husband, & after his death on marshalling his assets in the Court of Equity the mortgage debts were paid out of the personalty, it was held that the widow was entitled to her dower, and a sum of money assigned in lieu thereof, was ordered to be paid to her, out of the land which was ordered to be sold for the payment of debts.

[Ed. Note.—Cited in Agnew v. Renwick, 27 S. C. 569, 4 S. E. 223; Jefferies v. Fort, 43 S. C. 50, 20 S. E. 755.

For other cases, see Dower, Cent. Dig. § 110; Dec. Dig. ⟸53.]

[*Executors and Administrators* ⟸261.]

The common law prerogative of the King to be paid in preference to all other creditors, does not apply to the State. The right of the State depends, in this respect, altogether on the statute law. The Act of 1789, prescribing the order in which the debts of a deceased person shall be paid, gives the preference to the state only where the intestate is indebted to the State and a citizen in equal degree; and therefore a junior judgment in favor of Commissioners of the Poor, (conceding it to be a debt due to the public,) is not entitled to be paid in preference to senior judgments of other creditors.

[Ed. Note.—Cited in Haynsworth v. Frierson, 11 Rich. 478; Keith v. Trapier, Bailey, Eq. 63; Kinsler v. Holmes, 2 S. C. 498; Edwards v. Sanders, 6 S. C. 333; Baxter v. Baxter, 23 S. C. 117, 118; Lockwood v. Lockwood, 68 S. C. 331, 47 S. E. 441.

For other cases, see Executors and Administrators, Cent. Dig. § 948; Dec. Dig. ⟸261.]

[This case is also cited in Grube v. Lilienthal, 51 S. C. 452, 29 S. E. 230, and distinguished therefrom.]

This case came up at Charleston, in April 1834, before Chancellor Johnston, on the report of the Commissioner, made in pursuance of several orders calling in the creditors of George Keckley, and requiring the Commissioner to receive further demands against the estate, in order that the assets might be marshalled.

Among other demands, the Commissioners of the poor on Charleston neck presented a judgment against George Keckley, in the name of John Robinson, for the use of the said Commissioners, founded on a due-bill: and it was proved that Keckley had acted as chairman of the board of Commissioners, received the poor tax during his term of office, and on its expiration, accounted with Mr. Robinson, his successor, and gave his due-bill for a balance in his hands. It was insisted that this was a debt due to the public, and therefore entitled to a preference.

The widow of George Keckley, by virtue of an order of Court in another case, claims to be paid out of the funds in this case, a sum assessed to her for dower. The facts in relation to this claim are fully stated in the opinion of the Appeal Court.

The Chancellor held, that the demand of the Commissioners of the poor, could rank only as a judgment debt; and decreed the amount claimed by the widow for dower to be paid, on the ground that the previous decretal order was binding on him, and could only be set aside by the Appeal Court.

From this decree the Commissioners of the poor appealed, on the grounds:—

1. That the Chancellor erred in decreeing that their claim should only rank as a judgment debt, whereas it is submitted that it should rank as a debt due to the public, and be paid in preference to all other claims reported on.

2. That the Chancellor erred in allowing the claim for dower, as it was illegal and excessive; and the decree for the same was irregularly obtained and not obligatory on the creditors.

M'Crady, for the appellants, referred to 1 Faust, 76; 2 Faust, 75; A. A. 1813 p. 13, 14; A. A. 1824, p. 66, 67; and cited, State v. Williams, 1 N. & M'C. 26–28; State v. Simpson, 1 Bail. 378.

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*O'NEALL, J. The first question made in this case, is as to the payment to the widow of George Keckley, deceased, of the amount assessed in her favor for dower in another case in this Court, and directed to be paid out of the funds. The facts out of which the question arises seem to be, that George Keckley mortgaged his land to the Union Bank, and the Bank of the State; that his wife renounced her dower on these mortgages. Mr. Keckley, at his death, was found to be insolvent—on a bill against his executor, by his widow, a sum of money in lieu of dower, was assessed by the Commissioners under the writ of admeasurement of dower; their return was confirmed, and the sum assigned was ordered to be paid out of the proceeds of the sale of Mr. Keckley's estate ordered to be sold in this case, in which it had been previously ordered to advertize for creditors to come in, and that "the Commissioner shall thereupon marshall the assets of the es-

tate, after deducting the amount which may be decreed to the widow as dower, setting forth the assets of the estate, and the amount and order in which the debts are payable." Under this order, the creditors have come in, and the Commissioner reports, that he has paid out of the sales the mortgages, and has made a partial payment to the widow, on account of her dower. The personal estate was more than enough to pay the debts prior to the mortgages and the mortgagees. The funds however will not be sufficient to pay the dower and all the intestate debts. The widow is no party to this bill. She is however entitled under the former decree to receive her dower out of the assets in this case, and it might be difficult for the creditors in this case to entitle themselves to make the objection in this informal way to the widow's claim of dower; but as the objection was at last rested on the impropriety of such an allowance being made to the widow, and the objections to the irregularities (if there were any) in the proceedings for the admeasurement of her dower were not insisted on, and as a majority of the Court are very clearly of opinion that she is entitled to dower, we have concluded to consider the point, as if it was regularly made.

We are not advised of the form or manner in which the dower was renounced on the mortgages, but as no objection was made on account of any insufficiency in that respect, it is taken for granted that every thing was regular.

What is the effect of this renunciation of

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dower? I think it is *clear that it cannot operate beyond the estate conveyed. It cannot have the effect of a perpetual and absolute bar. For the mortgage is as against the mortgagor, only a lien. The renunciation can only have the effect to postpone the claim of dower to the satisfaction of that lien. The land then stands as a security for the payment of the debts secured by the mortgages, unincumbered by the wife's rights. If the mortgages had been paid by the husband in his life time, the wife's right of dower would have been restored. Does the fact of their payment after his death, in a regular course of administration, restore the wife's right to dower? The 36th Sec. of the Act of 1789, P. L. 494, directs that the debts due by any testator, or intestate, shall be paid, viz: 1st. Funeral and other expenses of the last sickness, and of administration. 2d. Debts due to the public. 3d. Judgements, mortgages and executions, the oldest first, &c. Under this provision, the mortgagees were entitled in their order, to be paid out of the personal estate: and if they had attempted to collect their debts by a sale of the real estate under a decree of foreclosure, I think the widow would have been entitled to the application of the personal assets, in exoneration of the land; for the other creditors have no right, either in law or equity, to the aid of her dower for the payment of their debts. According to the common law, dower is preferred to purchasers or creditors. The latter are not prejudiced by allowing the dower: it neither increases nor diminishes the fund, out of which they had a right to expect payment—the intestate's real and personal estate; for the widow's dower is no part thereof. But I have said that the renunciation of dower cannot have effect beyond the estate conveyed. When that ceases, the renunciation must also cease. The deed of a feme covert executed under, and agreeable to law, ought to be strictly construed, so as not to deprive her of any right beyond that actually conveyed. Here the legal effect of her renunciation must be controlled by the terms of the deed on which it is made, to which it has reference, and of which it is a part. That sets apart the land to secure the payment of a debt: the dower is forever renounced if the land is sold under the mortgage to pay that debt. This makes the renunciation in the nature of a collateral mortgage. If the husband's mortgage is not foreclosed, the wife is most clearly not barred of her dower; she could demand it of any one except the mortgagee, and no one but the mort-

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gagee could plead *her renunciation in bar to her demand. When the mortgage is paid off by the assets of the husband, none of his creditors have any equity to set it up against the wife, for she has generally a prior equity to be allowed her dower, and in this case there is nothing to take it out of the general rule; for the legal effect of her renunciation is removed, and when that is done, she stands as if she had never renounced her dower. For unless she had received some beneficial interest by the mortgage, Equity could not undertake to control the law. On examining such of the cases as I have been able to refer to, the principles which I have stated are fully sustained.

In Dolin v. Coltman, 1 Vern. 294, the wife joined her husband in a mortgage, and levied a fine to bar her dower, and in consideration thereof, the husband agreed that she should have the redemption of the mortgage; he twice subsequently mortgaged the same estate. It was held, that this agreement to redeem was fraudulent against the junior mortgages; but that the wife should have her dower, as she had renounced in the confidence of having the equity of redemption. This case shews that the renunciation of dower by the wife is not to have effect beyond her intent, as manifested by the consideration of the act done. Apply that principle to the case before us: what was the consideration of her renunciation on the mortgages? To secure the ultimate payment of the debts. It was the same as

if she had said to the mortgagees, if you cannot be paid your debts but by a sale of the land, I will not claim dower out of it. If they could be otherwise paid, from the analogy of this last case, she could not be barred from her dower; for then the consideration of the renunciation ceased, and to give it an effect beyond, would be a fraud on her. In Titus v. Neilson, 5 J. Ch. Rep. 452, the husband and wife legally executed a mortgage of the land, and subsequently the husband alone executed another mortgage. On a bill filed by the first mortgagee against the husband and wife and the second mortgagee, for a foreclosure of his mortgage, pending the proceedings the husband died, the land was decreed to be sold, and after payment of the first mortgage, the question arose whether the second mortgagee should be entitled to the entire residue, or whether the widow was entitled to one third thereof during her life, as and for her dower. Chancellor Kent held that the widow was entitled to her dower and in delivering his judgement

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(at 457,) he remarks, "when *the wife joined in the first mortgage, she only parted with her right of dower to the extent of that mortgage debt, and she would have been entitled to have redeemed the mortgage upon her husband's death, for the sake of her dower, and to re-instate herself in all her rights." If the wife upon the death of her husband may redeem the mortgage, and thus re-instate herself in all her rights, it follows (I think) that she has the right to have the mortgages paid out of the personal estate. For if she had redeemed, she would, against the heir, have been entitled to retain the land until she had her dower assigned her, and was paid the mortgage debt, deducting her proportion as dowress.—1 Eq. Ca. Ab. Tit; Dower and Joint. B. 6; 5, J. Ch. Rep. 491. Her contribution to the heir is one third of the annual interest of the mortgage debt during life; thus shewing that the mortgage debt, even in her hands, remains a charge upon the estate, and that her dower is preferred to all other claims where she has not renounced; or, if she has renounced conditionally, and the condition can be prevented from attaching. If the widow, in the case before us, had redeemed the land by paying off the mortgages, she would have been entitled to her dower, and also to have the mortgages paid to her. She would be also entitled to have that payment made out of the personal estate; for that is the primary fund for the payment of the debts, and as a mortgage creditor, she could only, in marshalling assets, have been compelled to exhaust the balance of the real estate after satisfying her dower, before resorting to the personal estate. That would be unnecessary to be done; for if she was paid out of the personal estate, the other creditors would get the balance of the real estate after satisfying the dower, and thus she could not be asked to go upon the real estate to relieve the personal, as no benefit would result from such a proceeding. The effect of allowing her renunciation to be taken advantage of by other creditors, so as to exclude her from dower altogether, would be to give them an equity to be paid out of her dower. This they have not. For, by her renunciation to the mortgagees, in the language of Chancellor Kent, "She only parted with the right of dower to the extent of the mortgage debts." Allow it to operate to bar her dower when it is not necessary that it should have such an effect, for the satisfaction of the mortgages, and it will amount to an absolute and unconditional renunciation, which never was intended, and which is

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therefore contrary to both law and *equity. In Hildreth v. Jones, 13 Mass. Reports, 525, the wife joined her husband in a mortgage, and after his death, in an application to the Judge of Probate, she stated that she was barred of her dower by the said mortgage deed, and prayed an allowance out of the personal estate, which was granted. The administrator afterwards paid the mortgage—it was held that she was entitled to her dower.

In Barker v. Parker, 17 Mass. Rep. 564, the land was mortgaged by husband and wife to Gerry, who assigned to Jeffries, by whom the land was recovered in an action, and he entered into the possession under a "judgement of possession," and so continued for some time, until John Henderson, who had been tenant under Barker, the original mortgagor, paid off the mortgage to Jeffries, who released to Henderson his right. Barker's right to redeem was sold under execution, and purchased by Mackay, who conveyed to others, by whom it was conveyed to the defendants. It was held that the demandant was entitled to dower. Mr. Justice Putnam remarked, in delivering his judgement, "If no mortgage had been given, it would be agreed on all hands that the widow should have dower. But the mortgage having been paid, is to be considered as never having existed." This dictum presents, I think, the true view, that the mortgage being paid, is to be considered, so far as the wife's dower is concerned, as never having existed, and hence no pretence can be made by which it can be set up as a bar to the wife's right of dower. Both the cases cited shew that payment is an absolute extinction of the mortgage, and the first that not even allowance out of the personal estate for maintenance to the wife on the supposition that she was barred, could keep alive and in operation the wife's renunciation of dower after the mortgage had been paid off.

In Pixley v. Bennett, 11 Mass. Repts. 298, the demandant, widow of Charles Pixley, de-

manded her dower of lands belonging to the husband during coverture: the tenants pleaded that she had released her dower: the demandant craved oyer of the writ, from which it appeared that she had released to Truze and Edwards. She therefore demurred to the plea, and her demurrer was sustained. From this decision it is apparent that a renunciation of dower cannot be taken advantage of by any one except the party, or his privies, to whom it is made. The creditors could not, therefore, set up the renunciations

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of dower to mortgagees, as a *bar to the wife's claim of dower out of the land mortgaged. It was said that the decree allowing the widow's dower did not make it a charge upon the land specifically, but upon the estate generally; and Stock and Parker, 2 M'C. Eq. Rep. 376, was cited to shew that this was incorrect; and if it was, as is supposed by the objection, there is no doubt from that case that it would be so. But the land is ordered to be sold in this case, and out of its proceeds the dower may be regarded to be decreed to be paid; and as it sold for a sum greatly beyond the dower, and as no rights of creditors will be changed thereby, the Commissioner, in paying the dower, will not be in error in paying it out of the funds generally. From this examination of the question, I am satisfied that the decree, allowing the widow dower of the premises mortgaged was correct, and that the sum assessed in lieu of her dower must be paid by the Commissioner out of the proceeds of the sale of the estate of George Keckley, deceased, in this case.

2. Without undertaking to decide whether the debt due to the Commissioners of the Poor be a debt to the public, it will be sufficient to say that, conceding it to be so, it is not entitled to the preference claimed. According to the report of the Commissioner, and in the aspect in which the claimant wishes it to be considered, this debt is on a due-bill for a balance due by the deceased for poor tax received by him. The other debts are due by mortgages or judgements. The case of the Commissioners of Public Accounts v. Greenwood, 1 Desaus. Eq. Rep. 450, (decided in 1795, and never questioned,) denied the general common law prerogative right of the King to be paid in preference to his subject, to have any application to the State. In the State v. Harris, 2 Bailey, 598, the same position was ruled. So that the right of the State to be paid in preference to other creditors, depends now altogether on the statute law. Under the Act of '89, the question is, what debts to the public are entitled to be first paid. In the State v. Harris, I said that debts which are due to the State as a "sovereign, and for the protection of both the citizen and property, are entitled to preference." This definition was intended to embrace the right of the State to be paid all taxes in preference to all other debts. But perhaps the words used in the act of 1789, ought to have a little more extended meaning, and to be construed by the common law. In the case of the Commissioners of Public Accounts v. Greenwood, the Judges say, "But even if the common law prerogative

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*was retained, yet we are of opinion it cannot affect the defendants in this case, because, by the common law, the King was entitled to a preference only when the debt was on record or specialty, in cases where he and the subject stood in equal degree." That the words "debts due to the public," must be construed to mean, that where the intestate is indebted to the State, and some of the citizens in equal degree, that in such case the State shall have the preference, is not only apparent from a construction of the act by the common law, but the same conclusion is obtained by looking to the fact that any other construction would divest liens existing in the life time of the debtor, by judgements, executions and mortgages.

It appears that a judgement was obtained on the debt due to the Commissioners of the Poor, in the name of John Robinson: if that can be considered as judgement in favor of the State, (which I much doubt) it cannot alter the case, the Act of '89 gives the oldest judgement the preference, and as this judgement is the youngest, it cannot be said to be in equal degree with the older ones. It is a debt of the same class, but it is not with the others equally entitled to payment. The case of Commissioners of Public Accounts v. Greenwood is, however, an authority upon the point, and it is unnecessary to look beyond it. I am, therefore, satisfied that the Commissioners of the Poor are not entitled to the preference claimed.

It is Ordered and decreed that Chancellor Johnston's decree be affirmed.

JOHNSON, J., concurred.

HARPER, J. I concur as the second point decided.

2 Hill, Eq. 257

VERNON & CO. v. the Executors of PEGGY AFRICANA EHRICH, and JACOB R. VALK and Wife.

(Charleston, March, 1835.)

[*Descent and Distribution* ⇐144; *Wills* ⇐847.]

Lands in the hands of the heir or devisee, are liable to the debts of the deceased, whether the executor has assets or not. Under the stat. 3 & 4 W. & M. the heir and devisee may be sued jointly, and the executor cannot be joined at law. The heir or devisee, however, has an equity against the executor to be reimbursed out of the personal assets: and when the creditor comes into Equity to charge the real estate, he must make the executor a party to prevent circuity of action, thereby at once affording the heir or devisee relief; but where there is no executor or adm'r. and no personal assets in the state, no such party can or need be made.

[Ed. Note.—Cited in Goodhue v. Barnwell, Rice, Eq. 239; Bird v. Houze, Speers, Eq. 256; Bryce v. Bowers, 11 Rich. Eq. 49; Gilliland v. Caldwell, 1 S. C. 198; Mobley v. Cureton, 2 S. C. 148; Mobley v. Cureton, 6 S. C. 66; Lanier v. Griffin, 11 S. C. 584, 587; Small v. Small, 16 S. C. 71; Gregory v. Rhoden, 24 S. C. 94, 99; Lowry v. Jackson, 27 S. C. 322, 3 S. E. 473; Ariail v. Ariail, 29 S. C. 94, 95, 7 S. E. 35; Fogle v. St. Michael Church, 48 S. C. 92, 26 S. E. 99; Brock v. Kirkpatrick, 60 S. C. 338, 339, 344, 345, 348, 350, 38 S. E. 779, 85 Am. St. Rep. 847, 69 S. C. 238, 48 S. E. 72.

For other cases, see Descent and Distribution, Cent. Dig. § 505; Dec. Dig. ⇐144; Wills, Cent. Dig. § 2161; Dec. Dig. ⇐847.]

[*Descent and Distribution* ⇐130.]

The heir or devisee is not bound by a judgement against the executor or adm'r.

[Ed. Note.—Cited in Bird v. Houze, Speers, Eq. 250, 256; Gilliland v. Caldwell, 1 S. C. 198; Small v. Small, 16 S. C. 71; Ariail v. Ariail, 29 S. C. 94, 95, 7 S. E. 35; Brock v. Kirkpatrick, 60 S. C. 339, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see Descent and Distribution, Cent. Dig. § 480; Dec. Dig. ⇐130.]

[*Wills*, ⇐749.]

Qu? Can a bill 'gainst a devisee to charge the devised estate, be sustained without making the heir at law a party?

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1934, 1935; Dec. Dig. ⇐749.]

[This case is also cited in Hendrix v. Holden, 58 S. C. 530, 36 S. E. 1010, without specific application, and cited and explained in Brock v. Kirkpatrick, 60 S. C. 345, 38 S. E. 779, 85 Am. St. Rep. 847.]

The bill states that John M. Ehrich, in his life time, and the plaintiffs, were jointly engaged, in New York, in the shipment of hemp; and that Ehrich died in 1822, having first executed his will, by which he devised to the defendant, Mrs. Valk, a house and lot

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*in Charleston, and appointed his widow, Peggy Africana, his executrix. That proceedings were had in the Court of Chancery, in New York, on the part of these plaintiffs, touching these shipments, against Mrs. Ehrich; that by her answer she admitted assets, and that, in 1826, it was then ordered and decreed as follows: "The master having reported a balance against the estate of the said John M. Ehrich, of $3,528.93, and the said Peggy A. Ehrich having, by her answer heretofore filed, admitted assets, it is Ordered, adjudged and decreed, that the report of the master be confirmed, and that the defendant, Peggy A. Ehrich, pay to the plaintiffs or their solicitors, the said sum of $3,528.93, so reported to be due to the said plaintiffs." That, thereupon, an execution was issued and returned nulla bona. That Mrs. Ehrich died in December 1832, having, by her will, appointed the defendants, E. Parmley, L. Catlin, and A. Dey, of New York, her executors. That the personal estate of John M. Ehrich is exhausted, and the house and lot in Charleston devised to Mrs. Valk, is the only resource to pay the decree. Prays an account for the rents, and satisfaction of the decree, by the sale of this property—and general relief.

Defendants, Jacob R. Valk and wife, demurred to so much of the said bill as sets forth a decree obtained in the Court of Chancery, in the State of New York, by the plaintiffs, against Peggy Africana Ehrich, lately deceased, and seeks to have satisfaction thereof by the sale of the house and lot devised by the said John M. Ehrich, as in the bill mentioned; and for cause of demurrer say, that these defendants were neither party nor privy to the said proceedings, nor is the said decree against them or against the property so devised as aforesaid, but against Peggy Africana Ehrich individually.

Defendants further demur to so much of the bill as states that certain commercial transactions took place between the late John M. Ehrich, in his life time and the plaintiffs, in which the said John was supposed to have become indebted to the said plaintiffs, and seeks to recover the amount of the same from the property in the possession of these defendants; and for cause of demurrer say, that by the plaintiffs' own showing, the said John M. Ehrich is dead, and his executor or administrator is not made a party to the said bill;—and for further cause of demurrer, these defendants say the said Peggy Africana Ehrich, executrix of John M. Ehrich, admitted that she had assets of the estate of

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her testator suf*ficient to satisfy his debts, and yet the plaintiffs do not show that they have pursued all proper means to procure payment of their supposed debts, from the fund so originally and properly liable, before resorting to the real estate of the said John M. Ehrich specially devised in trust for this defendant, Sarah Valk.

The Chancellor overruled the demurrer.

The defendants, Jacob R. Valk and wife, appeal on the ground, that the demurrer

should have been sustained for the reasons therein stated.

Dunkin, for the appellants, contended that the decree in New York is against the executrix personally, who became liable by admitting assets to be in her hands, and the plaintiffs have ample remedy by enforcing that decree against her estate. That the property here never was under her control, and that the defendants, Valk and wife, are in no wise bound by the New York decree to which they were not parties. That their property cannot be made liable until the executrix has been pursued to insolvency—and that there is no party now before the Court representing Ehrich's estate; for the other defendants, executors in New York, are not recognized as such here. Cited 6 John. Ch. Rep. 373; 8 Cranch, 9; 8 Wheat. 646, 667, 671; 3 John. Ch. Rep. 58; 1 M'C. Ch. 417.

Petigru, contra.

HARPER, J. The causes of demurrer set forth are, that no executor or administrator of John M. Ehrich is made a party to the bill; that the executrix, Peggy Africana Ehrich, admitted assets of the testator, and plaintiffs do not show that they have pursued all proper means to obtain payment of their debt from those personal assets. To so much of the bill as sets forth the decree in New York, the demurrer states that the defendants were neither parties nor privies to that decree.

By the common law, a bond creditor might bring his action against the heir at law in respect of real assets descended, and neither was bound to join nor could join the executor in the action.

And it was immaterial whether the executor had, or had not assets, the heir could not plead that the executor had assets.—Com. Dig. Tit. Pleader E. 2. But lands were not liable in the hands of a devisee. By the Stat.

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3 & 4 W. M. c. 14, (P. L.) 87, called *"the statute of fraudulent devises," an action was allowed against the heir and devisee jointly, on bonds and specialties. This action was of course subject to the same rules as that against the heir alone. The executor was not to be joined, and it was immaterial whether the executor had assets. Then by the Stat. 5 Geo. 2, c. 7, lands were made liable for the satisfaction of all debts, by simple contract as well as by specialty, "in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty." If this were an action at law then, against the heir and devisee, it would be no objection that the executrix was not joined, or that she had assets, or that no remedy had been pursued against her; but the heir or devisee had an equity, if there were assets sufficient to satisfy the debt in the hands of the executor, to be reimbursed out of those assets. When therefore it was necessary for the creditor to come into Equity, (and suits against the heir or devisee seem to have been more common in Equity than at law,) it was requisite that the executor should be made a party; not on the principle contended for in this case, that the executor is the only legal representative of the testator and the only proper person to defend an action which shall affect his estate, but on the familiar equity rule of preventing circuity of action by making all persons interested parties, so that complete justice may be done at once. "Now the Court of Equity in all cases delights to do complete justice, and not by halves, as first to decree the heir to perform this covenant and then to put the heir upon another bill against the executor to reimburse himself out of the personal assets, which, for aught that appears to the contrary, may be more than sufficient to answer the covenant; and where the executor and heir are both brought before the Court, complete justice may be done by decreeing the executor to perform this covenant so far as the personal assets will extend, the rest to be made good by the heir out of the real assets." Knight v. Knight, 3 P. Wms. 333. The question in that case was, whether the executor could be made a party. If it were shewn by the bill, however, that there were no assets in the hands of the executor, or that he had been called to account, and the remedy against him was exhausted, the reason would cease, and it would be unnecessary to make him a party.

If there were an executor or administrator in this State having assets, it would be neces-

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sary to make him a party, not on the *ground that he is the only legal representative to defend the estate, but on the equity principle mentioned. The bill however shows that there is no executor or administrator, and no personal assets in the State: of course no such party could be made. It shows that all the personal assets went into the hands of the executrix, Peggy Africana Ehrich, and her executors are made parties. If there had never been any proceeding whatever against the executrix or her representatives, here are all the parties that could be made. There is no analogy to our decided cases that have been relied on, as in Trescot v. Trescot, 1 M'C. Eq. 417, that before a legacy or distributive share can be pursued by creditors in the hands of the legatee or distributee, the executor must be sued to insolvency; such creditors never had any direct right of action against the legatee or distributee, and their entire equity as against them is founded on the executor's insolvency. Notwithstanding our decisions that lands in the hands of the

heir may be sold by an execution upon a judgement against the executor or administrator, (decisions which, however much we may regret them, have yet obtained too long, and too many rights have been vested under them to allow us to interfere with them,) yet I suppose an action at law might be sustained against the heir alone. There is nothing in these decisions to forbid such an action. In such action, the executor neither would nor could be joined, and it would be immaterial whether there were an executor or administrator in the State or not. Coming into Equity, the creditor must conform to the rules of Equity and make all necessary parties. This, it appears to me, has been done. It would be mere mockery that a formal administration should be taken out here where there are no assets, in order that such formal administrator might be made a party.

I think the ground of the demurrer is just to that part of the bill which states the decree obtained in New York, and prays the enforcement of it. The heir is not bound by a judgement against the executor or administrator, and defendants were not parties or privies to that decree. When the heir is sued he is to defend, and the cause of action must be established against him.

The bill however states sufficiently the original cause of action, and in addition to the prayer for the enforcement of the decree, contains a prayer for general relief. When a proper case is made, though the specific relief prayed for cannot be granted, yet, if there be a prayer for general relief, the proper relief will be afforded.

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*When a bill is against the heir and executor, the decree is, that the executor account for the personal assets, and that they shall be applied so far as they will go, and that the heir shall make good the deficiency. The executors of the executrix are out of the jurisdiction, and a decree against them would probably be ineffectual. I do not say that the plaintiffs may not be required to institute further proceedings in New York, calling those executors to account, before a decree will be made in their favor against the defendants; but this has nothing to do with the questions made on the demurrer, and it would be premature to consider that matter now.

By the Stat. 3 & 4, W. & M. the action is allowed against the heir and devisee jointly. The heir at law of John M. Ehrich is not a party to this bill, and a question may arise whether the bill can be sustained without making him a party. This, however, is not a ground of demurrer, nor is the question made. The demurrer is sustained to that part of the bill which states the decree obtained in New York, and prays the enforcement of it. In other respects it is overruled, and the Chancellor's decree affirmed.

JOHNSON, J., and O'NEALL, J., concurred.

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2 Hill, Eq. 262

BANK OF SOUTH CAROLINA v. JAMES ADGER.

(Charleston, March, 1835.)

[*Subrogation* ⟸7.]

A surety to a custom house bond having paid it, is not entitled, under the acts of Congress of '97 and '99, to be subrogated to the rights of the United States as against his co-surety, so as to give his demand for contribution a preference over other creditors; nor on the general principles of equity can he claim to stand in the place of the United States as against the co-surety.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 18; Dec. Dig. ⟸7.]

[*Principal and Surety* ⟸198.]

Joint judgment against principal and sureties paid by one of the sureties, will not be set up for contribution against the co-surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 633; Dec. Dig. ⟸198.]

On the 12th of September, 1825, Samuel H. Lothrop made a general assignment to William Price, of all his estate, for the payment of certain preferred creditors in the first place, and the surplus to his other creditors. William Price died intestate, and administration of his estate was committed to the defendant, James Adger. This bill was filed for an account of the administration of his estate, and an order was made directing Mr. Gray, the Commissioner, to take an account of the estate of William Price, and also of the estate of Samuel H. Lothrop, assigned to him; and of the assets that have come to the hands of the defendant; and also to inquire and take an account of the debts

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due by *the said William Price, at the time of his death, in his own right, and as assignee. The accounts have been taken, and it is found that Price is insolvent, but has left assets to pay his bond creditors; and that he is indebted to the assigned estate of Lothrop, in a large sum on bond. The preferred creditors of Lothrop claim to be paid according to his assignment, but a claim is interposed by John C. Miller, and James A. Miller, assignees of Duke Goodman, on the following grounds:

Duke Goodman and Samuel H. Lothrop were the sureties of Joseph T. Weyman, on two custom house bonds; one bond dated 2d May, 1825, payable 2d February, 1826, conditioned for $1332.75, upon which bond judgment was entered up against Weyman, Lothrop and Goodman, on 22d March, 1826; and another bond dated 29th April, 1825, payable 29th April, 1826, conditioned for $4,-

534.50, on which last mentioned bond judgment was had against the principal and both the sureties, on the 6th July, 1826.

In September, 1826, the assignees of Goodman paid the amount of these bonds to the District Attorney, who assigned to them the judgments against Weymau, the principal; and they now claim contribution from the assets of Lothrop for one moiety. The assets of Weyman are exhausted. On this state of facts, His Honor, Chancellor Johnston, decreed the funds of Lothrop to be paid over to his preferred creditors, and the assignees of Goodman appeal:

1. Because the estates of Lothrop and Goodman were equally bound to pay these bonds; and the United States had a priority to all other creditors. And the accidental circumstance that payment had been made by Goodman's assignees before the funds of Lothrop were got in, should not be allowed to favor one set of creditors, or disappoint another.

2. Because Goodman's assignees, by paying off the debts, are entitled to be substituted to the rights of the United States, and to set up the judgments against Lothrop for the moiety which his estate ought to have paid.

Petigru, for the appellants. Upon the general principle of marshalling assets, the assignees of Goodman have a right to payment of a moiety of the debt paid for Weyman.

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*By the 5th section of the Act of Congress of 1797, (1 Story's Laws U. S. 465,) when any person indebted to the United States becomes insolvent, or makes a voluntary assignment to pay his debts, the United States shall have priority in the payment of debts: and the 65th section of the Act of Congress of 1799 (1 Story's Laws U. S. 630) declares, that on all bonds for duties, when the estate in the hands of executors, administrators or assignees, shall be insufficient to pay all the debts, the debt due to the United States shall be first satisfied; and if the principal debtor be insolvent, and the sureties pay the bond, "then such surety or sureties shall have and enjoy the like priority and preference." By the insolvency and consequent assignment of Lothrop, the United States, under the Acts of Congress, were entitled to priority over all his other creditors —a right existing in respect to all the obligors in the nature of a joint mortgage. By the payment of the judgments, the rights of Goodman could not be affected—it was what the law would have compelled. Nor can the United States' Attorney, by coercing payment from Goodman's assets, defeat any of his rights. It has been shewn that the United States had priority of all Lothrop's creditors. On principles of general equity, Goodman, the surety, having paid the debt, is entitled to be remitted to all the rights of the creditor, and to be paid from Lothrop's estate, as if the United States were now claiming.—Aldrich v. Cooper, 8 Ves. 382. As to the right of setting up the judgments, Robinson v. Wilson, 1 Mad. Rep. 567. Lord Eldon, in Copps v. Middleton, overruled this last case, allowing, however, that if there had been a mortgage as a collateral security, the principle would have been right; and in this case, the judgment may be set upon the same principle.

Gilchrist & King, contra. It is not denied that Goodman's assignees are entitled to contribution—the rank which they are to occupy is the question. Against the principal debtor they may rank as the United States, but as against the co-surety, neither under the Acts of Congress, nor by the general principles of Equity, can they claim other than as a simple contract creditor. The preference under the Act of Congress applies only between the surety and his principal—it has no application between co-sureties, and it has been so ruled. Pollock v. Pratt & Haney, 2 Wash. C. C. Rep. 490. Nor will the

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equity doctrine of subroga*tion apply. Noonan v. Gray, 1 Bail. 437; Stat. Eq. Rep. 91; Copps v. Middleton, 1 T. & Russ. 224; 10 John. Rep. 549. Aldrich v. Cooper does not apply to this case. This is not a case of a creditor having two funds from which to be paid, and where he might be compelled to take one so as not to prejudice other creditors; this is a claim to priority.

O'NEALL, J. By the 5th section of the Act of Congress of 1797, (1 Story Laws of the U. States, 465,) it is provided, "that where any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor not leaving sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The 65th section of the Act of 1799, (1 Story's Law of the U. S. 630,) after directing a suit to be brought on any bond for duties which may not be paid on the day on which it becomes due, directs that "in all cases of insolvency, or where any estate in the hands of executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds shall be first satisfied." The proviso de-

clares, that if the principal be insolvent, or if he be dead, and his estate be insufficient to pay all his debts, and the surety or his representatives shall pay the money due on such bonds to the United States, then that the said surety or his representatives "shall have and enjoy the title, advantage, priority or preference for the recovery and receipt of the said moneys out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the United States.

Under these two acts, the United States were entitled to be preferred and first satisfied out of the estates and effects of Weyman. Goodman and Lothrop, under the last act, the security paying the debt, would be entitled to be preferred and first satisfied out of the estate and effects of the insolvent principal.

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*But it is perfectly clear that it does not give to him the preference of the United States to be paid out of the estate of his co-surety. The case of Pollock v. Pratt & Haney, 2 Wash. Cir. Court Rep. 490, is a direct authority upon the point. Judge Washington said, "In regard to the advantages reserved to the surety in the custom house bond, the provisions are confined to the estate and effects of his insolvent or deceased principal." In that case the claim was by the surety against the assignees of one of the assignees of an insolvent principal in a custom house bond, who had received a large sum of his assignor's estate, mingled it with his own, and then became insolvent and assigned to the defendants. Under such circumstances, Judge Washington ruled that the plaintiff was not entitled to be preferred, and used the words which I have quoted. If in such a case the plaintiff was not entitled to be substituted in the place of the United States, it would seem to follow pretty clearly, that the claim of the co-surety, Goodman's assignees, to be substituted in the place of the United States against the administrator of William Price, the assignee of Lothrop, the co-surety, cannot be allowed to prevail. For here as well as there, it may be said that the provisions of the act of Congress do not cover the case made.

But it is said, concede this to be true, and still the assignees of Goodman, on the general principles of Equity, have the right to stand in the place of the United States, and the case of Aldrich v. Cooper, 8 Ves. 381, was cited and relied upon in support of that position; but I think it does not sustain it. This is not a case of a party having two funds; and therefore the equity rule laid down in Aldrich v. Cooper, that in such a case a party shall not by his election disappoint the party having only one fund, cannot apply. By the custom house bond, the United States had the right to expect payment from any one of the three obligors, Weyman, Goodman or Lothrop. But they could not be forced by Goodman to accept his part of the bond, and look to Lothrop for the balance. It was an entire debt due by all or either of the obligors. Payment of it by one of the co-sureties entitled him to contribution as for so much money paid, laid out and expended; and the debt thus due to him by his co-surety, is a mere simple contract. This was ruled by Lord Chancellor Eldon, in Copps v. Middleton, 1 T. & Russ. 224. In that case, the Lord Chancellor stated the conclusion, which is, I think, directly applicable to this. He said, "there has been a case cited, where,

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upon the *general ground that a surety is entitled to the benefit of all securities which the creditor has against the principal, it seems to have been thought that the surety was entitled to be, as it were, a bond creditor by virtue of the bond. I take it to be exceedingly clear, if at the time a bond is given a mortgage is also made for securing the debt, that the surety, if he pays the bond, has a right to stand in the place of the mortgagee, and as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security, notwithstanding the bond debt is paid; but if there is nothing but the bond, my notion is, that as the law says that the bond is discharged by the payment of what was due upon it, the bond is gone and cannot be set up." The bond to the United States was paid by Goodman's assignees; in the language of Lord Eldon, "it is gone and cannot be set up." If the bond is gone, it follows that the preference given to the United States to be first paid and satisfied out of the estates and effects of all the obligors is also gone. The surety has none of the rights of preference of the United States, except as against the principal. The same reasoning applies to the judgment which was a joint debt against Weyman, Lothrop and Goodman. Satisfaction of it by any one of the parties, was a satisfaction of it against them all; the law without any further act to be done, ended its legal operation. If there had been separate judgments against each of the obligors, then it might have been that the satisfaction of one of the judgments against one of the sureties by himself, would not have been necessarily a satisfaction of all the other judgments, unless it was so intended by the surety making the payment.

It is Ordered and decreed, that Chancellor Johnston's decree be affirmed.(a)

JOHNSON, J., concurred.

(a) See Perkins v. Kershaw, 1 Hill's Eq. 351.

2 Hill, Eq. 267

FRANCIS THACKUM and Wife, and Others, v. JOSEPH LONGWORTH.

(Charleston. March, 1835.)

[*Executors and Administrators* ⟸115.]

How far the Court will interfere to prevent the negotiation by an executor or administrator, of notes or bonds taken by him on sale of the deceased's effects.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 467, 468; Dec. Dig. ⟸115.]

[*Executors and Administrators* ⟸115.]

An executor being indebted to the defendant the executor of another estate, by bond secured by mortgage, while solvent, transferred to defendant in payment of his own debt, bonds taken on a sale of his testator's estate, and defendant gave up his bond and mortgage, and paid over the money to the legatees. The executor became insolvent, and on a bill by the legatees of his testator, it was held that the defendant was not liable for the money received by him on the bonds—the equities being equal the law must prevail.

[Ed. Note.—Cited in Rhame v. Lewis, 13 Rich. Eq. 303, 308, 319, 320, 323.

For other cases, see Executors and Administrators, Cent. Dig. § 468; Dec. Dig. ⟸115.]

The following brief of the appellant's counsel is the only statement of the case which the Reporter can present:

The bill states that Thomas Milliken died in

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the year 1819, *having previously executed his will, in which he appointed John M'Nish his executor, and by which, after the death or marriage of his widow, he bequeathed all his estate to the plaintiffs—that M'Nish qualified, and in 1819 sold all the estate of his testator on credit, and took bonds for the purchase money—among others, one of James Cole for $900, one of Pearson Hardie for $850, and one of Isaac Hardie for $600. That the plaintiffs, being young, did not for a long time look after their rights; and in the mean time the executor, being deeply involved, wasted the estate and became insolvent. That he entered into a negotiation with the defendant, Joseph Longworth, who well knew his situation, for the purchase of a plantation called Stock Farm; and that Longworth, knowing the said bonds to be of the assets of the estate of Milliken, sold the plantation to M'Nish, and took the bonds in payment and applied them to his own use—that M'Nish is totally insolvent, and the plaintiffs have not received one cent of their father's estate. The bill prays that Joseph Longworth may account to them for the money so received.

The answer of Joseph Longworth states, that as executor of his brother, Archibald Longworth, he sold to John M'Nish, in the year 1818, the plantation mentioned in the bill, for $7500, and received in cash one-third of the purchase money, and took the bonds of M'Nish, payable in 1819 and 1820, with a mortgage of the premises, for the residue. That M'Nish afterwards paid $2000, and he considered the debt amply secured by the mortgage. That in 1820, M'Nish offered the defendant the bonds of Cole and Hardie, in payment of his own, which he refused. That M'Nish then requested him to collect them for him, which he agreed to do, and M'Nish delivered them to him endorsed in blank, and the defendant gave him a receipt for them, stating that he had received them for collection. That he called on the parties and received the money due thereon, which he considered himself as holding for M'Nish, and offered to pay it to him, but M'Nish requested him to credit his bond with it, which he accordingly did, upon which M'Nish gave him a paper, which he has unfortunately not kept, in the following terms:—

Received, 29th January, 1823, of Joseph Longworth, $2800.17 being the amount collected by him for me from Messrs. Hardie and Cole, on account of the estate of Thomas Milliken.

(Signed) J. M'Nish, Ex'or.

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*He denies that he knew the situation of the estate, or that M'Nish had no right to pay him the money. That he did not consider the money his until his settlement and accounting with M'Nish as aforesaid. That M'Nish afterwards paid him the balance due, and he gave him up his bond and mortgage to be cancelled. That M'Nish was then in good credit, and continued so till 1827, when his property was sold by the sheriff; and he believes it would then have paid his debts, if it had not been bought up by his friends. That the farm was bought at this sale for $800, and a part sold soon after for $2500, and the negroes sold for $100 per head. That in 1825 the plaintiffs sued M'Nish, and by diligently prosecuting their suit, might have recovered their money—and that the defendant was never called on by the plaintiffs to account to them, or had notice of their claims till the filing of this bill.

In January 1833, the cause came on before Mr. Justice Harper, sitting for Chancellor De Saussure.

John M'Nish, sworn on the part of the plaintiffs, says:—Longworth was pretty hard on me for the money I owed him—wrote to me several times [some of the letters produced]—I went to him and asked him to take the bonds, as he was more in the habit of collecting than I was, and if he could collect the money before I could pay him, he should have it. I took a receipt for them. I gave him a receipt for the money just before the last Court, as a memorandum of the settlement which took place in 1823. I have not the receipt which Mr. Longworth gave me; the purport was that he had received the bonds, and when collected would account to me for them. The debt to Longworth was

for a plantation of the estate of Archibald Longworth, at the price of $7000; the stock was $500 more.—$2500 were paid at one time, $2000 at another. The money received on account of these bonds was $2800. I sold negroes to Col. Martin to pay the residue, and he took up the bond and mortgage, which are now in his hands. I proposed to Mr. Longworth to collect the bonds and account to me for them, and had no idea of insolvency at this time; and I believe Longworth thought the debt well secured. He said his brother's estate wanted the money. My settlement with him was after May, 1823. My insolvency is to be dated from 1824 or 1825, by the loss of crops by caterpillars. My negroes were all sold in 1826 or 1827, except those I sold to Col. Martin—at the time of

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the transaction with *Longworth, I paid taxes for forty or fifty, probably more. The plantation sold at sheriff's sale for $800.

Sundry executions in the Sheriff's office against M'Nish were given in evidence.

His Honor decreed that the defendant should account for the $2800 received by him, with interest.

From this decree the defendant appealed, and now moves to reverse the same.

Petigru, for the appellant, argued, that the conduct of the defendant was free from artifice or design. He, too, was an executor, acting not for his own, but the benefit of others. The money was due to him as such, it was amply secured. In the first instance he acted as the naked agent of M'Nish, in collecting the money on these bonds, and after collection, while he was still in good credit, and the affairs of Milliken's estate unknown to him, he had a settlement with M'Nish, in which he gives up the security he had, on receiving the money collected, and has since paid it over. The complaint really is, that the defendant has been more diligent in obtaining his money than the plaintiffs. The law favors the vigilant—every one who collects money from a man in failing circumstances, may be said to get another's money; nor can it be material whether in receiving payment of a just debt, it be paid by the executor with his own money, or with money over which he has a legal control. Some one must lose? Shall it be the defendant or the plaintiffs? There may be great hardship on their part, but equal hardship on that of the defendant. The equities are at least equal, and in such case the law must prevail.

Under the circumstances, can the plaintiffs follow these funds? Whose were they? In law, beyond all question, they were M'Nish's; if he had died, the bonds would have been his assets. Seabrook v. Williams, 3 M'C. 371. Suppose he had been sued by the defendant, and arrested on a ca. sa., and the ca. sa. paid by these funds, could he have been detained in custody, although it might be known that they were Milliken's funds? The defendant is chargeable, if at all, for having collected the money on these bonds and applied it to M'Nish's debt, knowing it to be the funds of Milliken's estate; but there is no case to be found in which money has been followed into the hands of a bona fide creditor, nor any principle on which a creditor

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can be called on to refund *money received in payment of a just debt, without fraud. He reviewed and commented on the cases cited by the plaintiff's counsel, and thence insisted that the extent of the rule on the subject is,—that if one by fraud or collusion with the executor, obtain the assets, or the payment of a desperate debt of the executor, relief will be granted—and that the facts of this case did not show such fraud or collusion to justify the application of this principle.—Cited Taner v. Ivie, 2 Ves. sen. 466, Ewer v. Corbet, 2 P. W. 148; Nugent v. Gifford, 1 Atk. 463; Elliot v. Merriman, 2 Atk. 41.

Elmore, contra. The first question is, did Longworth receive the bonds on a mere naked trust to collect the money, or to collect and apply to his debt. Although he states in his answer that he received them merely in trust to collect and pay over, that he did not, will be seen from the circumstances. The bonds are endorsed in blank by M'Nish, shewing an absolute transfer. In his letters to M'Nish, he speaks of having received money on these bonds, as applicable to M'Nish's bond to himself. From the evidence of M'Nish and the statement of the settlements, it appears that the defendant had actually given M'Nish credit on his bond for the amount of the bonds of Milliken's estate, a year before the final settlement in 1823, when he got M'Nish's receipt. [He here went into a detailed statement of the dealings of these parties to show this fact.] Lastly, the explicit evidence of M'Nish, that the understanding under which the bonds were delivered to him was, that the money, when collected, should be applied to his bond, if it was not paid sooner. Besides, it is not a little remarkable that he should gratuitously undertake the trouble of collecting these bonds, as the mere naked agent of M'Nish, expecting to derive no benefit from them. There cannot be a doubt that he received these bonds with the understanding and intention of further securing his debt—to be applied to its payment, and not merely to collect. But conceding that he received them merely as agent of M'Nish, the result must be the same. He knew they were assets of Milliken's estate, and applied them to his own use in fraud of the legatees.

Had M'Nish the right to sell these bonds? It is of great consequence that the question be clearly settled, how far an executor or administrator may dispose of the equitable as-

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sets of the estate. *The English law allows greater control to executors than ours. The Act of '89, (2 Brev. Dig. 95,) restricts their rights. It declares, "that when it shall be requisite to make sale of any part of the personal estate, (for any purpose,) application shall be made to the Court of Ordinary;" which Court may "refuse or grant such order for sale, regulating the time, place and credit to be given, (Why?) so as to do impartial justice to all persons interested therein." And when the will gives the power to sell—a mere naked power—it may well be doubted whether it is still not necessary to obtain an order regulating the important requisites of "time, place and credit," so as to do "impartial justice to all concerned." Such was clearly the leaning of the Court, in Saxon v. Barksdale 4 Eq. Rep. 528. The will gives the executors the right to sell such property as "they may think proper, and to purchase such property as they shall judge beneficial." The authority is to both executors—one only transferred the bond, although two were acting; one acting under authority, can only bind to the extent of his authority. 5 T. R. 606. If the defendant knew that under the will, M'Nish had power to dispose of the funds, he also knew the purpose for which they were to be disposed of; and by taking the funds into his own hands, he becomes himself the trustee. 2 Eq. Rep. 378-9.

Had the defendant notice at the time of the transfer, that these bonds were assets of Milliken's estate? He swears in his answer that he had no notice, except that the bonds on their face were payable to M'Nish as executor. This however is explicit notice, and supposing it were not, it was sufficient to put him on the enquiry. When defendant might, by diligence, have had notice, plea of want of notice shall not avail him.—Jackson & Wife v. Row, 2 Sim. & Stuart, 472; Smith v. Low, 1 Atk. 490; Allen & Anthony, 1 Mer. 282; Daniels v. Davison, 16 Ves. 249; Powell v. Dillon, 2 Ball & Beatty, 416. The bonds pointed the defendant to the Ordinary's office, where he would have learned—from the will, the petition of sale and the accounts of the executor—that the executor was always in arrears—that these bonds, by a special provision of the will, were the property of these plaintiffs. In Saxon v. Barksdale, 4 Eq. Rep. 528, and Franklin v. Creyon, Harp. Eq. Rep. 251, it was held, that the record of a will is notice of its contents to all the world; and by the same reasons, records of petitions, orders for sale, and executors' accounts in the

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Ordinary's *office, are equally notices of their contents. Longworth was living in the neighborhood, had access to these sources of information, and it is hardly credible that he had not full notice of all the facts.

What is the effect of notice to the defendant? Lord Hardwicke says, in Mead v. Orrery, 3 Atk. 238, "If one will purchase with notice of another's rights, he throws away his money." It is settled in the English authorities, that where the assignment or pledge is for advances made to an executor or administrator at the time, it will be supported, unless it be apparent that it was upon collusion and not for the benefit of the estate. "It is prima facie good, being presumed that the advance is to enable the executor to pay the debts."—M'Leod v. Drummond, 17 Ves. 154. Here there was no advance, but the bonds were assigned to be collected and applied to M'Nish's antecedent debt. "This is very material," says Lord Eldon, in M'Leod v. Drummond. Longworth well knew that the funds were not to be applied to any of the trusts of the will, and this, Lord Eldon, in the same case, considers one of the strongest proofs of "fraud and collusion." If one concerts with an executor to obtain the testator's effects and apply them to his own behoof, or in extinguishment of the private debt of the executor, or in any way contrary to the duty of the executor, such concert will involve the seeming purchaser and make him liable.—Scott v. Tyler, 2 Bro. Ch. Rep. 431; see also 2 Vern. 444; 1 Bro. Parl. Ca. 71. And in Downes v. Power, 2 Ball and Beatty, 491, it is said, "Whoever deals with an executor for assets for a purpose inconsistent with due administration, subjects himself to a devastavit. See also Hill v. Simpson, 7 Ves. 152; Bonney v. Ridgard, 1 Cox's Ch. 145; Field v. Schieflin, 7 John. Ch. Rep. 150, to the same effect. The whole doctrine is strongly and concisely stated by Mr. Eden, in his note to the case of Andrew v. Wrigley, 4 Bro. C. R. 137.

It is urged that the equities are equal, and that being the case, the law must prevail. They are not equal. The plaintiffs were infants, ignorant of their rights and confiding in their father's executor. The defendants knowing these funds to be their's, concerts with him to misapply them. If he should sustain loss, it will be from his own wrongful appropriation of funds he knew to be of right the plaintiffs'. Nor is he so free from "artifice and design," as he is represented. Why take a receipt lately, dated back in 1823? To supply the one which he lost? M'Nish says he gave none then.

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*O'NEALL, J. This case for the first time presents to this Court the question, how far it can interfere to prevent the negotiation by an executor or administrator, of notes or bonds taken by him for the proceeds of the sale of the goods of the deceased.

In such choses in action he has a clear legal right of property, independent of his character as executor or administrator. For at his death they do not, by operation of law, pass to the administrator de bonis non of the testator or first intestate, but are, in point of

law, the property of the deceased executor or administrator, and his administrator can alone maintain an action for their recovery. Seabrook ads. Williams, 3 M'C. 371. It is true that the proceeds of such choses in action are in Equity regarded as assets, and will be so treated and considered in the hands of the executor or administrator to whom they were made payable, or any of his immediate representatives. Miller v. Alexander, 1 Hill's Eq. Rep. 25; Capehart and wife v. the administrators of Huey.—1 Hill's Eq. Rep. 405. So, too, in all such cases, they would be protected from being made liable by the process of law, for the debts of the executor or administrator.—Glass v. Baxter, 4 Desaus. Rep. 154; Tolbert v. Harrison, 1 Bail. 599; and in all cases of fraudulent alienations, the Court would follow and treat them as assets of the estate. But beyond this I am not prepared to go. For generally speaking, an alienee would have a clear legal estate in the chose in action to which, (unless it can be overreached by a superior equity, or be shewn to be defeated by fraud,) a Court of Equity as well as a Court of law, is bound to give effect. If the equity of the alienee and that of the creditor, legatee or distributee, be equal, the legal estate must prevail. I have looked through the cases referred to in the decree and in the argument with as much care as I could, and I concede that they sustain the position that an alienation by an executor or administrator of chattels or choses in action belonging to the testator or intestate, in his life time, for the payment of the debt of the executor or administrator, would not in Equity generally be allowed to prevail against creditors, legatees or distributees.—Scott v. Tyler, 2 B. C. R. 431; Andrew v. Wrigley, 4 B. C. R. 124; Bonney v. Ridgard, 1 Cox's Ch. Rep. 145; Hill v. Simpson, 7 Ves. 152; M'Leod v. Drummond, 14 Ves. 352, and 17 Ves. 152; Field v. Schieflin, 7 John. Ch. Rep. 150; Saxon v. Barksdale, 4 Desaus. Eq. Rep. 522. All of these cases, in which relief was granted against alienations by an executor or administrator in payment of his own debt, or in

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which the *Court thought that the party on that ground was entitled to relief, but denied it on some other, such as lapse of time, (except Field v. Schieflin,) were cases of alienations of chattels belonging to the deceased in his life time. The case of Field v. Schieflin was an alienation by a guardian of a bond executed to him as guardian. The Chancellor, without adverting to the distinction, which, I think, exists between alienations of chattels, or choses in action belonging to the deceased in his life time, and such as are acquired by the executor or administrator with, or which are given to him for, the proceeds of the estate, gave relief.

Would it be allowed in England, if it could be shewn that the money received for a chattel aliened by the executor had been vested in bonds or stock, and these had been aliened in payment of the executor's own debt, that these last should be followed into the hands of the purchaser, and his legal title be defeated? That no such case is found in the English books is strong evidence that such a case is regarded as too desperate of even a chance of success to be presented to a Court. The sale of the testator's or intestate's goods and chattels, if made according to law, ends the equitable rights of the creditor, legatee or distributee, to be paid out of them. The proceeds are at law, as we have already seen the executor's or administrator's property; so, too, it must be conceded, are the goods, chattels and credits of the deceased generally. At law, prior to the Act of 1824, he had an absolute right of disposition, and where the will directs a sale, he still has that right.—Jones v. M'Neill, 1 Hill, 84. But to some intent the goods and chattels of which the deceased died possessed, are still regarded as not the absolute property of the executor or administrator: in a contest between an execution creditor of the deceased and of the executor or administrator, the goods would be held liable to the former and not the latter. —Jones v. M'Neill, 1 Hill, 84. Such a distinction could not, however, be made in favor of a creditor of the deceased, in a contest at law for payment out of the proceeds of choses in action, payable to the executor or administrator. When the goods and chattels of the deceased are sold, or his choses in action collected, the liability of the executor or administrator to account for the proceeds to all parties interested, is generally that to which they must look. The right to collect these proceeds is indispensable to the executor's or administrator's now safety. The right to use

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the fund as his own, is also a necessary *consequence from his liability to account. For after he sells, he is not charged with the proceeds as he receives the money on the notes or bonds, but with the amount of the sales as cash received.—Davis v. Wright, (2 Hill, 560,) decided at Columbia last term. Upon this sum (the amount of the sale bill) he is chargeable with interest, which shews that he is regarded in contemplation of law as in the use of the money. He cannot be discharged from his liability to account for the proceeds of the sale, but by shewing that without any fault of his own he has been unable to make them available. If he was not allowed to alien the notes or bonds taken for the proceeds of the sale, (without any other restriction than it should be done without fraud,) it would subject him to the consequences of general liability for the proceeds of the sale, without any corresponding advantage. For after he made a sale, and charged himself in the sale bill with the value of the goods, yet he would stand in relation to the proceeds as if they were the goods and chattels and credits of the deceased. Such cannot be the case. If it

was, the executor or administrator ought to return to the ordinary, the bonds or notes so by him taken. There is no difference in respect to this question between an administrator or executor; yet, if it be true that when an administrator transfers the bonds taken by him for the goods of the deceased in payment of his own debt, such transfer would be void, it would follow that his securities for the administration would, as well as creditors, legatees or distributees, have the right to follow the fund; yet I apprehend such a consequence ought not generally to be allowed. I have already said that an alienation of the bonds or notes, payable to an executor or administrator, ought not be over-reached or defeated but by a superior equity, or by fraud. In the transfer of a chose in action by a solvent executor or administrator in payment of his own debt, it would seem to me that the equity of the creditor of the executor or administrator is fully equal, if not superior to that of the creditor of the testator or intestate, the legatee or distributee. In such a case, he parts with the precise money value of the thing acquired. For the debt of the solvent executor or administrator, which might have been otherwise collected, is given up. The question is, who of two innocent persons are to be losers? It cannot be answered, that he who has the legal interest is to be the man, and yet this would be the case, if the

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rights of the alienee were defeated. If *the executor or administrator were insolvent, and should transfer the chose in action in payment of his own debt, in such a case the equities would not be equal: for there the alienee would have paid nothing, and his legal estate would be over-reached by the equity of the creditor, legatee or distributee of the testator or intestate, and the alienee would be turned into a trustee. So, too, where there has been a fraudulent alienation, there the fraud defeats the title conveyed, and the alienee holds by a constructive trust for the uses of the creditor, legatee or distributee of the testator or intestate. From these views these plaintiffs are not entitled to recover. The executor, M'Nish, after his testator's death, legally sold his estate according to the will. The bonds now in controversy were given to him, as executor, for the proceeds of that sale. He was indebted to the defendant as executor of Archibald Longworth, deceased—this debt was secured by a mortgage. In payment and discharge of this debt, he, when solvent, paid and delivered to the defendant, the bonds and notes now in dispute, and thereupon the defendant gave up to him his bond and mortgage, and has subsequently accounted for and paid the amount to the devisees of his testator.

According to this statement, his equity is fully equal, if not superior to that of the plaintiffs, and hence his legal title must prevail.

It is Ordered and decreed, that the Circuit decree be reversed, and the plaintiff's bill dismissed.

JOHNSON, J., and EVANS, J. (sitting for Harper, J.) concurred.

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2 Hill, Eq. 277

The Administrator and Admiuistratrix of THOS. N. JOHNSON v. JOS. JOHNSON, Surviving Executor of Mary Johnson, (deceased,) the Administrator of Robt. Brailsford, JOHN MILES, and Wife, the Widow of Alex. W. Garden, (deceased,) and JAMES H. HEXT, Administrators and Administratrix of the said A. W. Garden, and ROBT. H. GARDEN, his only surviviug child.

(Charlestou. March, 1835.)

[*Executors and Administrators* ⇐307; *Guardian and Ward* ⇐33.]

After the division of an estate and the appointment of a guardian for a minor legatee, the executors are uo longer accountable for the income of the estate assigned to the miuor: his guardian is alone entitled to possession of the estate, and must account accordingly.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1254; Dec. Dig. ⇐307; Guardian and Ward, Cent. Dig. § 146; Dec. Dig. ⇐33.]

[*Executors and Administrators* ⇐292; *Guardian and Ward* ⇐35.]

When from the facts, an executor who was also guardian, might be charged with the receipt of monies either as executor or guardiau, he must account in the latter character: for whatever funds he had in his hauds as executor, were by operation of law, transferred to him as guardian.

[Ed. Note.—Cited in Creushaw v. Crenshaw, 4 Rich. Eq. 16; Long v. Cason, Id., 68; Jacobs v. Woodside, 6 S. C. 499; Coleman v. Smith, 14 S. C. 514; Chick v. Farr, 31 S. C. 469, 10 S. E. 176, 390.

For other cases, see Executors and Administrators, Cent. Dig. § 1167¼; Dec. Dig. ⇐292; Guardian and Ward, Cent. Dig. § 167; Dec. Dig. ⇐35.]

[*Guardian and Ward* ⇐164.]

A parol discharge of a guardian by his ward just after coming of age, without an account, will not bar an account against the guardian.

[Ed. Note.—Cited in Womack v. Austin, 1 S. C. 437.

For other cases, see Guardian and Ward, Cent. Dig. §§ 547, 551; Dec. Dig. ⇐164.]

[*Guardian and Ward* ⇐182.]

The security of a guardian is liable for the default of his principal, to the amount of the penalty of the bond, aud not merely to the value of the property set out in the petition praying the appointment.

[Ed. Note.—Cited in Todd v. Davenport, 22 S. C. 150.

For other cases, see Guardian and Ward, Cent. Dig. § 661; Dec. Dig. ⇐182.]

[*Executors and Administrators* ⇐304; *Guardian and Ward* ⇐33.]

A father, as such, has no right to receive a legacy of his child: and therefore where an

executor paid a legacy to the father of an infant legatee, and afterwards on the demand of the legatee's guardian, his co-executor paid it to the guardian, the last pay'mt was held proper and that the executor who made the first, was liable to the estate for his improper payment.

[Ed. Note.—Cited in Livingston v. Wells, 8 S. C. 360; Anderson v. Earle, 9 S. C. 462.

For other cases, see Executors and Administrators, Cent. Dig. § 1243; Dec. Dig. ⟸304; Guardian and Ward, Cent. Dig. § 146; Dec. Dig. ⟸33.]

[*Executors and Administrators* ⟸125.]

Nor will the fact that the father of the legatee was a co-executor be an excuse; for although executors are primarily regarded as only separately liable, yet, if they concur in any act touching the estate, they are jointly liable.

[Ed. Note.—Cited in Anderson v. Earle, 9 S. C. 462.

For other cases, see Executors and Administrators, Cent. Dig. § 508; Dec. Dig. ⟸125.]

[*Executors and Administrators* ⟸125.]

Liability of co-executors for the acts of each other considered—and the cases on the subject examined.

[Ed. Note.—Cited in Anderson v. Earle, 9 S. C. 462.

For other cases, see Executors and Administrators, Cent. Dig. §§ 508–522; Dec. Dig. ⟸125.]

[*Executors and Administrators* ⟸91, 125.]

The result of the cases seem to be that where by an act done by one executor, any part of the estate comes to the hands of his co-executor, the former will be answerable for the latter in the same manner as for a stranger whom he had enabled to receive it—and there is no distinction in respect to their liability, between legatees and creditors.

[Ed. Note.—Cited in Matthews v. Matthews, McMul. Eq. 411; Gates v. Whetstone, 8 S. C. 246, 28 Am. Rep. 284; Anderson v. Earle, 9 S. C. 462.

For other cases, see Executors and Administrators, Cent. Dig. §§ 397, 511; Dec. Dig. ⟸91, 125.]

[*Executors and Administrators* ⟸391.]

An executor who applied to the ordinary for an order of sale and returned the sale bill held liable for the amount of the sale, altho' his co-executor assisted in the sale and received part of the money.

[Ed. Note.—Cited in Anderson v. Earle, 9 S. C. 462.

For other cases, see Executors and Administrators, Cent. Dig. § 1589; Dec. Dig. ⟸391.]

Cases decided in this State in relation to waste committed by tenants for life and tenants in common.

[*Life Estates* ⟸13; *Tenancy in Common* ⟸26.]

Where a tenant in common by cutting down and clearing wood land beyond his interest injures his co-tenant, he is liable for waste; and so too if a tenant for life cut down more than is necessary for the enjoyment of his estate and injures the remainder, he is guilty of waste and liable to account.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 42; Dec. Dig. ⟸13; Tenancy in Common, Cent. Dig. § 68; Dec. Dig. ⟸26.]

[*Life Estates* ⟸13.]

Tenant for life in right of his wife of land and slaves, with remainder in fee of one-sixth in the land after her death, cleared out woodland in the centre of the tract not leaving sufficient timber to repair the place: *Held*, that if there was open land sufficient for the employment of the wife's slaves when the husband got possession, the clearing by him was waste.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 32, 42; Dec. Dig. ⟸13.]

Rent and hire to which plaintiffs were entitled under a former decree set out in this bill, now allowed.

[This case is also cited in Livingston v. Wells, 8 S. C. 361, without specific application.]

Bill for an account. This case had, by previous orders of the Court, been referred to the Commissioner, to state the accounts, and to take the testimony preparatory to

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trial; and came up for *hearing before Chancellor Johnston, at Charleston, May 1834, on the report of the Commissioner, and the evidence taken by him, from which the following appeared to be the state of the facts:

Thomas N. Johnson, the elder, was at the time of his death possessed of a large estate, mostly in Clarendon county, Sumter district: he left at his death a widow, Mary, and an only child, Sarah, him surviving. Some short time after his death, the plaintiffs' intestate was born. Thomas N. Johnson, the elder, left a will, the only clauses, or parts of clauses, which it is important now to notice, are the following: "Item, I give and bequeath to my beloved daughter, Sarah, to her, and the heirs of her body lawfully begotten, all the rest and residue of my estate, wherever it may be found, both real and personal." "I omitted to mention in the proper place, that it is my will, that should my daughter marry and leave at her death a husband and no children, that her husband shall have the profits and use of the estate during his life time," &c.

He named as his executors, Matthew James, Charles Connors and Dr. Joseph Johnson: and assigned to each of them a specific department, in which they should act; the first named, Mr. James, was directed to take charge of that part of the estate left to his sister, the testator's widow; the second, Mr. Connors, to take charge of the testator's business at Jack's Creek; and the third, Dr. Johnson, to attend to his business in Charleston.

There appears to be no question arising out of the acts of the executors, until after a division of the estate had been made between Sarah and Thos. N. Johnson, and Robert Brailsford had been appointed the guardian of the person and estate of the latter. This appointment took place at February term of the Court of Equity in 1818. His letters of guardianship are dated the 19th day of February, 1818. He gave his bond with Dr. Alex. W. Garden, as his only security: on the 24th of February, 1820, he made a single return, stating the land and negroes, and stock of his ward, which he received from the former guardian. Among

the papers furnished, there is a very particular account of his receipts and expenditures from 1818 to 1824, accompanied by many vouchers. During the time of his guardianship, it seems from the books of Chisolm & Taylor, the factors of the estates of Thomas N. Johnson, and Mary Johnson, that Joseph Johnson received considerable sums, parts of the income of both estates.

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Sarah, previous *to this time, had intermarried with Alexander W. Garden, and died without issue. In January 1818, Mrs. Mary Johnson died, leaving a will, of which she appointed Alexander W. Garden, Robert Brailsford, and Dr. Joseph Johnson her executors. By it, she gave a legacy of $1000 to Theodore Brailsford, son of Robert Brailsford, and after several other bequests, she gave the residue of her estate to her only surviving child, the plaintiffs' intestate.

All the executors qualified. Alexander W. Garden applied on the 10th of March, 1818, to the ordinary of Sumter district for an order to sell the perishable article of her estate, which he obtained, and under which it is probable they were sold by himself and Brailsford, to the amount of $1142.36. Alex. W. Garden, however, alone returned the sale bill.

About $700 of the proceeds of this sale were collected by Brailsford; of the balance, except $3 accounted for by Alex. W. Garden, no account is given. Alexander W. Garden paid the legacy of $1000 bequeathed to Theodore Brailsford by his testatrix, to Robert Brailsford, the legatee's father, during the minority of the said legatee, and charged it in his account for 1818 returned to the ordinary. It seemed that this account closed the acts of Alex. W. Garden, with his testatrix's estate. He died on the 5th of August, 1820, leaving a widow who has since intermarried with John Miles, and two children, only one of whom is now surviving. James H. Hext and the widow administered on his estate, and were in possession of the estate of A. W. Garden, including the land and negroes of his first wife, Sarah, devised to her by her father, Thos. N. Johnson, the elder. A bill was filed by Robert Brailsford, as guardian of Thos. N. Johnson, against the widow, and Hext, the administrator, and the minor children of Garden, for the recovery of the property, real and personal, devised to his wife Sarah, by her father. That case resulted in a decree, that the plaintiff's ward was entitled to half of the negroes, and other personal estate, and five-sixths of the land. A partition accordingly took place, and in it the plaintiff's intestate received of the personalty $190, and of the realty $280 more than his share; making an aggregate of $470, to be paid to Garden's administrator and administratrix. From the Commissioner's report, it seems that the Court decreed that there should be an account by the defendants of five-sixths of the rents of the land, and one half of the hire of the negroes from January

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1821: this account it seems has *never been taken. In 1824 (July) Thomas N. Johnson came of full age; in 1825 he received, from his guardian, his land and negroes, and died in the next year (1826,) leaving the plaintiff Margaret Ann, his widow, but no children. Between his attaining to full age, and his death, as appeared from the evidence of Mrs. M'Leod, the daughter of Brailsford, he often expressed himself to his guardian as satisfied with his management of his estate, and offered to give him a discharge. But none was given on account of the guardian's deferring it to another time. The guardian never exhibited his accounts to his ward.

Of the land of his first wife, of which he was entitled to possession during life, and to one sixth in fee, it is alledged by the plaintiffs, that Alex. W. Garden committed waste. The Commissioner states, that Dr. Garden cleared sixty acres of wood land in the centre of the tract, which did not leave timber enough upon the rest of the land for fencing. The damage thus done to the fee was estimated at $500.

After the death of Thos. N. Johnson, Robert Brailsford died intestate and insolvent. Subsequently, Matthew James was appointed the guardian of Theodore Brailsford, and demanded from Dr. Johnson, the surviving executor of Mary Johnson, payment of the legacy of $1000, left by Mrs. Johnson to him, and which had been paid to his father, Robert Brailsford, by Alex. W. Garden. The surviving executor having in his hands, in a debt on the guardian, Mr. James, assets belonging to the estate of Mary Johnson, much beyond the amount of the legacy and interest claimed, paid it, and credit has been allowed to him for the payment in his accounts on his testator's estate; so that such payment diminishes, pro tanto, the residuary estate which belongs under the will to the plaintiffs' intestate.

On exceptions by both parties to the Commissioner's report, and on certain points therein reserved, the Chancellor held:—As to the liability of Robert Brailsford, as guardian of Thomas N. Johnson, jr., that he was chargeable only with such amount as was proved to have been actually received by him; and as regards the estate of Mary Johnson, as it appeared that the other executors received portions of it, he was not chargeable with such sums, without proof of transfer to him, nor for the amount unaccounted for; that the evidence showed that he had accounted to the entire satisfaction of his ward, and although no formal

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release was given, there *was such high evidence of the execution of the trust, that it

was safer to rely on it, than upon the uncertain evidence on the subject of the accounts.

In relation to the payment by Alex. W. Garden, of the legacy of $1,000, in the will of Mrs. Johnson, to Robert Brailsford, the father of the legatee—he held, that the subsequent payment by Dr. Jos. Johnson, to the guardian of the legatee, was justifiable and proper, and that from the moment the legacy was paid by Dr. Johnson, the sum received by Brailsford ceased to be liable for it, and resulted to the estate to the use of Thos. N. Johnson, jr; Brailsford being his guardian, became instantly chargeable as such, with what he had received as executor, and Garden as sole surety for the guardianship became chargeable also.—Brailsford could not have acounted for this, the transaction having taken place after his death; and that Dr. Johnson was entitled to reimbursement primarily against Brailsford, secondly against Garden.

In regard to the sale of the perishable articles of the estate of Mrs. Johnson, the Chancellor held, that Alex. W. Garden was not liable for the amount of such sale, as from the evidence, he neither received the money, nor was guilty of any laches.

On the question of waste committed by Dr. Garden, he decreed as follows:

"It is admitted, that at all events there should be deducted from the sum assessed, an amount proportioned to Doctor Garden's sixth in the fee. But the question remains, is his estate at all chargeable with waste for the clearing of the sixty acres? The clearing has impaired the value of the land; and according to the English doctrine, amounts to waste for which the tenant for life would, as a trustee, be accountable, if by the terms of his tenancy he was impeachable for waste. I have heard it suggested, however, that the English doctrine must be modified in this State, and that it is not waste here, for one entitled to the use to clear so much wood-land from year to year, as a prudent planter would clear, if he were entitled to the fee. It appears to me this is a hasty conclusion. It is no light thing to unsettle a legal doctrine. It is still worse to convert one which is certain, into one so vague as that which has been mentioned.

"There is a certain narrowness of mind,

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often passing for libe*rality, which can endure nothing fixed, either in doctrine or in practice, and which, instead of recognizing in settled rules the only securities which society can throw around the rights of the citizen, is ever impatient under them—regarding them as harsh restraints upon the free administration of justice. With such, every circumstance, however light, limited or temporary in its character, forms a reason for modifying doctrines or relaxing the rules of procedure. They trust that justice will be more certainly attained by consulting the particular circumstances of the times, the parties or the case, than by the general application of pre-existing rules. But to say nothing of the obligation upon the Judiciary to apply as the law what the society have adopted as the law, regarding it as the will of the society until altered by legislation—or of the perplexity to which fluctuating decisions would doom the citizen; or of the opportunities which they would beget for arbitrary adjudications—it may well be asked, whether the rules of law, drawn as they are from a philosophical examination on all sides of the general interests of society, and tested by experience, are not more likely to be just, than crude and hasty conclusions adopted on the spur of every occasion. My own solemn conviction is that law is justice—that it is the highest degree of it, which man can administer to man. I am persuaded that rules, upon which the citizens can ground their expectations, are indispensable to the progress and welfare of society, and cannot safely be relaxed, shaken or changed, but upon the ground of imperative necessity. In the consideration and application of legal doctrines, we should not confine ourselves to the present occasion, nor make a change of them to suit our present condition, which will not suit hereafter. If we do, when the time comes for another judicial modification, (which upon the same principle must then be made,) we shall subject the interest of the country to a dreadful revulsion. Whole masses of men will then be deprived of rights, which, up to the moment of their being adjudicated out of them, they held under the law of the land. Nothing can be more shocking.

"The doctrine of waste, as we have received it, will be indispensable, when our State (at no distant day it may be hoped) shall become densely peopled and highly improved. When our forests shall have given way, as they are rapidly giving way to cultivated fields, who will then contend that it is not

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waste in one, en*titled merely to a temporary use, to deteriorate arable land by improvident culture?—and as if that wrong were not enough, to resort to the standing timber, further than is necessary to the use of the land as he received it? My own opinion is, that what is waste in England, is waste here. That any treatment which leaves open lands less fertile, or changes their culture, or mars the woods or structures, is waste. It by no means follows, however, that because clearing is waste, the life devisee of wild lands, is chargeable with waste for clearing them. The devisee cannot, without clearing them, realize the benefit which the devise implies: therefore there is a further implication of exemption from impeachment for the clearing. If there had been no open land on the tract devised to Doctor Garden for life, so that he

could have derived no profit without clearing, I should have thought the charge for waste was erroneous. But if I correctly understand the facts, there was a considerable extent of open land. The Commissioner has my views, and can cast his report accordingly. If there was open land, the charge of waste is sustained. If there was not, then Doctor Garden had a right to clear. That right, however, was not without limits; and this strikes me to be the extent of his right—that where the fee is limited over, after a life estate in wild lands, the life tenant's clearing must not transcend that proportion to the whole land, which the life estate bears to the fee. In this case Doctor Garden's sixth ought to be added."

On appeal from the decree of Chancellor Johnston, the case was elaborately argued by M'Crady and Memminger, for the plaintiffs, and Toomer for the defendants; but the arguments are so fully stated in the opinion of the Appeal Court as to supersede the necessity of any report of them.

O'NEALL, J. [after making the foregoing statement of facts.] The questions arising out of these facts, seem to me to be the following viz:

1. Ought Robert Brailsford to be charged as guardian with the income derived from the estate of Thos. N. Johnson, (which was assigned to him as his part of the estate of his father,) from the time of his appointment as guardian?

2. Ought he to be charged as guardian, with the income of Mary Johnson's estate from 1819.

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*3. Is the parol discharge of Robert Brailsford by his ward, just after he attained to maturity without an account, a sufficient discharge in law to bar the account now claimed?

4. Is Alex. W. Garden, the security of Robert Brailsford, the guardian, liable to the extent of the penalty of his bond, for the arrears of the said Robert on account of his said guardianship?

5. Is Alex. W. Garden liable as executor of Mary Johnson, to account to the plaintiffs for the $1,000 with interest thereon, paid to Robert Brailsford, on account of the legacy to his son?

6. Is Alex. W. Garden, as executor, accountable for the amount of the sale of the perishable articles sold as Mary Johnson's estate, with the interest thereon?

7. Was waste committed by Alex. W. Garden, and if so, are the plaintiffs entitled to an account for the same?

8. Are the defendants in this case liable to account for the rent and hire directed to be accounted for in the former decree?

Each of these questions have been most elaborately discussed, and have been maturely considered by the Court. The able and zealous counsel for the defendants has made us feel deeply for the orphan, who, from his statement, will be stripped of every thing by our decision; but it is not for us to give way to the feelings of men—our duty is a stern and inexorable one, to administer the law, which, as the Chancellor said in this cause, is justice. The several questions will, as briefly as possible, be disposed of in the order in which they have been set down.

1. There can be no question that the guardian, Robert Brailsford, is alone accountable for the income of that part of the estate of Thomas N. Johnson the younger, derived from his father; for as guardian, he seems by his own return to have been in the possession of the corpus of the estate; but in law, after the division between Thos. N. Johnson and Sarah, and after a guardian had been appointed for the minor or minors, the executors were no longer accountable for the future income of the estate. The guardian was alone entitled to the possession of his ward's estate, and must, as a matter of course, be regarded as in the receipt of the income. If Dr. Johnson received a part of the income, it must have been as the agent of the guardian: for he had no other right to receive it. It is probable that when the accounts of the receipts and expenditures of the guardian, and of Dr. Johnson, regarded as his agent in this respect, come to be exam-

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ined, that all the supposed hardships of this part of the case will vanish. But be that however as it may, Brailsford must account for the income of the estate, and show how it has been expended, and must be held responsible for any balance which may be found on the foot of his account.

2. There is perhaps a little more difficulty in the question, as to his liability to account as guardian for the income of Mary Johnson's estate. He, Dr. Johnson, and Garden, were the executors of her will. Garden acted, as appears from the papers, for only a single year. The plantation and negroes were in the immediate vicinity of Brailsford; and it seems to be pretty well established from the defendants' own showing, that he had the entire management of all Thos. N. Johnson's estates, whether derived from his father or mother, which were in the country. These facts constitute such a reasonable showing, as would charge Brailsford with an account for the income, as executor, or as guardian. He must, however, by operation of law, account in the latter character; for whatever funds he had in his hands as executor for Thos. N. Johnson, by operation of law, were transferred to his account as guardian. In addition to the view which I have suggested, it may be added, that executors are only jointly liable, so far as they concur

in an act done in the administration of their testator's estates. Each are primarily regarded as separately liable: and as between themselves, this is always the rule.—Motte v. Schuit and Motte, 1 Hill's Eq. Rep. 146, [26 Am. Dec. 194.] It will be observed, that Dr. Garden has accounted for his receipts of the income during the single year, in which he acted as executor. Dr. Johnson, in this case has filed his account, which is satisfactory to the parties. Mr. Brailsford has never exhibited any account of his receipts, unless it may be embraced in the account from 1818 to 1824, found among the papers furnished to me. The fair presumption from these circumstances is, that he is alone accountable for that part of the income unaccounted for. It is plain, that the income exceeds the sum received by the other executors. It is conceded that in this respect they have fairly accounted; the balance unaccounted for, may be fairly charged to him who, by his default in not accounting, is legally presumed to be in the wrong. Add to these considerations the fact, that as guardian, he ought by law, at the expiration of one year after his testator's death, to have compelled the possession of his ward's es-

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tate to have been *delivered to him, and his liability to the account is sufficiently made out.

3. I am perfectly satisfied that the verbal discharge cannot operate. The only mode in which it could have effect, would be as an admission that an account had taken place between the guardian and the ward, and that the former had paid to the latter the balance due. But nothing of this kind did take place; the guardian, Brailsford, as appears in this cause, had not made out his accounts until after the death of Thos. N. Johnson. He did not even pretend at the time spoken of by Mrs. M'Leod, the witness, to make any statement of the accounts of his guardianship with his ward. "He," (Mr. Brailsford) said, "he did not care much about it, (the discharge) as he had delivered up all the property, and did not have any money concerns with the estate,—that part was conducted by his co-guardian, Dr. Joseph Johnson, who would have to account for the funds." This testimony of the witness puts the discharge out of all question; for it shows that there was not only no accounting, but also that the guardian had deceived the ward in inducing him to believe that he had no funds belonging to him in his hands.

But, if a regular release had been executed, it could not have been supported. A guardian dealing with his ward, just after he has arrived at full age, and obtaining any beneficial contract from him, or a release of the ward's rights, must, in order to have it sustained, show its fairness. In this case, the supposed discharge was probably in less than a year after the ward attained to full age, and at or about the time that he received the possession of his estate; and there is not only no proof of fairness in the transaction, but there is abundant reason to believe, that whatever Mr. Johnson did say, was said in ignorance of his rights. The case of Hylton v. Hylton, 2 Ves. Sen. 547, is a clear and direct authority against the allowance of the release to the guardian, even if it had been regularly executed.

In that case, "The plaintiff had considerable gifts or provisions left to him by the will of Philippa Downs, his aunt, and Charles Palmer, his half brother. The defendant, his uncle, was acting executor and trustee in both those wills, and also acted as guardian to him during his minority, having neither father nor mother. Coming of age in April 1746, he, in October, 1747, entered into a transaction with his uncle, whereby he grant-

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ed to him an annuity *of £60, gave him a general release, and two written discharges, all signed the same date with the grant upon his delivering up several papers." "The bill was filed to set aside the grant of the annuity upon the general principles of being made just after coming of age without being thoroughly informed," and Lord Chancellor Hardwicke decreed accordingly. In the conclusion of his opinion, the Lord Chancellor says, "nor is there any evidence of an account made up of the personal estate proved to have come to the defendant's hands. Certainly, if anything could make such a transaction supportable, it must be where there was a real and fair account; of which there is no evidence; yet a general release is given upon delivering up several papers and vouchers as they are called."

It will be observed that the Chancellor says in that case, that the only circumstance which could sustain the grant of the annuity, was "a real and fair account;" the same rule governs a release, which is in point of fact a gift to the guardian of his arrears; and unless the ward sees most clearly what he is about to do, it cannot be supported. In the case under consideration, that knowledge is wanting, and in every point of view, the defence attempted to be set up in this respect must fail.

4. That the security of the guardian is liable for the default of his principal to the full amount of the penalty of the bond, is, I think, too plain a proposition to require much illustration. The appointment of a guardian of the person and estate of a minor, is not, as was supposed by my friend, the counsel for the defendants, limited to the property set out in the petition, praying that the appointment should be made. The Court may, it is true, so limit it; but unless the appointment is restricted and special in its terms, it extends to all the property which the minor may then or afterwards possess. It is hence that the bond is always taken in a larger

sum than the nett value of the ward's estate at the time the appointment is made. There might have been some difficulty about the jurisdiction of the Court, to decree against the security; but, as in the case of M'Dowell v. Caldwell, 2 M'C. Eq. R. 43, [16 Am. Dec. 635,] that question was not raised by the defendants, and the Court will at once, without any circuity of action, hold the representatives of Dr. Garden liable, so far as they may have assets real or personal, and to the extent of the penalty of the bond, for the default of the guardian, Robert Brailsford.

5. I think that Alex. W. Garden is liable

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as executor, to the *plaintiffs' intestate for the $1000 and interest thereon, paid by him to Robert Brailsford for his son's legacy. The truth of this conclusion depends upon showing that this payment was an illegal one, and that the payment made by Dr. Joseph Johnson, the surviving executor, out of the residuary estate, was proper, and entitles the plaintiffs' intestate to the account as against Garden, the executor. It was contended that the payment to Robert Brailsford, as the father of the legatee, was good. But this is wholly untenable. The point was very fully considered and adjudged by Chancellor Kent, in the case of Genet v. Tallmadge, 1 John. C. R. 3. He held, after a general review of the decided cases, that a father, as such, had no right to receive the legacy of his child. To attempt to add any thing to his conclusive array of authorities, would be an idle consumption of time. It was next urged, that although the payment to him, as father, might not be good, yet, that as co-executor, he had the right to receive the legacy, and that his receipt of the money discharged Garden. I have already had occasion to say, that primarily executors are regarded as separately liable; but that, if they concur in any act touching their testator's estate, that they are jointly liable. This is, I think, a wise rule in both its parts —the latter is only subject to objection on the present occasion, and it is only necessary that it should now be vindicated. If it were the case that executors when they concurred in an act were not required to account for it jointly, there could be no safety to an estate. Responsibility might be shifted at pleasure by transferring the funds: and a solvent executor might release himself from liability, by simply producing the receipt of an insolvent co-executor. For the sake of some pecuniary advantage or other cause, an executor might desire to give up his trust; it has been held that the Courts cannot release him; and yet, by simply turning over the funds to his co-executor, he might be released, if his liability ceased as soon as he parted with them to his co-executor. If he chooses to turn over a fund in his hands to his co-executor, he is generally responsible for its administration; for he thus makes the other his agent for its application. Both are liable to their cestui que trusts, for both have had the actual control of the fund, and both have concurred that one should manage it. If it is a well settled rule of law, "that where by an act done by one executor, any part of the estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have

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*been for a stranger whom he had enabled to receive it."—Toller's Law of Ex'ors, 484. It is our duty to give it effect in this case, by holding Garden to be liable for the $1000 paid to Brailsford for his son's legacy and by him not paid over. Without going through all the cases bearing upon this position, it will be sufficient to cite and examine some of the leading cases. In Crosse v. Smith and Munt, 7 East, 246, the defendants were co-executors of Grierson, who was indebted by bond to the plaintiffs' intestate. Smith having £400 of the assets of his testator, remitted the same to Munt, for the purpose of being paid over to the payment of Grierson's debt: he however paid it to a simple contract debt due by Grierson to himself, and subsequently became bankrupt. The question was, whether Smith was liable for the misapplication of the £400, and it was held that he was. The only possible distinction between that case and the one under consideration is, that there the question was made by a creditor plaintiff, and here by the residuary legatee. I am persuaded from the best examination I have been able to give to the subject, there is no such just distinction; but that will be further considered in the sequel. In the case of Crosse v. Smith, Lord Ellenborough's concluding words state very fully and forcibly the legal conclusion, making out almost in terms the rule which I have stated from Toller. He said, "in conformity therefore to the rules of law as handed down to us in respect to executors, we are obliged to pronounce that the defendant, Smith, having once received and fully had under his control assets of the testator applicable to the payment of this bond debt, was responsible for the application thereof to that purpose, and such application having been disappointed by the misconduct of his co-executor, whom he employed to make the payment in question, he is liable for the consequences of such misconduct, as much as if the misapplication had been made by any other agent of a less accredited and inferior description." It may however be objected to that case, that it was at law, and that in Equity, a different rule prevails: but this is a mistake. Equity is bound as much by legal rules where they apply to the case as a court of law. Relief may, and often is given in Equity where it cannot be at law, owing to the difference in the modes of proceeding, and the effect of the judgments of the two courts: at law, the judgment gives effect to

a previously existing legal right: in Equity, the decree creates a legal right out of a contract or trust. But it will be seen on

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*looking to Lord Ellenborough's judgment, that he founds it mainly upon cases decided in the Chancery Court, and it is hence apparent, that the rule is the same in both courts.

In Sadler v. Hobbs, 2 Br. C. C. 114, the bill was filed by a residuary legatee for his legacy, and in the report on the accounts, it appeared that Davies had joined with Reeve, his co-executor, in drawing two bills of exchange, amounting together to £7000, on the house of Trueman, Reeve & Co. payable to Devonshire & Reeve, as he supposed, in satisfaction of the testator's debt to them to that amount; but he was in this respect mistaken, the debt being only £3,000, so that the executors had paid £4,000 too much. Reeve, the executor, who received the money under the bills of exchange, afterwards became bankrupt. The question for the Court was, whether the joinder of Davies in the bills of exchange, without the receipt of the money, made him answerable to the plaintiff for it. Lord Chancellor Thurlow ruled that he was; and stated the rule to be, "that where, by any act or any agreement of the one party, money gets into the hands of his companion, whether a co-trustee or co-executor, they shall be both answerable." In a note to that case (Note 1) the editor remarks, that "Westley v. Clarke (before Lord Northington, and lately reported in 1 Eden, 357) mentioned in the case of Sadler v. Hobbs, with some disapprobation, (whether rightly determined as to its peculiar circumstances, 4 Ves. 609,) seems to have given occasion to relax the sound and intelligible rule which previously prevailed, viz: that where either executors or trustees (and executors more especially) joined in any act which as to them was unnecessary, and a loss happened, the parties thus unnecessarily concurring should be held responsible, although none of the funds came into their hands; that rule seems to be now restored,"—and he refers to a host of authorities in support of his assertions. Although in the words of this note, and of Lord Thurlow in the case of Sadler v. Hobbs, there is some difference from those employed by Toller, in stating the rule as I have done, yet the difference is merely verbal: the rule is identical in substance. For the meaning is clear throughout, that the concurrence to charge an executor for the act of a co-executor, must be voluntary and not the result of legal necessity. The case of Sadler v. Hobbs and that under consideration are almost identical. That case as well as this was in Equity, and on a bill filed by the residuary legatee: the concurrence there, was not great-

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er than it is here; it *was a payment to a co-executor as one of a firm, supposing him entitled to receive it on account of a debt, when in fact he received more than the firm was entitled to: so in this case, it was a payment to a co-executor, supposing him entitled to receive it for his son's legacy.

The case of Joy v. Campbell, 1 Sch. and Lef. 328, maintains the same position. At page 341, Lord Chancellor Redesdale states the rule with his accustomed fulness and clearness. "The distinction," he says, "seems to be this with respect to a mere signing: that if a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all those cases seems to have been whether the money was under the control of both executors: if it was so considered by the person paying the money, the joining in the receipts by the executor, who did not actually receive it, amounted to a direction to pay his executor, for it could have no other meaning; he became responsible for the application of the money just as if he had received it. But this does not apply to what is done in the discharge of a necessary duty of the executor." This clear view of the rule is in exact accordance with all the previous authorities; and carries out and enforces the explanations and application which I have given or made. Test the case before us by Lord Chancellor Redesdale's criterion, "whether the money was under the control of both executors," and it will be seen that Dr. Garden's liability is fixed beyond all doubt: he had the control of the money until he paid it over to his co-executor on a mistaken view of his power to receive it for his son, and it follows that having had the control he is liable for it. It cannot be necessary to multiply authorities to establish a rule which is now conceded by all the law and equity writers to be settled law. But it is said that there is a distinction in the application between a creditor plaintiff and a legatee plaintiff: as I have already said, that distinction cannot be maintained. The case of Sadler v. Hobbs, which I have already stated and commented on, shows that the application of the rule is allowed even in the case of a residuary legatee plaintiff, and the Lord Chancellor, in that case, speaking of the distinction in the reasoning of Lord Chancellor Harcourt, in the case of Churchill

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v. Hobson, 1 P. Wms. *241, calls it (as it deserves to be called) an odd distinction. But as Chancellor Harcourt's remark in Churchill v. Hobson was a mere dictum and not the point ruled, it could not have created the doubt which does seem to have existed on the subject. It is referrible more probably to the case of Westley v. Clarke, before Lord Northington, 1 Eden, 357: but although

it had the effect to relax the old rule, yet, as the editor observes in his note to the case of Sadler v. Hobbs, "that rule seems now to be restored." The case of Bacon v. Bacon, 5 Ves. 331, is no authority for the distinction between creditors and legatees as to the liability of co-executors; there the payment to the unqualified co-executor was sustained, not on account of his character as executor, but because he was the testator's attorney, and the payment to him was in the regular course of business. I am not prepared to say that a case decided under its special circumstances, (as that case was,) is ever authority for any purpose; but it is clear, without utterly condemning it, that it proves nothing in this case. In Doyle v. Blake, 2 Sch. & Lef. 229, the bill was by the legatees against the solvent and surviving executors who had renounced in favor of the now deceased executor Horan, who afterwards obtained administration cum testamento annexo, received and wasted the funds and became insolvent; it was ruled that they were liable for his acts. In the case, Lord Redesdale says, "Legatees are bound by the terms of the will; creditors are not so; and therefore in many cases executors would be discharged as against legatees, though not as against creditors."

This, regarded as an abstract proposition, is a startling one; but when explained by the subject matter of which the Lord Chancellor was speaking, is plainly right. The testator, in the case then before him, had directed all the funds to be deposited with the co-executor, Horan, as trustee for the legatees. It is clear beyond all doubt, that such a payment to him under the will would have been good against the legatees: for as between them and the other executors, Horan would have been, under the will, the agent of the legatees in the receipt of the money, and they would have been bound; but creditors would not have been, for he had no right to receive as trustee until the debts were paid. With this explanation, the case is consistent with itself and all the previous cases. For in the point ruled by the decision of the case, (as I have already stated

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it,) and the Lord Chancellor's reasoning *at 242, it is a direct authority in support of the general and old rule. But, as was well said in the argument, the case of Langford v. Gascoyne, 11 Ves. 333, uproots the distinction supposed to exist between creditors and legatees. That was a bill by a widow claiming to be a legatee for life, and the general residuary legatees. There were three executors, Gascoyne, Lambert and Spurrell: the day after the testator's funeral, the three executors met at his house. His widow brought out to them a bag of money, and on being advised not to trust it to Gascoyne, she delivered it to Spurrell in the presence of the other two. He counted it and handed it to Gascoyne. It was held by the Master of the Rolls, Sir William Grant, that Spurrell was liable. He says, "The rule in all the cases is, that if an executor does any act by which money gets into the possession of another executor, the former is equally answerable with the other; not where an executor is merely passive, by not obstructing the other in receiving it." In the case of Monell et al. v. Monell, 5 J. C. R. 283–8, Chancellor Kent, speaking of this subject, said, "a rule once prevailed in England which was recognized in Pennsylvania, (1 Dallas, 311,) that either of two executors who had executed receipts for assets, was liable to the legatee for the amount only actually received by him. But that rule is exploded, and the doctrine now established at law and in Equity is, that if assets come to the hands of one executor only, but both join in a receipt for them, both are equally liable to legatees and creditors."

In this State no distinction has ever been made between creditors and legatees. In Evans v. Evans, 1 Desaus. Eq. Rep. 520, Chancellor Rutledge, speaking of the liability of executors for joint acts, although only one received the money, said, "As they were all consenting and joined in the sale, they must all be responsible for the debts, but not one for the separate act of the other." In Lenoir v. Winn, 4 Desaus. Eq. Rep. 65, [6 Am. Dec. 597,] and in another case in the same book, 92, the rule is loosely stated, but most obviously in reference to it as stated by Chancellor Rutledge in the case of Evans v. Evans, and in the English authorities. It is, I think, therefore clear beyond all doubt from this array of authorities, that in a suit by a legatee as well as a creditor, both at law and in Equity, "that where by an act done by one executor, any part of the estate comes to the hands of his co-executor, the former

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will be answerable for the latter, in *the same manner as he would have been for a stranger whom he had enabled to receive it."

But it was contended that admitting this to be true, yet that the plaintiffs were not entitled to recover, because the executor had misapplied, and therefore wasted the fund, and that their intestate having received his residuary legacy, could not have been called upon by the legatee, Theodore Brailsford, to pay his legacy: and that therefore the payment, by Dr. Johnson, was altogether voluntary; and the case of Lupton v. Lupton, 2 J. C. R. 614-627, was cited in support of this position. It does, beyond all doubt, prove that where the executor has wasted the assets, that a legatee who has been paid must refund to a creditor, but cannot be compelled to contribute to make up a legacy to a co-legatee. But the authority has no application to this case. A part of the assets of Mary Johnson, deceased, were unadministered and in the hands of the surviving execu-

tor at the time the guardian of young Brailsford demanded payment. He was legally liable to meet the demand. For there had been no sufficient legal payment to the legatee; and having assets of the estate in his hands, equal to and beyond the amount claimed, he had no cause to allege why he should not pay the legacy and the interest due thereon. The plaintiffs could not object to the allowance of this payment in the accounts of the surviving executor, and hence they had a right to call on the other executor, Garden, for the amount he had misapplied. It was a part of the estate of Mary Johnson, and in legal contemplation in the hands of Garden. He is, therefore, plainly accountable to the plaintiffs.—Sadler v. Hobbs, 2 B. C. C. 114. The executor, Garden, being accountable for the $1000 paid by him to Robert Brailsford for his legacy, I think he must account for it with interest from the time he paid it to Brailsford. The legacy and interest was properly paid by the surviving executor. For there can be no pretence that the interest, while it was in the father's hands, was applied to the maintenance of his son. The father made no such charge. Garden cannot make it for him. But if this had been contended for by the representatives of the father, it would not have been sustained. For so long as the father was of sufficient ability to maintain his child, it was his duty to do so.—Myers v. Myers, 2 M'C. Eq. R. 264, [16 Am. Dec. 648.] There is no proof or assertion that there was any inability to do so. His insolvency probably developed itself after his death.

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*6. Garden's liability to account for the amount of the sale of the perishable articles, with the interest thereon, results from the view which I have taken of his liability to account for the $1000. In this respect, however, there are some additional circumstances making it still plainer. He applied for and obtained the order for sale, and returned the sale bill. Each of these acts he did as executor without even noticing any other person. They cast upon him the burthen of accounting for the proceeds of the sale. It was no answer to say that a part or the whole thereof had been received by his co-executor, unless he could also have shewn that the co-executor received it against his will. This, however, is not pretended, and it follows that Garden's liability is on the clearest principles made out.

7. I think there is no doubt that the late Dr. Garden is liable to the account for waste, both as tenant for life of the whole, and as tenant in common of the remainder in fee. This is not an application to stay waste, but for an account of whatever may have been committed. In general, it may be admitted that one tenant in common cannot have an injunction against his co-tenant. But even between them under special circumstances, the Court might grant an injunction. As where the waste was destructive to the estate, and not within the usual and legitimate enjoyment.—Hole v. Thomas, 7 Ves. 589; Twort v. Twort, 16 Ves. 128. And as in the case of Hawley v. Clowes, 2 J. C. R. 122, where the tenant in common in possession was cutting down the timber and threatening to persevere. This last case carries the proposition further than I should be willing to sanction; it ought, I think, to be shewn that the cutting down the timber was not necessary to the enjoyment of the estate, and would greatly prejudice the interest of the co-tenant. But without dwelling further on a view of this part of the case not necessary to the decision of the point now in dispute, I will proceed to state the grounds upon which the defendant is liable to an account for waste.

In several cases in this State it has been held that a tenant in common may use the estate to the extent of his interest in it: and in the case of Kerr and wife et al. v. Robertson, it was held (by my brethren) that for wood land cut down and cultivated by one tenant in common, he was not liable to account to his co-tenant for rent, but that the remedy of the latter would be for waste. In Backler v. Farrow, ante, 111, (at the

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last term in Columbia,) it was held that *co-tenants who had cut down and worn out a portion of the land much beyond their shares, were liable in Equity to account for the waste, and the Commissioner having reported a sum certain as to the value of the waste committed, the defendants were ordered to pay it. These cases sufficiently shew the right of the plaintiffs to come here against the representatives of their intestate's co-tenant for an account for the waste by him committed. It only remains to enquire what is waste? and is it made out here? According to the English authorities, cutting down wood land, interspersed as our forests universally are with timber trees, would be waste. But there has been some modification of this rule in this State. Several cases have been decided on the subject—two I recollect pretty well, and will, from memory, (as we have no reports of them,) state the principles by which they were decided. In Milam v. Byrd and wife, Mrs. Byrd was tenant for life of her former husband's estate, consisting of a plantation and negroes. It was alledged that her second husband had brought his own negroes on the plantation, and with them and the negroes of his wife that he was cutting down large bodies of the wood land. He was restrained from cutting down the land for the employment of his own negroes; but he and his wife were allowed, with her negroes, to cut down as much land as a prudent man, the owner of the fee, would do in a course of good husbandry. It was made the subject of refer-

ence to ascertain the present or future quantity to be cleared. In Nuckoll's v. M'Kie, a large tract of land, principally in the woods, was devised to Mrs. M'Kie for life, and after her death to the plaintiffs. She not only cleared a portion herself, but settled many tenants on different parts of the land. Her tenants were restrained from clearing the land, but she was permitted to cut down and cultivate the land for her own use and support.

These cases leave the rule perhaps still too vague, and do not reach the case of a tenant in common. But when taken in connection with the cases fixing the right of a tenant in common to the use of the estate to the extent of his interest and his liability to account for waste committed, I think we may deduce the rule to be—that where a tenant in common, by cutting down and clearing wood land, beyond his interest, has greatly injured the interest of his co-tenant, he would be liable for waste. And so if the

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*tenant for life cuts down more wood land than is necessary for the enjoyment of his estate, and has injured the remainder, he would be guilty of waste, and liable to the account. It is the ultimate injury done to the rights of the plaintiffs, as co-tenants or in remainder, which gives them the right to complain. For if the clearing of the land had improved its value to the co-tenant or remainderman, it could not be pretended that still the co-tenant, or tenant for life, would be liable for waste.

It now remains to be considered whether, according to this rule, Dr. Garden was guilty of waste. Under the clauses of the will of Thomas N. Johnson, sen. deceased, already cited, he had a life estate in the land of his wife, Sarah, and according to the construction placed upon the same by the Court of Equity, he was also entitled to one-sixth in fee. There are no words in the will which would exempt him from the impeachment of waste. If it should turn out that there was no cleared land on the plantation when Dr. Garden went into possession, then it is probable that he did not clear more than was necessary to the enjoyment of his life interest, and did not exceed his interest as tenant in common. But, as is most probable from the testimony, there was a cleared plantation sufficient for the employment of the slaves of his wife, in which he also had an estate for life, then it is clear, that the clearing of sixty acres of wood land in the centre of the tract, not leaving timber enough upon the whole land to repair the plantation, and which the witnesses, (Nelson and Havin,) say was an injury of $500, would be waste. But as it may be that the Commissioner did not ascertain the precise injury done to the remainder of five-sixths in fee by the clearing at the time the life estate fell in, the report will be left open for further examination on this point, under the rules laid down in this opinion.

8. Under the former decree the plaintiffs are plainly entitled to the account of five-sixths of the rent of the land, and half of the hire of the negroes. For this bill, although not a bill of revivor, sets out the former decree, and with the immense mass of other matter brought to the view of the Court, claims that it should be executed. This was, I think, proper where the bill embraced new matter; if it had barely proceeded on the former decree, then that case ought to have been revived. In taking the account under the former decree, the Commissioner must observe that Hext and Mrs. Miles, the adult

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defendants, are alone liable to be *charged therein. They were in possession of the property, and they, not the minor, are properly chargeable.

In making up the accounts against Dr. Garden, the Commissioner will deduct, from the eventual balance against him, the amount of $470, which his estate was entitled to receive from Thomas N. Johnson, the younger, under the decree confirming the partition of the land and personal estate of his first wife, Sarah, with interest from the date of the decree of confirmation.

It is Ordered and decreed that Chancellor Johnston's decree be modified according to the views expressed in this opinion; and that the case be remanded to the Commissioner, with instructions to re-state the accounts according to the principles and directions herein contained; and that the defendants may, by other and additional testimony, discharge themselves; to which the plaintiffs are permitted to reply; and where necessary under this opinion, testimony in explanation of facts of the case which are doubtful upon the former proof, may be received by the Commissioner. Let the costs be paid out of the estate of Garden.

JOHNSON, J., and HARPER, J., concurred.

CASES IN CHANCERY,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA, IN MAY AND JUNE 1835.

JUDGES PRESENT.

HON. DAVID JOHNSON, President.
" J. B. O'NEALL.
" WM. HARPER.

2 Hill, Eq. *299

*LANGDON CHEVES, Ex'or of Anne Lovell, and M. E. CHEVES, his Wife, v. EDWARD RICHARDSON, JOSEPH DALLAS, and others.

(Columbia. May, 1835.)

[*Wills* ⇐579.]

Testatrix devised to her grand niece, viz: "one thousand acres of land, to be taken off my plantation called Good Hope, to be run off conveniently adjoining the place called Cave Hall late the property of W—— C——, which said plantation, called Cave Hall, shall be purchased & paid for out of my estate, and shall be given to my said grand niece, making in all fourteen hundred acres:" *Held*, that this was a devise of the whole plantation called Cave Hall altho' containing 1550 acres, or its equivalent; and the executor was ordered to make the purchase for the benefit of the devisee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1266; Dec. Dig. ⇐579.]

This bill was filed for the purpose of partition, distribution and settlement of the estate of Mrs. Anne Lovell, late of St. Matthew's Parish, who, by certain settlements entered into between her husband and trustees on her part, was authorized by deed or will, to dispose of her estate. The only point in dispute was the construction to be given to the following clause:

"Item.—I give and bequeath, limit and appoint to my grand niece, Rachael Susan Bee, one thousand acres of land to be taken off my lower plantation, which is called Good Hope, and purchased of Joseph Manigault, situate on the half-way swamp. The said thousand acres to be run off conveniently adjoining the place called Cave Hall, late the property of William Caldwell, which said plantation called Cave Hall, shall be purchased and paid for out of my estate, and shall be given to Rachael Susan Bee, my grand

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*niece aforesaid, making in all, fourteen hundred acres; provided the said Rachael Susan Bee be living at the time of my death."

Rachael Susan Bee survived the testatrix; and it was referred to the Commissioner to report whether the said plantation called Cave Hall, could be purchased, and at what price—what quantity of acres it contained, whether the proprietor would sell four hundred acres thereof, and in case he will not, to report the value of four hundred acres: and which would be more advantageous to the devisee, (in case such a construction should be given to the will,) the specific purchase of four hundred acres, part of Cave Hall, or the payment by the executor of the value thereof.

The Commissioner reported, "That Cave Hall contained one thousand five hundred and fifty acres, of which seven hundred acres are supposed to be highland, and the remainder swamp.—(Santee.) That the price demanded for the whole tract, by Mr. Paul Warley, the owner, is two dollars per acre, or three thousand one hundred dollars, which the parties agree in thinking not an unreasonable price under all the circumstances of the case: and the Commissioner was of the opinion, that if the proprietor would divide the tract, and sell four hundred acres thereof, one thousand dollars would be a reasonable price for the same: but the proprietor refused to do so, and this refusal, the Commissioner supposes, makes it unnecessary to consider the last point referred, viz: which would be most advantageous to the

devisee, the specific purchase of the quantity of four hundred acres, or the payment by the executor to the use of the devisee, of the reasonable value of the last mentioned quantity." Upon the report coming before the Chancellor, it was contended by the executor, that it was the intention of the testator only to give four hundred acres of Cave Hall, which added to the one thousand acres of Good Hope, the adjoining plantation, would make only fourteen hundred acres.

For Miss Bee, it was contended that a devise was a common law conveyance: that this, in Chancery, would be considered as a devise of Cave Hall plantation, and though the testatrix might have been mistaken as to the number of acres, still the words would carry the whole plantation; four hundred acres, part of Cave Hall, was not a compliance with the will, which directs the purchase of the "plantation called Cave Hall, late the property of William Caldwell."

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*De Saussure, Chancellor. The question made and submitted for the judgment of the Court was, whether Miss Bee, the devisee, was entitled under the will of Mrs. Lovell, to have the whole of the tract called Cave Hall purchased for her, or only four hundred acres thereof, or the value of the same, if it cannot be purchased. There is no rule more clear or fixed, than that the intention should prevail in the construction of wills as well indeed as of contracts.

The great qualification to this rule is, that the intention of the devisor or donor, shall not prevail against some known and clear rule of law, founded in the general policy of the country, such as the creation of a perpetuity.

On reading the will of Mrs. Lovell, it is obvious that it was her intention to make up a plantation of fourteen hundred acres of land for her grand niece, Miss Bee; she says so in terms, for she declares that one thousand acres shall be severed from her plantation called Good Hope, and set apart for Miss Bee, and that the adjoining plantation called Cave Hall, shall be purchased, which, added to the said thousand acres, makes in all fourteen hundred acres for her said niece. It appears that she was mistaken as to the quantity of land in Cave Hall tract, which actually contained fifteen hundred and fifty acres, and not four hundred acres, as she supposed. The words of the devise were there used under a clear misapprehension of a fact, and the question is, shall we give effect to the distinct intention, or to the misapprehension? I think we are bound to give effect to the obvious intention. As, however, the owner of Cave Hall will not consent to sell four hundred acres of that tract, it will be proper to allow Miss Bee an equivalent in money.

It is therefore Ordered and decreed, that the sum of one thousand dollars, as reported by the Commissioner, to be the fair equivalent for the said four hundred acres, be paid or invested by the said executor of Mrs. Lovell, for the benefit of Miss Bee, the devisee, so as to be a productive fund for her.

The counsel for Miss Bee now moves to reverse the decree, on the ground that his honor was wrong in not directing the executor to purchase the whole of Cave Hall plantation.

M'Cord, for the appellant, cited Chamberlaine v. Turner, Cro. Car. 129; Gascoigne v. Barker, 3 Atk. 8; Wrotesley v. Adams, 1 Plow. 191; 8 East. 163; Sugden 145; Whitaker v. Whitaker, 4 Bro. Ch. Ca. 31; 2 Atk. 369; Broome v. Monk, 10 Ves. 597, 618.

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*Gregg, contra, cited 2 Swinb. 484; Shep. Touch. 623; 2 Roper on Leg. 328, 330; Philips v. Chamberlaine, 4 Ves. jr. 51; Hotham v. Sutton, 15 Ves. 319; Milner v. Milner, 1 Ves. Sen. 106; Constantine v. Constantine, 6 Ves. 102.

HARPER, J. There is no question of the rule, that in construing wills we must, if possible, give effect to the intention; but the intention must be collected from the words of the will itself, and not from any conjecture of ours as to what the testator may be reasonably supposed to have meant. It sometimes happens that contradictory or inconsistent instructions are expressed in the same will, and then it has been the rule to give effect to the general or predominant intention, even at the expense of that which is particular and subordinate. The words of the testatrix are, that the "said plantation, called Cave Hall, be purchased and paid for out of my estate, and shall be given to Rachael Susan Bee, my grand niece aforesaid." Now, if it had stopped here, words could not more clearly express the intention to give the entire plantation called Cave Hall. Then follow the words, "making in all fourteen hundred acres." If there is any thing ambiguous, it is in these latter words. I think this comes within the rule expressed by Cruise, in his treatise on real property, treating of devises—"With respect to additional words, the Courts appear to have always been disposed to adopt the rule established for the construction of deeds, namely, that where there is a correct and specific description of the property devised, a mistake in any additional words will have no effect; but where the first description is merely general, these additional words will be considered either explanatory or respective according to the intention of the testator." One of the cases referred to is that of Chamberlain v. Turner, Cro. Car. 129, in which the devise was of "the house or tenement wherein Nichols dwelleth, called the White Swan." The jury found that William Nichols occupied the alley of the said house,

and three upper rooms, and that divers other persons occupied the garden and other places in the said house. It was held that the terms "house or tenement, called the White Swan," necessarily implied the whole house; and the words, "wherein William Nicholls dwelleth," did not abridge the devise. Now the words, "the plantation called Cave Hall, late the property of William Caldwell," seems to me to be as certain and specific as "the

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house *or tenement called the White Swan." In Gascoigne v. Barker, 3 Atk. 8, the devise was of "all my lands, tenements and hereditaments, in possession or reversion, freehold and copyhold, in the parish of Chiswick or elsewhere in the county of Middlesex, (which copyhold lands I have surrendered to the uses of my will.)" There was part of the premises copyhold not surrendered, and the Chancellor held that this did not pass. He adds, however, that if the premises had been devised by name, "my messuages with the appurtenances called the king of Bohemia's head," the whole would have passed, and he would have held the subsequent words to be only a mistake in the description. In Banks v. Denshire, 1 Ves. 63, Lord Hardwicke says he determined the case of Gascoigne v. Barker with great reluctance, and chiefly on the word "which." In that case the devise was of "all and every freehold and copyhold lands, tenements and hereditaments, (having surrendered the copyhold to the uses of my will,) &c. The testator had two copyhold estates, one of which he had not surrendered; but it was held that both passed.

The principle is explained as applied to a deed, in Wrotesley v. Adams, Plow. 191, that if there be a certain description in the first instance, any further description is superfluous. That was a lease by a prior and convent of "all their farm in Brosley, &c., now in the tenure and occupation of Roger Wilcox." It is said that this word (farm) "is a capital messuage and all the lands lying to it, and signifies the chief house and lands belonging to it, and not a common house; and so has a certainty in itself. And when it goes further and says, in the tenure and occupation of Roger Wilcox, this is of no effect: for, if it was not in his tenure and occupation, yet it should pass, for there is a certainty in the thing demised, viz.: the farm in Brosley." So, if I make a "release of White Acre in Dale, which I have by descent on the part of my father, and I had it not by descent on the part of my father, but otherwise, yet the release is good." If this had been a conveyance of the plantation called Cave Hall, further described as containing four hundred acres, no doubt the whole must have passed.

The testatrix clearly expresses her intention to give the whole of Cave Hall plantation to her grand niece; but she was mistaken in its quantity. She further expresses her intention to make up for her a plantation of fourteen hundred acres. It was supposed that complete effect could be given to the inten-

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tion by purchasing *four hundred acres of the Cave Hall plantation. But this would be speculating on intention. What part shall be purchased? That contiguous to the one thousand acres devised? But the contiguous part might be differently selected and arranged, so as to vary greatly in value. Suppose there are valuable buildings and improvements on the land, the testatrix certainly contemplated that the devisee should have these, and may have made the devise chiefly with a view to them. But suppose them to be so distant from the one thousand acres as not to be included in the contiguous four hundred acres.—But the four hundred acres cannot be purchased. The object of the testatrix was to make up what she regarded as a suitable plantation for her grand niece. Are we likely to approach that intention more nearly by giving her a thousand dollars in money, rather than the whole of Cave Hall plantation? That can only be matter of guess. It is better to adhere to rule than thus to speculate on intention.

The decree of the Chancellor is therefore reversed, and it is Ordered and decreed that the executor proceed to complete the purchase of the entire plantation called Cave Hall, which shall be conveyed to the devisee, Rachael Susan Bee. Costs to be paid out of the estate.

JOHNSON, J., and O'NEALL, J., concurred.

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2 Hill, Eq. 304

JAMES FRAZIER, and Others, v. The Executors of JOHN FRAZIER, Deceased.

(Columbia. May, 1835.)

[*Slaves* ⇐22.]

The Act of 1820 (p. 22) relates to emancipation within the State only, and does not prohibit the removal of slaves to another State for the purpose of being emancipated.

[Ed. Note.—Cited in Blackman v. Gordon, 2 Rich. Eq. 45, 44 Am. Dec. 241; Finley v. Hunter, 2 Strob. Eq. 214; McLeish v. Burch, 3 Strob. Eq. 240; Willis v. Jolliffee, 11 Rich. Eq. 512, 513.

For other cases, see Slaves, Cent. Dig. § 94; Dec. Dig. ⇐22.]

[*Slaves* ⇐22.]

The owner of property may by his will direct his executors to dispose of it in any way he could; and as he could in his lifetime have removed his slaves to another State and there have emancipated them, he may by will direct his executors to remove and emancipate them.

[Ed. Note.—Cited in Jolliffe v. Fanning & Phillips, 10 Rich. 195; Finley v. Hunter, 2 Strob. Eq. 214; McLeish v Burch, 3 Strob. Eq. 240; Willis v. Jolliffee, 11 Rich. Eq. 512, 513.

For other cases, see Slaves, Cent. Dig. § 95; Dec. Dig. ⇐22.]

[*Slaves* ⟸22.]

Testator by his will directed his negroes to be hired out during the life of his wife, and at her death declares "it is my will and desire that the whole of my negroes be set free by my executors, and the amount of money arising from the hire of the said negroes be equally divided among them; and if the hire does not amount to $100 each, it shall be made up out of the other part of my estate: the interest of the money is to enable them, with the assistance of government to go to St. Domingo to be colonized, or to any part they with government may choose." *Held*, that the intention of the testator was that his slaves should be removed to parts where emancipation is lawful, and there be emancipated; that such will was legal and would be enforced: and on a bill by the next of kin claiming the slaves, the executors were ordered to remove the slaves to parts beyond the State where emancipation is lawful and there set them free; that they defray the expenses of removal from the interest on the $100 bequeathed to each of the slaves, and that they pay the legacies of $100 each to them after being so emancipated.

[Ed. Note.—Cited in Jolliffe v. Fanning & Phillips, 10 Rich. 195; Finley v. Hunter, 2 Strob. Eq. 214; McLeish v. Burch, 3 Strob. Eq. 240; Willis v. Jolliffee, 11 Rich. Eq. 512, 513.

For other cases, see Slaves, Cent. Dig. § 107; Dec. Dig. ⟸22.]

[*Wills* ⟸446.]

[Where two different constructions are put upon a devise, one of which would be valid and the other not, it will be presumed that the testator intended to make a valid devise, and it will be construed accordingly.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 962; Dec. Dig. ⟸446.]

[This case is also cited in Carmille v. Carmille's Adm'r, 2 McMul. 468, relative to the operation of Act of 1820.]

The testator, John Frazier, by his will, dated 14th October 1824, directs all his estate, real and personal, except his negroes, to be sold on twelve months' credit or a longer time, if the executors should think it better so to sell: the proceeds of the sale, and the money due to the testator at his death, were to be divided among his executors to be severally managed by them; and they were to retain to their own use all that they could make over the legal interest from the said funds. But of these funds the testator's widow was to be comfortably supported during her natural life. She was to have the use of one or two of the testator's slaves during

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life to *wait and attend on her "own proper person." The other slaves were directed to be hired out during the life time of the widow. After the death of the widow, the testator directed the balance of the funds of his estate arising from the sales of his land and the personal estate and money due to him at his death, which might be left after maintaining his wife during life, to be divided between James Frazier, John M. Frazier, James Jeter, John Livingston, John Frazier, son of Benjamin, and John Gomillian, subject to a contribution from this fund to make up the sum of $100 for each of his negroes, if the fund arising from their hire should be insufficient. The will then proceeds, "as respects the hire of my negroes, it is my will for my executors to hire out my negroes and see that they are treated well and not abused. It is my will that the money arising from the hire of said negroes be equally divided among my executors as the before mentioned part of my estate, only the money arising from the hire of my negroes to be kept entire and distinct from the other part of my estate before mentioned; and after the decease of my wife, Nancy Frazier, it is my will and desire that the whole of my negroes be set free by my executors, and the amount of money arising from the hire of the said negroes be equally divided among the said negroes; and if the hire does not amount to one hundred dollars each, that it shall be made up to them out of the other part of my estate before mentioned: the interest of the money is to enable them, with the assistance of government, to go to St. Domingo to be colonized, or to any part that they with government may choose."

The testator appointed John S. Jeter, Benjamin Frazier, and James Jeter, executors. The two last named qualified. By a codicil, dated 4th February, 1825, the testator directed that if his man slave, Isaac, would pay to his executor $600, that he, his wife Lively, and his daughter Haily, "shall be set free to enjoy liberty forever:" and that if his negro boy, young Isaac, should wish to be set free, that upon the payment by him of $650 to the executors, he "shall be set free and enjoy liberty for ever more."

The testator died shortly after the execution of his codicil, leaving a widow but no issue. The widow died in 1832, and shortly after Benjamin Frazier, one of the executors, seized the negroes, with the view of carrying the will into effect.

This bill was filed by the next of kin of the testator, claiming, amongst other things, the negroes and an account for their hire,

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*on the ground that the provisions in regard to them were void, as being contrary to the policy and laws of this State.

The case was heard at Edgefield, June 1833.

De Saussure, Chancellor. The questions which arise for the present consideration of the Court, are:

1. Is the bequest as to the freedom of the slaves valid and effectual?

2. If not, who are entitled to them?

On the first question I have no doubt: our statute forbids the emancipation of slaves, and declares the act null and void. An argument was set up for the defendants, which was urged with great ingenuity, and applied with great talent. It was that although the statute forbade direct emancipation, it did

not forbid a direction that the slaves should be sent abroad, and there emancipated; and that a direction to the executors to do so, raised a trust in them, which they were bound to fulfil, and the Court would enforce it. Upon considering this argument, I am inclined to think it cannot be sustained.

The statute is founded on deep policy, and was intended to prevent emancipation of slaves as a great political evil, dangerous to the institutions of the State, and injurious to the property and interest of the citizens. I am aware that a statute is not to be enlarged beyond a fair and reasonable construction of its words and provisions, in order to give effect to some supposed recondite meaning. But Courts are bound to look to the real object of a statute, and to give it effect, if the meaning be obvious and the provisions of the statute sufficient to cover the meaning. In the case before us, it is quite obvious, the object and intent of the legislature was to prevent the emancipation of the slaves held in the State. A direction to others to do what the owner is prohibited from doing cannot be permitted to defeat the prohibition. Such an easy evasion would be making the statute a mere cobweb. The frailty of the argument was felt by the counsel, who therefore endeavored to sustain it by saying the executors might and were bound, as trustees, to carry it into effect, by sending the slaves out of the State, and there emancipating them, which would be effectual. What effect a will, which directed slaves to be sent out of the State and there emancipated would have, need not be now decided in this case, for the

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direction to the executors is simply *to emancipate, which I take to be clearly against the statute, and null and void. It is true that after the direction to set the slaves free, a clause is inserted providing a fund for them, which was to enable them, with the assistance of the government, to go to St. Domingo, to be colonized, or to any part that they and the government may choose. This provision is an incidental one, and not a direct order to make an application to the legislature for permission to liberate the slaves and send them abroad.

The liberation is not made conditional and dependent on the will of the legislature to confirm the emancipation.—It is an absolute direction to the executors to emancipate, and then to get the assistance of the government to be colonized at St. Domingo or elsewhere. I consider the direction to emancipate null and void; and the rest of the provision depended on that. Besides, what government is meant? If the State government, that has no foreign relations with St. Domingo, or any other power or dominion by which it could give its assistance. If the government of the United States be meant, assuredly neither the State nor its authorities, nor any of its citizens, would ever permit the interference of that government with that subject, on which the government of the United States has no right to intermeddle, and on which, if it made any attempts directly or indirectly, a disruption of the bonds which bind and unite the States, would necessarily take place. It is the noli me tangere subject. Any intermeddling by the government would be the immediate death of the Union (however valued and cherished on other grounds) by the general consent of the citizens. If the executors choose to apply to the State legislature, they may do it. But till that be done, and a decision be made by that body, I feel myself bound to consider and treat this direction to executors to emancipate slaves, as an attempt to evade the statute, and merely null and void. Consequently the slaves attempting to be emancipated, remain in their former condition, slaves. 2. The question then arises, who are entitled to these slaves? Three claims are set up: 1. By the executors. 2. By the residuary legatees. 3. By the nearest of kin.

His Honor then went into an examination of the several provisions of the will, and on its construction, held that the next of kin were entitled to the negroes and their hire, and decreed accordingly.

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*From this decree the defendants appealed on the ground:

That the negroes are effectually disposed of by the will; and the trust reposed in the executors to remove and emancipate the negroes, is not in violation of the laws of this State.

Bauskett, for the appellants. The negroes are not emancipated by the will—there is a mere direction to the executors to remove them out of the State, and set them free. The will was executed in 1824; and the legal presumption is, that this was done with a knowledge of the existing laws against emancipation in the State; it had reference therefore to emancipation beyond its limits. Is the bequest void, according to this construction? The Court has no right to control the actions of its citizens without the State. If the executors now asked leave of the Court to remove the negroes for the purpose of emancipation, it would be a different question; perhaps in such case, the aid or interference of the Court would be refused. But the aid of the Court is not asked—all that is required, is to leave the executors uncontrolled—and they will, according to their oaths, perform the trust imposed on them by the will. The trust is not, as has been said, void, for it is not in violation of either the express letter, or intention of the law of this State. The Act of 1820 is the only statute having any application to this subject. It is manifest from the preamble of this act, that the mischief intended to be remedied, was the

emancipation of slaves within the State. There is no attempt here to evade the act; but, in fact, a plain direction to the executors to conform to it—not to attempt its violation, but with certain funds set apart for that purpose, and with the assistance of the government, to remove the negroes to St. Domingo, or to any part that the government may choose, where they might be lawfully emancipated. As the State has no foreign relations, and the government of the United States cannot interfere in this subject, the executors or the negroes themselves may choose the place of their removal. In Young v. Sylvester, 1 Bail. 632, it was held, that but for the act of 1820, which was passed after the death of the testator in that case, the executors would have been compelled to emancipate according to the directions of the will. If then the provisions of this act do not reach this case, the executors here may be compelled in like manner to carry the trusts of the will into effect. The testator, in his life time, beyond all question, could have

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removed his negroes to *St. Domingo, or any where else, and have emancipated them. The legislature neither could impose restrictions on his rights in this respect, nor so intended. If he had such rights in his life time, could he not delegate them by will to his executors? What prevents? The executor is the representative of his testator, invested with all his legal rights—he is in law the owner of the chattels, and may dispose of them, or do any act in relation to them not prohibited by law. If the executors in pursuance of the will had removed the negroes, would the Court have held them accountable?

The law of the domicil governs the disposition of personal estate, and the Courts of another State are bound to notice and enforce it. Suppose the testator had lived and died in Georgia, and by his will had given directions to his executors to hire out his negroes in South Carolina during the life of the widow, and at her death to take them back to Georgia, and there set them free. In such case, the executors would not only have the right to perform the trust, but the Courts of this State would be bound to compel its performance.

Waddy Thompson, on the same side. It seems to me, that this case may be discriminated from that class of cases embraced in the act of the legislature prohibiting emancipation. It will be seen that the will does not directly emancipate the negroes, but directs the executors to do it. Now, it is said in the decree that it would be an evasion of the law to allow one to do by the agency of another what he could not do himself; certainly it would. What is the conclusion from this admission?—Why, that the executor could do whatever his testator could. Now the testator could not emancipate the negroes in this State, therefore his executors could not emancipate them in this State; and a provision that they should do so would be void. But on the other hand, the testator could have removed them from the State, and then have emancipated—so can the executor; and a bequest directing the executor to do so would be good. Suppose the bequest had been an explicit direction to the executors, to take the negroes out of the State, to some State where emancipation was tolerated, and there to manumit them. What law of the State, or what policy of the State would be thereby violated? Would the letter of the law be violated? And let it be remembered that this is a stat-

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ute in res*traint of the rights of the citizen, and therefore to be strictly interpreted, and not extended by construction. Its prohibition is against emancipating in this State—there is no prohibition against removing them out of the State, nor any against emancipating them after they are out, nor could there be. What is the evil intended to be prevented, if even the Court will look to that with the view of extending the words of the law? not the removal of slaves; for on that subject, there would be much diversity of opinion—at all events, no legislative prohibition has been, or ever will be enacted against it—What considerations of policy are there to influence the state, to desire to prevent emancipation in other States? With the domestic institutions or policy of other States, we are in no way concerned, and have no sort of right in any way to interfere. The evil intended to be remedied was the accumulation of free negroes residing amongst us, from the acts of emancipation of their owners. This was all that the State had any interest or power to prevent. The master had the power to remove his negroes—why has not his executors? Suppose the bequest had been, that his executors should remove his slaves to Alabama to plant cotton—surely it would be good. Suppose in the violence of our opposition to the tariff laws, all manufactories of cotton goods in the State, had been prohibited under the severest penalties—a bequest that his executors should establish a cotton manufactory in the State, and employ his slaves as operatives, would have been clearly bad. But if the bequest had been that the negroes be taken to Georgia, (where there would be no such law) and there thus employed, the bequest would be good. The laws of this State prohibit gaming, and the keeping of gambling houses—a bequest to the executors to establish such a house, and employ his capital and slaves in the establishment, would be void. But I apprehend, that if the bequest had been to the executors, to take the property to Louisiana, and there establish a gaming house (where such things are legalized) that the bequest would be

good. A bequest that they be taken there, and the proceeds of their sale or of their hire invested in the Commercial Bank of Louisiana would be good. Why not equally good if the bequest were, that they should be thus invested in stock in a faro-bank which is there lawful; and in which, to my knowledge, men of large fortune, who never see the game played at all, invest their money as a profitable investment? It is there lawful, and deemed as fair an investment, and as

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fair a risk, *to put their money upon the issue whether an ace or a deuce will be the next card turned up, as whether a house will be burned down in a given time, or a ship going to sea will reach its destination in safety. Here our notions of morals and of policy are different, and I think wisely—we have the right to declare what shall be lawful, and what not, and a provision for an unlawful purpose is void; but we have no right to say what shall be done with property the moment it passes beyond the control of our laws, and as certainly none to prevent it from passing beyond that limit. The testator had a right to remove his negroes to Alabama to make cotton, or to New York to make freemen—and he had a right to have appointed an agent in his life time, to have done the same thing; and I cannot see why he had not a right to appoint an executor to do the same thing after his death. The executor is in fact strictly the agent of the testator—the agent to execute his wishes after his death; as an attorney in fact is the agent to do the same thing whilst he is alive.

I think it cannot be denied, that if the testator had expressed in so many words his wish that his executors should take his negroes out of the State and emancipate them, that it would have been a valid bequest, as not conflicting with any provision of the law, nor with any considerations of public policy. Has he in fact expressed such an intention? For if he has, and that intention is conveyed by the words used, it is sufficient. It seems from the will, that the testator was aware of some legal impediment to emancipation in the State—he does not emancipate himself, but directs his executors to do it. Are we not then to presume, that knowing the difficulty, he intended to guard against it? And when he creates a trust, that he intended as far as in him lay to give all the powers which were necessary to enable his trustees to execute it? One of those powers was, that they be taken out of the State. And this was not an independent and separate provision, but necessarily connected with the other. They were not to be set free immediately, but at a remote time; until that time, to be hired out, and that not for the benefit of any one else, but solely for the purpose of raising a fund to take them out of the country—for the fund arising from their hire, was to be kept separate. If the bequest had been that they should be sent to New York, and then sent to Liberia, it would have been good—is it the less good because there are inserted the

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words that they *are to be set free? Where set free? In this State? What is there to shew it? Nothing—but much to shew the reverse. I will not contend that a general direction to set free would mean a direction to set free out of the State—but admit that in the absence of any other words, such a provision would be construed as intending to set free in the State, and therefore void; still I do contend, that there is indissolubly connected with the provision to set free, a direction to send out of the State; and that the order in which the two things are stated in the will, or rather in the same sentence, is in no wise material—and that, to say that they be set free and sent to Ohio, is the same precisely as to say, that they be sent to Ohio and set free: and the more especially will the expressions be regarded as convertible, when by such construction alone, can the purpose of the testator be accomplished.

D. L. Wardlaw, contra. The construction contended for is, that this is a bequest to remove the slaves to St. Domingo or elsewhere, settle and emancipate them. Conceding this to be the true interpretation of the will, how is it to be enforced? At whose instance? In contemplation of law, slaves are chattels, things—they have no civil rights; can hold no property, nor maintain a suit in Court. Should the executors refuse to perform the trust, there is no one authorized to compel them—the Court cannot interfere but in the regular course of procedure at the instance of the cestuique trusts, and they cannot be recognized as parties, or regarded as having any rights. To entertain a bill at their instance, the Court must recognize persons unknown to the law, and actually confer rights on mere chattels. The case is totally different from a devise to charitable uses in mortmain; for there is no one here capable of complaining to the Court. If then the Court is wholly powerless to enforce such a bequest, the bequest itself must be void. For it would be a solecism in terms, to say that the bequest is valid—the trust is good—without the means of enforcing it—a right without a remedy.

But the construction contended for on the part of the defendants is not the true one. It is not, according to the will, a bequest to remove, and then set free; but first to set free, and afterwards to remove them to St. Domingo, or elsewhere, with the assistance of the government, to be colonized. The words are, "after the decease of my wife, &c. it is my

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will and desire, that the whole of *my negroes be set free by my executors," &c., and then follows the direction to give them a hun-

dred dollars each, to "enable them to go to St. Domingo," &c. There is no direction here given to the executors to remove them before emancipation—it must take place here. The negroes were to receive each a hundred dollars; before they could receive the legacies, they must be emancipated—as slaves, they are incapable of taking. Whatever ambiguity there may be in the will, there is none in the codicil: that directs that certain negroes, on the payment of certain sums of money, shall be set free; and this is an absolute, and not a mere directory bequest—not a direction to the executors to remove and emancipate, but a positive bequest of freedom here; and goes to show that such was also his intention in the will, in regard to all his negroes, after his wife's death—the future destination of the negroes is purely matter of advice.

The aid of the government, too, is to be obtained, and the consent of St. Domingo to receive these negroes. These are serious difficulties to the fulfilment of this trust, independently of the act of 1820; but that act utterly prevents it, by declaring emancipation illegal. The seizure by the executor could not avail. Young v. Sylvester, 1 Bail. 632. The bequest being void, the interests of the next of kin attached, and they became entitled to possession after the widow's death, and the executor must hold for their benefit. In Walker v. Bostick, 4 Eq. Rep. 266, it was held, that a bequest of a slave to a trustee with directions to liberate, was an attempt to evade the law, and void; and a legacy to the slave was declared void, and fell into the residuum of the estate.—See also, Chapman & Brown, 6 Ves. 403. As to the argument drawn from the law of the domicil: the law of the domicil, is to prevail generally, but not where the rights of the State, and her public policy is concerned, and would be affected by it. 3 Dallas, 370; Dixon v. Ramsay, 3 Cranch, 319.

O'NEALL, J. It does not appear that any question is made under the codicil: the slaves, under it, have not, I presume, attempted to obtain any benefit. The probability is, that in no event could it benefit them. Under the clause of the will which has been already set forth at length, the question arises, can the slaves be set free according to its directions. To solve this question it will be necessary to examine first the law on the

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subject of emancipa*tion of slaves; and then see whether, according to law and a just construction of this will, the provisions directing and connected with the emancipation of the testator's slaves can be carried into effect.

The Act of 1820, (Acts of 1820, p. 22,) by its preamble, recites that "whereas the great and rapid increase of free negroes and mulattoes in this State, by migration and emancipation, renders it expedient and necessary for the legislature to restrain the emancipation of slaves, and to prevent free persons of color from entering into this state:" and therefore enacts "that no slave shall hereafter be emancipated but by act of the legislature." Other provisions of that, and the Act of 1823, are intended to prevent the migration of free negroes into this State; but, at present, it is only necessary to look to the enactment in restraint of emancipation. The great rule of construing a statute, is to construe it by the old law, the mischief and the remedy, so as to put down the mischief and advance the remedy. The law, as it stood prior to the Act of 1820, allowed emancipation to take place by deed upon an examination before, and to the satisfaction of a Jus tice of the Quorum and five freeholders, that the said slaves were of good character and capable of gaining a livelihood in an honest way. Under this law, it seems from the preamble of the Act of 1820, there was a rapid increase of free negroes and mulattoes by emancipation. This was the evil, to remedy which the Act of 1820 was passed. The remedy provided was, that emancipation should only take place by act of the legislature. This provision is general, and might, from the words, prohibit emancipation out of, as well as within, the State by a citizen of the State. But this is a construction altogether by the letter and not by the spirit of the law. For the intention of the legislature is manifest—to prohibit the emancipation of slaves within the State except by act of the legislature. The evil was the increase of free negroes within the State from emancipation. So this was remedied, the end of the law was obtained. The removal of slaves belonging to citizens of the State and their emancipation in parts beyond her territorial limits, was no injury to her. They could not return upon her as free negroes; for the Acts of 1820 and 1823, provide penalties to prevent the migration of free negroes into South Carolina.

The Act of 1820 could not, however, have effect upon emancipation beyond the limits

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of the State. For the slaves within her *limits, when lawfully removed beyond them, ceased to be liable to her jurisdiction. They then became liable to another jurisdiction, and were to be held, enjoyed or disposed of, according to its laws. It is not, as I understand, denied that the owner might have removed his slaves from South Carolina and manumitted them in any State where he could lawfully do so. But if it were denied, the denial could not be sustained: for there is no law prohibiting the owner from removing his slaves from this State at any moment, and for any purpose he pleases. If he has the power to remove them, after they have crossed beyond the exterior line of the State she cannot reach out a hand to touch them

for any cause; and hence, if they should be then manumitted, no person can capture them for being emancipated contrary to her laws; for they have been set free beyond her territorial limits, and beyond the operations of her laws. In Cline v. Caldwell, 1 Hill, 427-8, we recognized this principle. In Linam v. Johnson, 2 Bail. 137, it was held that a slave emancipated contrary to the Act of 1820, could be seized under the provisions of the Act of 1800; and that this was the only penalty which could be imposed against illegal emancipation. This being so, and there being no right of seizure for an emancipation out of South Carolina, it follows that the emancipation must prevail. But it is said, although the owner might remove from the State and set free his slaves, yet his executors cannot, by direction of his will, do the same acts. As a general rule, to which there is no exception, unless it be by express statutory provisions, it may be laid down that the owner of property may by his will direct his executors to dispose of it in any way which he could. The case of Bynum & Wallace v. Bostick & Walker, 4 Desaus. Eq. Rep. 266, under the Act of 1800, does hold that a bequest of slaves to a trustee with directions to set them free is void, as being contrary to that Act: but that opinion was certainly prepared under a strange misapprehension of the law, and without looking at the Act. For it states that the "statute expressly forbids any emancipation in any other way than by deed executed in the life time of the master a certain time before his decease." On looking at the Act, (2 Faust, 355,) it will be seen that there is not a word said about the deed being executed "in the life time of the master," or within "a certain time before his decease." This shews at once the unsoundness of that decision. The case of Lenoir v. Sylvester, and Young v. the same, 1 Bail.

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*632-7-8-9, held that an executor, under the Act of 1800, might execute the deed and do every other act requisite by it, and thus give effect to a legacy of freedom. So that at the passage of the Act of 1820, an executor could have carried out and given effect to the testator's directions to emancipate his slaves, just as well as he could have done. The Act of 1820 did not profess to abridge the rights of an executor in this respect, any more than it did the rights of the owner, the testator. Emancipation by either, in the State, could not be effected—it could only be done by act of the legislature. But, if the Act of 1820 did not deprive the executor of the power of doing any thing which his testator could lawfully do, (and in the absence of any provision to that effect, it cannot be doubted that it did not,) then it follows that a testator's directions to his executor to remove his negroes from the State and set them free, are legal and valid, and must be obeyed. For he had the power in his life time to do the act; and it follows that he may authorize his executor to do the same.

This makes it necessary now to inquire as to the construction to be placed on the bequests in favor of the testator's slaves in his will. It directs in substance that the interest, on their hire during the life of his wife, or on the sum of $100 each, should constitute a fund to enable them to go to St. Domingo or any other place they may choose, and to which the government may be willing that they should go, and that his executors should set them free, and pay them the sum of $100 each. In construing a will, it is an uniform rule to give it if possible, such a construction that it may have effect, and not be defeated. It is hence admissible to transpose words and sentences to subserve the intentions of the testator. In this bequest it is manifest that the testator intended that his slaves should enjoy freedom, not within the State, but in parts beyond her limits, where it might be lawful and proper that they should be free. This is not contrary to the law of this State. The direction to his executors to set them free must be taken to be part of the provision to "enable them to go to St. Domingo to be colonized, or to any part that they, with

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the government, may *choose." To set them free within the State, is contrary to law; and this the executors cannot therefore do: but they can remove them from the State to parts where emancipation is lawful, and there set them free. This comports with the testator's intention, and is therefore admissible. The legacy of freedom here is in its words altogether executory: and according to Lenoir v. Sylvester, and Young v. the same, 1 Bail. 637-8-9, it is the duty of the executors to give it effect. But it is said, how can the Court compel the executors to carry such a bequest into execution? for the slaves themselves cannot, nor can any other person, for them, file a bill to compel the executors to execute a will in this respect. But I apprehend there is in this case, and others like it, no difficulty. For on a bill filed by the heirs to partition the slaves, the Court would, if on looking into the will they should find that the executors could execute it by sending the slaves out of the State and there set them free, order them to so discharge the trust reposed in them by the testator. In other cases the executor's oath to execute the will, and the fair claim which they have to the confidence of the Court by the confidence reposed in them by the testator, are sufficient guaranties that such a bequest will be faithfully executed. To remove the slaves beyond the State to the place to which they may choose to go, the testator's estate under his directions to his executors to remove them, would have been liable to the expenses, had he not provided a fund in the interest on the

sum of $100 each which he had bequeathed to them. This last sum they will also be entitled to receive on being emancipated; for in the will it follows the bequest of freedom, and is intended to vest in them and be payable to them when they shall become free people. In this point of view, it is not liable to the objection to which it would be subject was it a legacy to slaves.

It is therefore Ordered and decreed, that the defendants do forthwith remove their testator's slaves to parts beyong the limits of this State, where it may be lawful to emancipate them, and that they do there legally emancipate and set them free; that they defray the expenses thereof out of the interest from one year after the testator's death, on the sums of $100 bequeathed to each of the said slaves when they should be set free: and that they pay to the said slaves when they do set them free as herein before ordered, the sum of $100 each, and any arrears of interest which may remain after defraying the expenses of their removal and emancipation.

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*It is Ordered and decreed that the defendants do account to such of the plaintiffs as may be entitled under the will, for the proceeds of the sale of the land and personal estate and the hire of the slaves, after deducting from the aggregate of principal the sum of $100 for each of the said slaves at the end of one year from the testator's death; and also after deducting all sums paid properly for the maintenance of the widow, and all other proper payments and expenditures touching the estate, and the costs of this case, which are to be paid out of the estate. The defendants must account for interest on the annual balances.

JOHNSON, J., concurred.

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2 Hill, Eq. 318

WM. H. GIST v. S. P. PRESSLEY, JAS. ALLSTON, GEO. W. HODGES, and GEO. W. PRESSLEY.

(Columbia. May, 1835.)

[*Mortgages* ⟸564.]

Plaintiff had a mortgage of two negroes from his debtor against whom there were senior executions. Defendants also had a mortgage of real estate junior to the plaintiffs, and in order to save the property mortgaged to them purchased the eldest execution. The negroes mortgaged to plaintiff, and all the other property except that mortgaged to defendants, were sold under the executions and they were all satisfied: the defendants afterwards foreclosed their mortgage by sale under the order of the Court, the proceeds remaining in Court. On a bill filed by the plaintiff, it was held that he was entitled to relief out of the proceeds of the property mortgaged to defendants, to the extent of the sales of the negroes mortgaged to him.

[Ed. Note.—Cited in Bank of Hamburg v. Howard & Garmany, 1 Strob. Eq. 178.

For other cases, see Mortgages, Cent. Dig. § 1627; Dec. Dig. ⟸564.]

[*Fraudulent Conveyances* ⟸138, 139.]

There is a difference between an absolute sale and a mortgage in respect to the effect of the grantor's retaining possession; in the first it is in the common course that possession should be changed, and if it is not, it is evidence of fraud: but this is not the course in the case of a mortgage, and the mere circumstance of the mortgagor retaining possession until condition broken, is not of itself evidence of fraud.

[Ed. Note.—Cited in Bennett v. Sims, Rice, 427; Fishburne v. Knnhardt, 2 Speers, 564; Ryan v. Clanton, 3 Strob. 423; Maples v. Maples, Rice, Eq. 311; Bank of South Carolina v. Gourdin, Speers, Eq. 460; Hirshkind & Co. v. Israel, 18 S. C. 167.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 439, 448; Dec. Dig. ⟸138, 139.]

[*Fraudulent Conveyances* ⟸138.]

Even after condition broken a mortgage is still different from an absolute sale. It is not the usual course that the mortgaged property should be seized immediately after condition broken—some degree of neglect in this respect will not infer fraud; great neglect may.

[Ed. Note.—For other cases, see Fraudulent Conveyances. Cent. Dig. § 452; Dec. Dig. ⟸ 138.]

[This case is also cited and approved in Bank of South Carolina v. Gourdin, Speers, Eq. 441.]

Before Chancellor Johnston, at Abbeville, June 1814.

The bill alleges that John B. Pressley made a note in these words:—"On or before the first day of July next, I promise to pay William H. Gist, or bearer, nine hundred dollars, for valne received, with interest from the first day of January last past, this 21st day of May, 1832.

(Signed.) John B. Pressley."

And executed the following mortgage:

"State of South Carolina.—Whereas, I, John B. Pressley of the district of Abbeville, and State aforesaid, am indebted to William H. Gist, in the sum of nine hundred dollars by promissory note, dated the twenty-first day of May, due the first day of July next, with interest thereon from the first day of January last: Now therefore, know all men by these presents, that I, John B. Pressley, in consideration of the premises, and to secure the more certain payment of the above specified sum of money, have granted, bargained and sold, and by these presents do grant, bargain and sell, and in market overt deliver, to the said William H. Gist, two negro slaves, Godfrey and Betty, the former

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about twenty-eight *years of age, the latter about thirty-two, to have and to hold the said two negroes, with their future increase, if any, unto the said William H. Gist, his heirs, executors, administrators and assigns for ever: And I do hereby bind myself and

my legal representatives, to warrant and for ever defend the title and soundness of the said two negroes, to the said William and his legal representatives, against myself, and all claims derived through, or founded on my title or claim, and against all persons whomsoever, claiming, or to claim the same. Given under my hand and seal, this nineteenth day of June, in the year of our Lord, one thousand eight hundred and thirty-two.—Now, the condition of the above obligation is such, and it is hereby expressly agreed, that if the above bound John B. Pressley, or his legal representatives, shall well and truly pay the sum of money specified in the said promissory note above referred to, with all interest there may be due thereon according to its tenor and legal effect, then this obligation and every grant hereby made, shall become null and void, otherwise to remain in full force and effect.

Jno. B. Pressley, (Seal.)

Signed, sealed and delivered in the presence of

Thos. B. Speerin,

Gary Davis."

That on the 19th February, 1829, John B. Pressley, with these defendants, his sureties, become bound to David Lesley in the penalty of five thousand dollars, conditioned to pay $2,000, with interest from the first January, 1829, on the first January, 1832; which bond was assigned on the day of its execution, to Alexander B. Arnold. That bond being unpaid, Jno. B. Pressley, on the 23d June, 1832, mortgaged to the defendants as an indemnity for their suretyship, a house and lot in the village of Abbeville, and his mill tract of land. On the 3d August, 1832, John B. Pressley died, possessed of the negroes, house and lot, mill tract of land, and very little other estate; at his death, there were executions to the amount of twelve or thirteen hundred dollars older than either of the mortgages. That soon after Pressley's death, James Allston knowing of the plaintiff's mortgage, and suspecting Pressley's solvency, on the 6th August, 1832, took an assignment of the execution of William Harris v. John B. Pressley, which was senior of the others, and on which was due about $970. That Allston assigned one half of that execution to George

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W. Hodges, 1st Octo*ber, 1832. That Allston and Hodges caused this execution to be levied on Godfrey and Betty, with the view to save the mill tract and house and lot, for their mortgage, and they were sold in Oct. 1832, by the sheriff, for the inadequate price of $680, which was paid over to Allston and Hodges, under Harris' execution; and that under this and the other executions, all the visible property of John B. Pressley, except the house and lot, and mill tract, was exhausted, and all the executions satisfied.

That afterwards administration of John B. Pressley's estate was granted to George W. Pressley, who being sued by this plaintiff, obtained leave to plead plene administravit, declaring there would be no assets to pay simple contracts of the intestate. In Nov. 1832, the sureties of J. B. Pressley paid the assignee of his said bond about $2,600, the amount due; and in May 1833, filed their bill for foreclosure of their mortgage, upon which an order was made (June 1833) by the Chancellor of foreclosure, to satisfy the mortgage or other lien having preference, and that the money should be held by the Commissioner subject to the liens of claimants; and this order was thus made on the suggestion of this plaintiff's claims. The house and lot and mill tract were sold for $2,400. That plaintiff has before and since frequently urged on defendants, that his mortgage being older than theirs, he had a right in equity to insist that all unincumbered property and that subject to a junior lien, should be exhausted, before that subject to his lien should be disturbed, and that having caused a contrary course to be taken, they were bound to allow him satisfaction of his mortgage out of the avails of theirs; but they refused, and even denied him a ratable proportion thereof. The bill prays that the defendants may answer on oath its allegations: that Allston and Hodges may discover what they paid for the execution of Harris; whether they did not procure the sale of Godfrey and Betty under that execution, and whether they were not, then and before, well informed of the plaintiff's mortgage; that from the sale of the Commissioner, the plaintiff may have satisfaction of his demands, or so much as will equal the inadequate prices for which the negroes were sold, with interest from the date of the sale; or that of the price of the negroes, and interest and the proceeds of real estate, the plaintiff may have a share proportioned to the sum left for the sureties, as the amount of his note is to their demand; and for such other relief as should be proper.

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*The answer of George W. Pressley admits $105 of assets in his hands applicable to debts of his intestate, J. B. Pressley, and that the amount of specialty debts greatly exceeds the assets.—The answer of James Allston and George W. Hodges denies that they knew any thing of the plaintiff's debt, and say they did not hear of his mortgage until after J. B. Pressley's death; nor did they hear that it was older than their mortgage until they had purchased the Harris execution, but did hear of it before the sale of Godfrey and Betty. That these defendants were the sureties of J. B. Pressley, and as such, paid the amount stated in the bill; and that the bond on which the payment was made, was for the purchase of the house and lot, afterwards with the mill tract, mortgaged to them as the bill sets out: that J.

B. Pressley died about the time and left the property mentioned in the bill, and personal property under no specific lien, which was sold by the sheriff for $656.11. They suspected the solvency of J. B. Pressley, and did buy the execution of Harris to protect the lot and mill tract, but paid for it its nominal value, and had it assigned as the bill states. That the plaintiff told Allston his mortgage was not recorded, and theirs was recorded. That neither of them caused or procured a levy or sale of Godfrey and Betty under their, or any other execution, nor was a levy or sale made under theirs. They did not receive the price of Betty, it was paid over to junior executions, and only received the price of Godfrey, ($430,) which the sheriff had applied to theirs as the oldest execution. That the plaintiff knew the negroes had been levied on and would be sold, and did not resist the sale or claim the proceeds at the sheriff's hands. That the defendants might well have claimed the proceeds of Godfrey and Betty both; because, after the mortgage, they remained in the possession of J. B. Pressley until his death, and at his late residence until seized by the sheriff, having never been in the plaintiff's possession. That the plaintiff never did apply to them to have their execution satisfied out of the unincumbered property, or for payment, as the bill states.

The Chancellor decreed, that of the monies in the hands of the Commissioner arising from the sale of the house and lot and mill tract, the plaintiff should be allowed the amount for which Godfrey and Betty were sold by the sheriff, with interest from the time of sale until the money was impounded

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by the order of the *Court of Equity. From which decree the defendants, James Allston, George W. Hodges and Samuel P. Pressley appealed.

A. Burt, for the appellants, now moved to reverse or modify the decree, on the following grounds:—

1. Because the decree allows to the plaintiff the price of Godfrey and Betty, of the avails of the land, assuming that his mortgage is older than defendants', although, if older, its lien was waived by permitting them to be sold, and their proceeds appropriated to Harris' and other executions; and although the Harris execution was never levied, or otherwise used to the plaintiff's detriment.

2. Because the Harris and other executions older than the mortgage, could not be thrown upon the land; for they were satisfied before the filing this bill.

3. Because the decree requires the defendants to account for the price of Betty, although she was not sold under the Harris execution, nor the proceeds of her sale applied to it.

4. Because the mortgage of the defendants being taken without the knowledge of the plaintiff, and being a lien on different property, gives the plaintiff no claim to subject the land to executions older than either mortgage.

5. Because the possession by J. B. Pressley of Godfrey and Betty, after breach of the condition of the mortgage, was fraud per se; or at least such a badge of it as impaired any claim that the plaintiff might have had to the relief decreed to him.

6. Because at all events the decree should have allowed the Harris execution as the oldest, the avails of the whole unincumbered estate of J. B. Pressley, and charged the land with the residue only of the defendants' receipts under the Harris execution.

On these grounds, it was argued that the plaintiff had no equitable ground of relief against the defendants, at least to the extent afforded by the decree. The fifth ground was however principally relied on, under which it was insisted that the plaintiff's mortgage was fraudulent and void as to creditors and purchasers because it was not recorded, and its existence was not known to the defendants—that the mortgagor, after condition broken, continued in possession of the negroes, and exercised all acts of ownership over them until his death, and his representatives afterwards up to the levy; and permitting the property to remain in posses-

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*sion of the mortgagor, was evidence of some secret trust for his benefit: and that the circumstances of themselves constituted such a case as rendered the mortgage absolutely void; or at least furnished such high evidence of fraud, as should prevent the Court from interfering in behalf of the plaintiff against creditors and purchasers without notice. And in support of this ground, the following authorities were cited and commented on: Smith v. Henry, 1 Hill's Rep. 16; Cowp. 434; 1 Cranch, 316; 2 Kent's Com. 405; Hudnal v. Teasdale, 4 M'C. 294; 3 Co. 87; Prec. in Ch. 285; 1 Atk. 165; 1 Bur. 467; Kidd v. Rawlinson, 1 Bos. & Pul. 59; Arundel v. Phipps, 10 Ves. 145; 2 Kent's. Com. 412; Reeves v. Harris, 1 Bail. 563; Edwards v. Harben, 2 T. R. 587; Montgomery v. Kerr, 1 Hill, 291; Bobo v. M'Beth, 2 Bail. 489–91; Walwyn v. Lee, 9 Ves. 24; Frost v. Beekman, 1 John. Ch. Rep. 300.

D. L. Wardlaw, contra, contended that the circumstances made a case for relief, on the established principles of Equity that a creditor having a specific lien, may compel other creditors having elder general liens, to exhaust all the rest of the property before resorting to that on which he has the lien—that the defendant's mortgage being junior to the plaintiff's, the property therein mortgaged must be first subject to the elder executions. It was mortgaged subject to the

plaintiff's equitable right to have it so made liable before resorting to the negroes mortgaged to him; and the proceeds of the sale of the property in the hands of the Court must be held liable in like manner as the property itself. As to the charge of fraud, he insisted that the possession of the mortgagor was not such as would render the mortgage void; it was but for a few days after condition broken, and being consistent with the purpose of the deed, repelled the presumption of fraud. Cited Clowes v. Dickinson, 5 John. Ch. Rep. 235; Gill v. Lyon, 1 John. Ch. Rep. 447; Stoney v. Shultz, 1 Hill's Ch. 500; 2 Bar. & Ald. 134; 1 Bin. 467; Ryan & Moody's Rep. 305.

HARPER, J. The three first grounds of the motion may be considered together. The principles of the Chancellor's decision, are perhaps less distinctly seen, because the defendants, Allston and Hodges, sustain the characters both of senior execution creditors and junior mortgage creditors of the deceased, John B. Pressley. If the execution creditors were different persons, and were now

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seek*ing to enforce their executions against the slaves in question, the plaintiff would have a clear equity to restrain them, and to compel them to resort to the property mortgaged to defendants. This is on the principle expressed in the case of Fowler & Addison v. Barksdale, Harp. State Rep. Eq. 164, "that when a preferred creditor has a lien on two funds, and another creditor has a junior lien on one of them, the creditor who has the preference shall resort to that which will operate the least injuriously to the other creditor." And if the executions, being restrained as to the slaves, had been enforced against the property mortgaged to the defendants, the latter would have had no redress or claim of contribution against the plaintiff. The principle is fully explained by Chancellor Kent, in Gill v. Lyon, 1 John. Ch. Rep. 447, and Clowes v. Dickenson, 5 John. Ch. Rep. 235. When the intestate mortgaged (that is, conditionally sold) the slaves to plaintiff, his execution creditors were bound on equitable principles to exhaust the property which remained in his hands, before pursuing that to which plaintiff had acquired a title. Among this property, was the land and mill and house and lot in question. When the intestate afterwards conveyed these to defendants, he could only convey them, subject to the equitable burden to which they were liable in his own hands. In the language of Chancellor Kent, "they sit in the seat of their grantor." The burden is, that the property must be liable to the execution creditors in preference to that conveyed to plaintiff.

Then, if plaintiff had neglected to restrain the execution creditors, and had lain by and permitted the property to be sold, and then filed his bill against defendants to be re-imbursed out of the property conveyed to them, could that bill be sustained? I see no reason why it should not; provided no particular injury were occasioned to defendants by the delay. This is part of the matter decided in Clowes v. Dickinson. And this will dispose of the third ground, relative to the proceeds of the slave, Betty. There were executions older than the plaintiff's mortgage, to exhaust the whole personal property. That defendants were the owners of the Harris execution, was merely an accidental circumstance. If they had not been, and the whole of the money had been paid to third persons, their liability would have been the same. In Clowes v. Dickinson, the bill was in like manner filed to be reimbursed after the property first purchased had been sold. In that case too, it happened that the second

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purchasers of property *had purchased the older execution. In that case, as is alledged in this, the property (two lots of land) sold under execution was purchased at a very low price; and it was contended for the plaintiff, that if he were not entitled to have the lots themselves, he ought to have an inquiry as to their actual value at the time of the sale. But as he had been guilty of great laches, having lain by for several years, and the purchasers had in the mean time made much improvements on the lots, which would have rendered it inequitable that they should be taken from them, the Chancellor would only allow him the amount for which the property actually sold. This is what the Chancellor has done in the present case; though I do not know that laches can be imputed to the plaintiff. What has been said, disposes of the fourth ground, and also of the sixth. With respect to the latter, it is enough to say that defendants have been satisfied their execution. It is immaterial to them whether this has been done by the proceeds of the particular slave, Betty, or other personal property of the intestate. To whatever executions these may have been applied, the property in defendants' hands is liable to make them good. The third, fourth and sixth grounds are all misconceived.

The fifth ground is that which seems principally to be relied on. It is supposed to come within the principle of the case of Smith v. Henry, 1 Hill, 16—that where a conveyance is made by an insolvent person in payment of a previously existing debt, and the grantor is allowed to retain possession of the property, this is conclusive evidence of fraud. Or, at all events, that the intestate's having been permitted to retain possession after condition broken, was a badge of fraud, which has not been explained, and which must vitiate the conveyance. It is argued that there is no difference in principle between a conveyance by way of mortgage and an absolute conveyance. The

principal English cases relied on, are those of Edwards v. Harben, 2 T. R. 587; Ryall v. Rolle, 1 Atk. 165, and Worsely v. De Mattos, 1 Burr. 467. The two latter were cases of express mortgages, and, it is said, decide that possession's being retained by the mortgagor, whether before or after condition broken, is of itself conclusive of fraud. But these elaborately considered cases were determined with reference to the English statutes of bankruptcy, and particularly the 21 Jac. 1 c. 19, which reciting "For that it often falls out that many persons, before they become bankrupts, do convey their

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goods to other *men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as their own," enacts, "that if at any time hereafter, any person or persons shall become bankrupt, and at such times as they shall so become bankrupt, shall, by consent and permission of the true owner and proprietary, have in their possession, order or disposition, any goods or chattels whereof they shall be reputed owners, or take upon them the sale, alteration or disposition as owners, that in every such case, the said Commissioners shall have power to sell and dispose the same, as fully as any other part of the bankrupt's estate." The cases determine that a mortgage is a conditional sale and transfers the property to the mortgagee, who is therefore the true owner and proprietary, and if by his consent it be left in the mortgagor's possession, it comes within the terms of the act, whether the possession be before or after condition broken. But I acknowledge that the subject is fully considered with reference to the common law, and the stat. 13 Eliz., and the opinion of the Court expressed, that there is no difference between a mortgage and an absolute conveyance. But it is not, as under the bankrupt law, that the retaining of possession of itself avoids the transaction, or is conclusive evidence of fraud. It is one of the circumstances which is to be taken with all the other circumstances, to make up a judgment on the fraudulent or bona fide character of the transaction. After reviewing the cases on the subject, it is said in Ryall v. Rolle, "From all these cases, it appears, that upon the construction of the stat. 13 Eliz. there is no room to make a distinction between conditional and absolute sales of goods, if made to defraud creditors, but a Court or jury are left to consider of this from the circumstances of the case." I have before ventured to express the opinion, that the true ground of decision in Twine's case was lost sight of in succeeding cases, and the distinction overlooked between the cases in which the retaining of possession is conclusive evidence, or only one of the badges of fraud.

I have not found any decision of the English Courts or our own, inconsistent with the cases of Ryall v. Rolle and Worseley v. De Mattos, on the point we are considering. And I concur, that there is no distinction in principle between an absolute conveyance and a mortgage or conditional conveyance. There will be a great difference, however, in the application of the principle, according to the circumstances of the different cases.

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If, according *to the distinction in Smith v. Henry, there were a previous debt due and payable at the time, and the mortgage was executed to secure that, the mortgagor remaining in possession, it would come completely within the reasoning of that case. No other motive could well be imagined for such a transaction, than that the mortgagor's being permitted to retain possession of the goods, was the price paid by the creditor for the preference given to him. Such precisely is the case of Edwards v. Harben. Though called a bill of sale, that was in effect a mortgage. It was intended as a security. It was for a debt already due, and it was stipulated that the vendee should not take possession for fourteen days. It was in this case that the retaining of possession was held to be conclusive evidence of fraud. The case of Meggott v. Mills, 1 Lord Raym. 286, which was not referred to in Smith v. Henry, and which is quoted and commented on in Ryall v. Rolle and Worseley v. De Mattos, seems to me to illustrate this. In that case the landlord had advanced money to his tenant to buy furniture, and took a mortgage of the furniture to secure himself, the tenant retaining possession. As observed in both the cases mentioned, this was not decided upon any notion of a distinction between a mortgage and an absolute conveyance, but Lord Holt said that "if these goods of Wilson's had been assigned to any other creditor, the keeping of the possession of them had made the bill of sale fraudulent as to the other creditors." This cannot be on any such ground as that a landlord stands on a better footing than any other creditor; but must go on the principle of Smith v. Henry, that he who has advanced his money on the faith of the security of the mortgage, stands on a different footing from a creditor to whom the debtor's goods are mortgaged to secure a previously existing debt. In the former case no injury is done to creditors. They are deprived of nothing which they would have had if the transaction had never taken place.

But when a conveyance is made to satisfy a debt created at the time, then, in the case of an absolute conveyance, the retaining of possession is not conclusive evidence of fraud, but one of the badges of fraud, susceptible of explanation. So it may be in the case of a mortgage; but there is then a difference in the application of the principle. When there is an absolute conveyance, it is

in the natural course of things that the possession should be changed; and when this is

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not done, we are set upon looking for *some secret motive or understanding which has induced this departure from the ordinary course. But it is not in the common course that possession should be transferred when a mortgage is executed. If there is a stipulation that possession shall be retained till condition broken, it seems to me that it comes within the principle of Cadogan v. Kennet, Cowp. 432, Arundel v. Phipps, 10 Ves. 140, and that class of cases in which possession was held not to be fraudulent, because in pursuance of the terms of the deed. But if there be no such stipulation, still it is very different from the case of an absolute sale. It is the common understanding and practice of the country that possession shall not be taken till condition broken. It is a conditional sale to provide for satisfying a debt, and in conscience and equity the party is not entitled to his satisfaction until the debt is due. I should therefore say, that the mere circumstance of retaining possession until condition broken, is not of itself evidence of fraud. The possession is sufficiently explained.

And even after condition broken, it is still different from the case of an absolute sale. As I have said, in the latter case, it is the common course that possession should be transferred with the title, and the departure from the common course is to be accounted for. But it is not the common course that the mortgaged property should be seized the moment the condition is broken. It may be harsh to do so. It may not be in the party's power to find the property, or he may not be able to seize it without committing a trespass. Even some degree of neglect does not infer fraud Still I think a great degree of neglect in leaving the property in the mortgagor's possession after condition broken, may be a badge of fraud; though not so strong as in the case of an absolute sale. It is one among the circumstances to enable a Court or jury to judge of the character of the transaction.

In this case, there was but a very trifling degree of neglect, which may be further accounted for by the plaintiff's having been aware that the slaves were liable to the older executions. It was argued that this mortgage was not given for a debt created at the time. The note, which is the evidence of the debt, was given at the same time.(a) We know nothing of the consideration of the

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*note, but it is not impeached. The only circumstance relied on to shew that it was given for a previously existing debt, is that it provides for the payment of interest from the previous first of January. But this is too slight to warrant the conclusion. A contract might have been entered into at that time, with a view to this security, which was not regarded as executed until the note and mortgage were given. There are many ways in which the circumstance may be accounted for. Whatever consideration was paid, may have gone to the use of creditors.

The motion is therefore dismissed and the decree affirmed.

JOHNSON, J., and O'NEALL, J., concurred.

(a) From the brief (the only document the Reporter had from which to make a report, not having the Chancellor's decree,) it appears that the note was dated 21st May, 1832, and the mortgage, the 19th June following.

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2 Hill, Eq. 329

WILLIAM WHITE and JOHN BLAIR, Executors of Margaret White, v. WILLIAM VAUGHAN, Guardian of M. E. Harper.

(Columbia. June, 1835.)

[*Wills* ⇐S32.]

Testatrix by her will gave pecuniary legacies to the amount of $1060, and separate specific bequests to her niece, M. E. H. and others, of negroes and other property including her Indian leased land, and then directs, viz: "I further will and devise that my negro man Will have the privilege of choosing his master, and be appraised to him by two good men, and that all my other property be sold and the proceeds be applied towards the legacies mentioned within, and the remaining sum of the legacies be paid by M. E. H." Will and the other property directed to be sold were sold for $894; the debts amounted to $378. *Held*, that the amount of the price of Will and the other property sold, was a fund set apart for the payment of the pecuniary legacies, and was exempted from the payment of the debts; that M. E. H. should make up the deficiency in that sum, to the pecuniary legatees; and that she and the other specific legatees should contribute ratably to the payment of the debts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2150; Dec. Dig. ⇐S32.]

The testatrix's estate at her death consisted entirely of personalty; for the land mentioned in her will, was (as it appeared by the statement and admission of counsel,) Indian land, which is held on long leases, and is therefore a chattel real, and assets in the hands of an executor or administrator for the payment of debts. She by her will made the following bequests, viz: To different persons and in different amounts, the sum of $1060; to William White, a negro man Anthony; to the defendant's ward, M. E. Harper, two feather beds, one bureau, a sorrel horse, a negro woman and her five children; and to John G. White, her (Indian) land. In the ninth clause of her will, she makes the following provision: "I further will and devise that my negro man, Will, have the privilege of choosing his master, and that he be appraised by two good men, which shall be

the price for which he is to be sold; also that all my other property be sold, and the proceeds to be applied towards the legacies mentioned within, and the remaining sum of the legacies be paid by Eliza Harper, &c." The negro, Will, and the other property, sold for $894—the debts of the testatrix amount to $378. The only question in the case is whether the debts shall be paid out of the

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$894, and the balance *of that fund applied to the legacies, leaving the deficiency ($544) to be made up by the defendant's ward; or whether the $894 shall be applied to the legacies, and the defendant's ward shall pay the balance, $166, and in common with the other legatees of specific property, contribute ratably and in proportion to the debts.

The case was heard at Lancaster, July, 1834.

De Saussure, Chancellor. The question made and argued was, out of what fund this deficiency was to be raised. For the plaintiff, it was insisted that the debts of $378 should be paid out of the sum of $894 produced by the sale of Will and the other property directed to be sold, which would then leave the balance of $516 to be applied to the payment of the pecuniary legacies amounting to $1060, which would leave the balance of $544 of the pecuniary legacies, to be paid out of the estate bequeathed to Eliza Harper subject by the will to the payment of the pecuniary legacies.

For the defendants it was contended, that the debts ($378) should be paid ratably out of the legacies, in proportion to their respective amounts, the pecuniary legacies to be considered specific legacies under this will. The original fund to pay debts is the personal property not specifically bequeathed. That is the case with the price of the slave, Will, ($436,) which is more than sufficient to pay the debts. The sale of the other property applied to pay the legacies will leave a balance due on the pecuniary legacies, which is charged by the will on the estate devised to Miss Eliza Harper. It would be a singular construction of the will to make the deficiency payable out of the pecuniary legacies themselves, though charged expressly on the particular estate given to Miss Harper.

It is Ordered and decreed that the defendant do pay to the plaintiffs the amount of the deficiency of the pecuniary legacies out of the estate bequeathed to Miss Eliza Harper. Costs to be paid out of the estate.

From this decree the defendants appeal on the following grounds:—

1. That by the will the whole estate is disposed of without making provision for the debts, and therefore these are to be paid ratably out of each legacy—the pecuniary legacies to be considered specific, as they are to

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be paid out of specific property men*tioned and set apart in the will; the balance only between the amount of this specific property and the legacies to be paid by defendant's ward.

2. That at all events, Eliza Harper's legacy is only charged with the difference between the sale of Will and the other property which amounts to $894, and $1060, the amount of pecuniary legacies, being $166, and the Chancellor decrees $544; which includes not only the balance of pecuniary legacies, but the debts also.

T. Williams, Jr., for the appellant. The question is out of what particular funds shall the debts be paid; it is not whether the personal estate shall be exempted and the lands charged—that question is entirely different from the present. It is, whether a particular portion of the personal estate is not exempted under this will; and that as the balance of personal property is disposed of by the will, and no provision made for the payment of debts, whether the legacies may be abated proportionably for the payment of debts. Nor is it a question whether the personalty is not first liable for the debts. If the defendant were seeking to exempt the personal property and to create a charge on real estate for the payment of the debts, nothing short of an express declaration in the will would be sufficient for this purpose. This question would turn on the intent to change the nature of real estate to personal, and thus to follow the fate of personal; and this "intent" must be plainly and expressly set forth. This is admitted to be the law; but this rule does not touch the case before the Court. Here the whole estate is personal; for the lands are within the Indian boundary, and are declared to be personal property, and made assets by law in the hands of executors and administrators to pay the debts. The question here is, whether a particular part of this personal estate, to wit: the negro man, Will, and the other property ordered to be sold, is not, by the clear intent of the testatrix, drawn from the express words of the will, exempted from the payment of debts. I conceive such is the case. What are the facts? The testator bequeaths to sundry persons pecuniary legacies to the amount of $1060. Suppose the testatrix had said, "I order my executors to sell my lands, (describing them,) in order to raise the money for these legatees." I ask if this would not be a charge on these lands for the purpose of raising this particular fund? Would not the executor have the power, 1st to sell; 2d to make the titles; and 3d to apply the money to the payment of these pecu-

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*niary legacies, and would this not bar the heir at law claiming these lands? In the case of Dunlap v. Dunlap, which is found in 4 Eq. Rep. 323, the Court ordered this, even under a will not executed to convey the lands, and ordered debts to be paid, thus defeating the heirs at law; because a testator had by a will that passed personal property, other-

wise disposed of the personalty. If this would create a charge on lands for the payment of legacies, it would also do it for the payment of debts.

Now, here this charge is expressly set forth on Will and all the other property not bequeathed, to pay these legacies.

Suppose no charge had been laid on Miss Harper's legacy? It is a specific legacy. According to the rule contended for, if the debts had been $894—the amount for which Will and the other property was sold, the pecuniary legatees would get nothing, notwithstanding a specific property, and enough too, had been set apart by the testatrix to pay the legacies.

Let us put a case. The testatrix wills to her niece $1000; and says in her will, "I hold a bond on A. B. for $1000; I direct my executor to collect that money, and to pay off this legacy with interest from the day of my death." And then she wills her negroes by name, and her lands by description, and all her other property, to her nephew. The executor collects the $1000 and the interest—but the testatrix owes $1000 and interest. How is this debt to be paid? If the bond money is taken, the pecuniary legatee loses her legacy; because the balance of the estate is willed in specific legacies. If the $1000 is considered specific, which it ought to be, and the bond set apart to the payment, this fund then is liable to the legacy; as such it becomes specific, and is also exempt from payment of debts; and thus each legacy would be abated proportionably and the debtor paid. —2 Roberts on Wills, 114; 2 P. W. 23; 1 Robt. on Wills, 76, note; 4 Eq. Rep. 323.

My view of this will is this, that as the negro man, Will, and the other property ordered to be sold, amounting to $894, were set apart by the testatrix to pay the pecuniary legacies, this makes the special charge on this property, and makes the pecuniary legacies specific, the same as if the negro and the property had been willed, instead of their value.—See 1 Roberts on Wills, 76, note.—Where the profits of a term are willed, it is as specific as to will the term itself. If so, the negro and other property willed is exempt from the payment of debts as effectually as any other specific legacy.

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*If the negro had died before sale, and the property ordered to be sold, being personal, had also perished, would Miss Harper have had to pay the whole of the pecuniary legacies? I think not; because the testatrix says, "the balance of the pecuniary legacies," meaning clearly the balance between the price of Will and the other property, and the amount of the pecuniary legacies.

Suppose the will had said, I appraise Will and the other property at $894, this sum to be divided between my niece and nephews, who shall get $1060, and the balance to be paid them by Miss Harper? Would she be liable for more than the difference between $894 and $1060? Certainly not. Now, there can be no difference between ordering the property to be sold and to be appraised. The object of the testatrix was to give her nieces and nephews $1060. To raise this fund she says, sell a negro and other property for what they will bring, and let Miss Harper make up the balance. And this is common sense. If the debts are not provided for, each legatee must abate his legacy proportionably. But the Chancellor, by his decree, orders the negro and other property sold, to pay the debts, and then orders Miss Harper to pay up the balance, which is to make her pay the debts. The will says, she shall pay the balance,—meaning between what the negro and other property sold for, and what the pecuniary legacies amounted to.

M'Willie, contra. The construction of the will of the testatrix contended for by the defendant is inadmissible, because the pecuniary legacies, in the event of other property not being sufficient to pay them, are directed to be paid out of the legacy to Miss Harper. In other words, the legacy to Miss Harper is charged with the pecuniary legacies; and the requisition of the will is, that it protect and pay them. The construction contended for defeats this provision, as it is asked to reduce them for the purpose of paying debts. This ground perhaps is not necessary, as the negro man, Will, is specifically bequeathed, and was sold for a sum more than sufficient to pay the debts, and certainly constitutes a fund to be so applied before the pecuniary legacies.—See 1 Eq. Rep. 512-13.

O'NEALL, J. I think the view taken of this subject, by the defendant's counsel, is unanswerable. It is not necessary that I should repeat arguments which he has stated clearly and with great force.

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*I have no doubt where, as in this case, the testatrix sets apart property and directs pecuniary legacies to be paid out of its proceeds, that they are entitled to have it so applied. If the other parts of the estate, whether specifically devised or not, be sufficient to pay the debts, the pecuniary legacies directed to be paid out of a particular fund could not be called on to contribute for their payment; for the testatrix has indicated a clear intention that that fund should be applied to a specific purpose. A contribution by the legatees entitled to receive it, would throw upon the legatee directed to make up any deficiency which might be between it and the amount of the legacies, an undue proportion of the debts. Indeed, if that fund was made first applicable to the debts, and only the balance left was to go to the extinguishment of the pecuniary legacies, the result, in making up the deficiency to them, according to the words of the will, would be to charge the defendant's ward with the whole debts of

the estate. Such a result was never contemplated by the testatrix. For after directing the proceeds of Will and the other property to be applied to pay the pecuniary legacies, she says, "the remaining sum of the legacies to be paid by Eliza Harper." These words are plain and unambiguous, and their meaning is just as plain as if the testatrix had known how much her personal estate directed to be sold, would produce, and had said, inasmuch as the legacies I have directed to be paid out of this fund will exceed it $166, I direct that sum to be paid by Eliza Harper. This direction, that Eliza Harper should pay the difference between the proceeds of the sale and the amount of the legacies, not only shews that this was all the burthen she intended to cast on the defendant's ward on their account, but also that those legacies should be paid in full. The consequence of this is, to have the debts to be paid out of the property specifically devised.

It is Ordered and decreed that the Chancellor's decree be reformed in the following particulars:—1. That the defendant, as guardian of M. E. Harper, do pay to the plaintiffs, for the difference between the proceeds of the sale of the negro and the other property, and the pecuniary legacies, one hundred and sixty-six dollars with interest from one year after the testatrix's death: 2. That he do contribute and pay toward the debts of the de-

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ceased *such sum as may be ascertained by stating a proportion—as the whole value of the property bequeathed to M. E. Harper, (after deducting therefrom the said sum of $166,) of the negro, Anthony, bequeathed to William White, and of the Indian land bequeathed to John G. White, is to the whole amount of the debts of the deceased, so is the value of the property bequeathed to M. E. Harper, (after deducting $166 as aforesaid,) to the amount to be paid by her on account of the debts of the testatrix. And it is referred to the Commissioner to ascertain and report the amount of the contributions. In all other respects the decree is affirmed.

JOHNSON, J., and HARPER, J., concurred.

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2 Hill, Eq. 335

NATHANIEL GIST v. WM. G. DAVIS, M'DOWALL & BLACK, and JAMES HUNT.

(Columbia. June, 1835.)

[*Judgment* ⇐570.]

That a former decree should be a bar to another bill, it must appear that the rights of the parties were considered and adjudged: therefore, where the plaintiff in the first bill did not show any interest or liability which required the aid or interference of the Court, and on that ground his bill was dismissed, but in his new bill set out his liability on a bond of indemnity connecting him in interest with the parties litigant: *Held*, that the former decree was not a bar to the new bill.

[Ed. Note.—Cited in Thew v. Porcelain Mfg. Co., 5 S. C. 427.

For other cases, see Judgment, Cent. Dig. § 1037; Dec. Dig. ⇐570.]

[*Evidence* ⇐419.]

The question considered whether a party may in contradiction to his acknowledgment in his deed shew that the consideration has not in fact been paid. It seems that although he may show other and further considerations consistent with the deed he may not except in case of fraud or usury, contradict the deed by showing that no consideration was received.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1915; Dec. Dig. ⇐419.]

[*Judgment* ⇐699.]

None but parties and privies are estopped by a judgement. Giving a bond of indemnity to the sheriff for not paying over money to a claimant, will not make one a privy so as to be concluded by the judgement against the sheriff for the money; although the sheriff gave him notice to defend the action, and he actually did defend it; The verdict would be conclusive against him in action by the sheriff on the bond, but not as to others.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1223, 1224; Dec. Dig. ⇐699.]

[*Execution* ⇐171.]

Plaintiff advanced money to a manufacturing company, and afterwards, in order to secure himself, and according to the agreement at the time he advanced, took the outstanding title to the lands and buildings of the company to himself from persons having the legal title, it not being in the company, and gave his bond to convey to the company on the payment of the money. After the plaintiff had advanced the money, but before he got titles, defendants obtained judgment against the company, and the plaintiff afterwards recovered judgement for the money loaned, on which he had the lands and buildings of the company sold by the sheriff, and became the purchaser at a sum less than that due to him, and took a deed from the sheriff, paying no money but giving his bond to the sheriff to indemnify him. Defendants brought suit at law against the sheriff claiming the money on their senior execution, and obtained judgment, and was about to enforce execution against him: On a bill by the plaintiff it was held that he was entitled to relief, and defendants' judgement at law against the sheriff was perpetually enjoined.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497–518; Dec. Dig. ⇐171.]

The following is the brief of the appellant's counsel:

Bill for injunction, to cancel a bond, and for general relief. The bill charges, that in the year 1818, there was a Manufacturing Company on Tiger river, called the "South Carolina Cotton Manufacturing Company;" and, in that year, some of the members of the company applied to the plaintiff to borrow about three thousand dollars. That the company, being unable to give personal security, agreed to give him a lien upon their property, both real and personal, on the faith of which he loaned them the said sum of money; he was shortly afterwards informed that the defendant, Davis, was a member, and sanction-

ed the loan. That when the company were about to give the lien promised, it appeared for the first time to the plaintiff, that the title to the land on which the factory stood, with all the machinery and buildings, was in one Benjamin Wofford, and he was under the necessity of advancing the further sum of one thousand dollars, in order to obtain a lien on the same: and upon this sum being paid to Wofford, with the consent of the company, he executed a deed in fee simple to the plaintiff, for the land, including all the buildings, &c; and the plaintiff executed a bond to the company, conditioned to make titles upon the payment of the sum borrowed, with

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interest. That the reason the *company did not give him a title to the forty acre tract adjoining the sixty acre tract, was, that some misunderstanding existed as to the boundaries, and the title bond which had been given by Wofford to make titles to one Weathers, from whom the company purchased, was lost, or mislaid: and the reason the plaintiff did not obtain a lien on the land on the other side of the river was, that the company had not acquired a title to it. When the deed from Wofford to him, was executed, plaintiff was of opinion that at the time he took the deed for the sixty acres, the machinery, buildings, and every thing upon it, would pass with the land: that being advised afterwards, that it was doubtful if the machinery were attached to the freehold, he procured a deed from the company, dated 13th March, 1820, for the purpose of securing his claim, upon that part of the property: he also obtained from one Thomas Stark, a deed for an additional portion of the machinery, which had been purchased by the company after he took the first deed: the reason he took the deed from Stark was, that the company had transferred that part of the machinery to Stark—this conveyance is dated 21st November, 1820. The plaintiff having been informed about the last of March, 1821, of a conveyance of all the lands of the company to Stark, except the sixty acres, and before he knew they had acquired a title to the same, immediately called upon the company, and demanded a deed from Stark, which the company consented he might execute to plaintiff—this deed is dated 21st April, 1821. Wofford executed to plaintiff a deed for the forty acres, adjoining the sixty acres.—All of which deeds and transfers were made in pursuance of the original agreement, that plaintiff should have a lien upon all the property. That plaintiff does not know at what time the company acquired a title to the said land, but from the copy of a deed in the register's office of Spartanburgh district, it appears that Weathers, from whom they purchased, conveyed to the company a tract of 300 acres, which he supposes to be the same, on the 14th August, 1819, and the same was conveyed to Stark by the company, 10th January, 1820, as also appears by a copy deed, on record in said register's office. That the plaintiff never heard of the claim of M'Dowall & Black, hereinafter more particularly mentioned, until about the last of January, 1820. That, about that time Andrew M'Dowall, of the firm of M'Dowall & Black, called at his house, and informed him of the nature of his claim against the defend-

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ant, Davis, who had lately been a mem*ber of the firm. It appeared from the statements of M'Dowall, that one Pena was one of the original members of the company, and that M'Dowall & Black had purchased his interest, amounting to four shares, in the capital stock, and some time afterwards sold their interest to Davis, and took a mortgage upon the same. The plaintiff informed M'Dowall that he had loaned the company about four thousand dollars, (at which he expressed great satisfaction,) and that the company had agreed to give the plaintiff a lien upon all the property, real and personal. The plaintiff and M'Dowall met the next day at the factory, and it was agreed upon by and between them, that a confession of judgment which M'Dowall was about to take from the company should not interfere in any manner with his claim, and should be postponed to the same—the origin and character of M'Dowall & Black's claim will appear by a mortgage given by Davis, (exhibited, with the bill.) When Davis sold to the remaining members of the concern, they agreed to pay M'Dowall & Black's debt, which Davis was owing for his said four shares, and to stand in his place, in regard to the same. The confession of judgment, was for the purpose of securing the same debt. A judgment was confessed by the Weavers [the members of the company] to Davis, as before stated, the 30th Jan. 1820, and was not entered up until the 21st Oct. 1820. The plaintiff also obtained a judgment against the Weavers, on the 27th Oct. 1820, which was signed the 8th Nov. 1820, as appears by the record. Plaintiff, about the first of March, 1821, addressed a letter to M'Dowall & Black, on the subject of their claim against the Weaver's, and amongst other things gave them his opinion as to the prospects of obtaining the money from the concern, and also asked leave to sell under the judgment of Davis, as he did not wish to incur their displeasure by selling under his own. From this letter, it will appear that plaintiff's claim was to be preferred to the claim of M'Dowall & Black, and that, in their answer, dated 24th March, 1820, they distinctly admit the fact, and they are called upon to exhibit a true copy of the letter referred to, or produce the original to be used on the trial. M'Dowall & Black not consenting to sell under their judgment, and believing there was no hope of being paid by the company without a sale, as they were on the decline, on the ——— day of ——— 1821, the plaintiff directed James Hunt, who was

then sheriff of Spartanburgh district, to levy upon the property, by virtue of his execution,

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which he did; and the same *was legally brought to sale, and plaintiff became the purchaser at the price of $2600, he being the highest and last bidder; and the sheriff made him a deed for the same dated 4th October, 1821, in consideration of the said sum of $2600 as expressed in the deed, although no money was paid, nor intended to be paid by plaintiff, as he then claimed, and still claims the purchase money, in satisfaction of his said debt, by virtue of his paramount equity, intending the said sale to foreclose his equitable mortgage upon said property, and thereby repay himself the money loaned with legal interest; and also by virtue of the agreement made with M'Dowall at the time the Weavers confessed the said judgment to Davis; but the plaintiff, notwithstanding he paid no money to the sheriff at the time he executed the deed aforesaid, nor intended to pay him the purchase money if he could legally avoid it, yet pledged himself to Hunt to pay him the purchase money, if he should ever be required to pay it to the said William G. Davis, or M'Dowall & Black, and promised at all times to indemnify the said James Hunt against any injury or damage he might sustain in consequence of executing an absolute deed for the said land, without having received the purchase money for the same; and that plaintiff all along from the sale down to the present time, promised to indemnify him against the judgment of Davis; and in pursuance of said promise on the 26th day of June, 1832, executed a bond of indemnity to the said James Hunt, for the purpose before stated. Some short time after the sheriff's sale, a rule of court was served upon Hunt, requiring him to shew cause why he did not pay over the purchase money to the Davis execution, and the rule was resisted and finally abandoned. From that time plaintiff rested satisfied that the claim of Davis would not be allowed. The plaintiff further states, that on the ——— day of ——— 182— a suit was commenced in the Court of Common Pleas for Spartanburgh, in the name of the said Davis, against the said Hunt, for the recovery of the said sum of $2600, and a judgment has been rendered against the said Hunt, and execution sued out thereon, and the said judgment is about to be enforced against Hunt immediately and without delay, and without the aid of this Court, will compel him to pay the same to the great injury of the plaintiff, as he is liable over to Hunt, in case he is compelled to pay said judgment, so that it appears plaintiff is the real defendant in said suit at law, and Hunt a mere nominal defendant. Plaintiff would here sub-

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mit *the question, whether from the case made by the bill, he would not be entitled to be paid his debt in preference to the said Davis, even supposing his judgment is legally entitled to priority, on the ground that Davis may be regarded as a member of the concern; if not so far as to make him liable for the debts of the company, at least so far as to make his shares in the capital stock liable. Plaintiff states that he is willing, and offers to surrender all claim he may have acquired under the sheriff's sale, inconsistent with the equities of the judgment creditor, and if he has obtained an undue advantage in the sheriff's sale, he consents to be made responsible in any manner this honorable Court may order and direct. The bill charges confederacy, prays for an answer, a perpetual injunction against the Davis judgment, and that the bond of indemnity to Hunt, may be delivered up to be cancelled, and for general relief, &c.

To this bill an amendment was filed, which is in substance as follows: That the said William G. Davis having obtained a judgement against the said James Hunt, as before stated, for the sum of $2,600, and the said Hunt having obtained an injunction from the Court to restrain further proceedings, and given his bond, together with plaintiff and A. W. Thomson as his securities, which injunction was finally dissolved, plaintiff further sheweth: That since that time, he (being as before stated the real defendant at law, and having given a bond of indemnity to the said Hunt, about the time he executed titles to plaintiff for the said tract of land, which bond he has discovered since the filing of the original bill, a copy of which is herewith exhibited,) has filed his said bill praying, for the reasons therein stated, for an injunction to stay the said execution of Davis, upon which an order has been made, ordering and directing the suspension of all further proceedings on said execution. Plaintiff further states, that notwithstanding the said order, an action at law has been commenced by Davis against the plaintiff, Hunt, and A. W. Thomson, upon the said bond of injunction. The amendment prays for an order restraining further proceedings on said bond, and for other and further relief, &c.

To this bill and amendment, the defendants, M'Dowall & Black, pleaded in bar that a bill was filed on the 28th of March, 1827, by M'Dowall & Black, against N. Gist, the present plaintiff, and others, and the answer of N. Gist put into the same; as also a cross bill was filed by the said N. Gist and James

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Hunt, against *the defendants, M'Dowall & Black and William G. Davis, and the answer of M'Dowall & Black put into the same—wherein the same matters were put in issue, as by the present bill of the said N. Gist are set forth and put in issue, and the same were drawn in controversy before the Court of Appeals and a final decree pronounced thereon, by which both the said bills were dis-

missed with costs—and pray to be dismissed without further or other answer, &c.

The pleadings in the former cases, referred to in the pleas, and the decrees, were adduced.

De Saussure, Chancellor. On an inspection of the papers and documents, it appears to me that the matters of the bill and the amended bill, were completely comprehended in the former proceedings, and the questions arising thereon have been adjudicated by the decrees of the Circuit Court and Court of Appeals. Indeed the only difference in the case attempted to be shown by the counsel, was that the bill in the former case did not set forth that N. Gist had actually given a bond of indemnity, but only that he had promised to indemnify. It does not appear to me that this varies the case at all. The single question then is, is there any thing in the case to prevent the application of the rule that all the matters and questions made by this bill, having been adjudicated upon by the former decrees, the parties are concluded thereby, and no new litigation is open to them. The plaintiff has not made such a new case as ought to induce the Court to open the door of litigation, after the parties have been so long in controversy.

The plaintiff seems to have been somehow involved in difficulties and sustained losses, which are greatly to be regretted; but they do not appear to have been caused by the defendants, M'Dowall & Black, who would be far more aggrieved if they should be deprived of their remedy, and of the benefit of their judgement at law; and Mr. Hunt is merely a surety.

It is therefore Ordered and decreed that the plea in bar be sustained, and that the injunction heretofore granted in the case be dissolved. Costs to be paid by the plaintiff.

From this decree the plaintiff appealed on the grounds:—

1. That the decree is erroneous in sustaining the plea on the ground that the matters in controversy were tried and adjudged in the former proceedings; whereas, by ref-

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erence to the proceedings *it will be seen that the plea is not true in fact, and cannot be sustained in law.

2. That the case made entitles the plaintiff to relief.

Herndon & A. W. Thomson, for the appellant.

Henry, contra.

HARPER, J. I am sufficiently clear that the plea in the present case cannot be supported, whatever may be the merits of the case itself. The rule is unquestionable, that where the same matter has been determined by a decree between the same parties, that will be a bar to a new bill. But then it must appear that the rights of the parties were actually considered and adjudicated. In Brandlyn v. Ord, 1 Atk. 571, Lord Hardwicke laid down the rule where the defendant pleaded a former suit, and that the Court implied that there was no title where they dismissed the bill, that this was not sufficient; they must show that it was res adjudicata, an absolute determination in the Court that the plaintiff had no title; and that a bill dropped for want of prosecution is never to be pleaded as a decree of dismission in bar to another bill.—See also Pickett v. Loggon, 14 Ves. 230. If a party by his bill makes out an imperfect case, so that a demurrer would hold, and the bill be dismissed on that ground, I am not aware that this has ever been held a bar, if by a new bill he can make out a good case. In Child v. Gibson, 2 Atk. 603, the Chancellor said, "every plea that is set up as a bar, must be ad idem." As I understand the facts of the case from the opinion of the Chancellor, there had been a former bill against the defendant as executor, for an account. The new bill was also for an account, but stating specific facts of the executor's having made interest on legacies specifically bequeathed. The Chancellor sustained the plea to so much of the bill as sought a general account, but directed it to stand for an answer relative to the demand for interest. He says, "it is extremely hard to say, that because the plaintiff failed in the case which he made on the former account, that new he has made a new case, and brought a new bill, that he shall not be allowed to go on, but be barred by a plea of a former decree in the same matter." So in Collins v. Gough, 7 Bro. Par. Ca. 94, (quoted 2 Mad. Ch. 249.) "A plea of a former deed for the payment of titles, where a modus and the lands alleged to be covered

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by it, were imperfectly *stated, so that the Court could not direct an issue, was held not to be a bar to a bill for establishing the modus." "Former bill depending pleading in bar of a second; but the latter had some new matter. Plea allowed with the actual costs; but defendant to answer the second bill, and the former dismissed with twenty shillings costs."—2 Bridg. Dig. Tit. Lis Pendens, 2, referring to Crofts v. Wortley, 1 Ch. Ca. 241. That is to say, the plea was sustained so as to give costs, but the defendant was directed to answer the latter bill which contained the whole case. The cases in which the plea of a former decree has been sustained, such as Bell v. Read, 3 Atk. 590, were those in which the case made by the former bill was in every respect the same.

Is the case made by the two bills we are considering the same? The former, after stating the circumstances of plaintiff's claim, the sale of the land by the sheriff, Hunt, the purchase by plaintiff, and the deed executed to him by Hunt, by which he discharged him of the purchase money, without its being ac-

tually paid, prays an injunction to restrain M'Dowall & Black from proceeding against Hunt. In the present bill it is further stated, that upon Hunt's executing the deed to plaintiff, plaintiff promised to indemnify him, and afterwards, in pursuance of his promise, executed a bond of indemnity, on which he will be liable if M'Dowall & Black's judgment should be enforced against Hunt. Do these make the same case? The Chancellor says, in his decree, that "the only difference in the case attempted to be shown by the counsel was, that the bill in the former case did not set forth that N. Gist had actually given a bond of indemnity, but only that he had promised to indemnify. It does not appear to me that this varies the case at all." Now, the former bill of Gist and Hunt does not set forth any promise to indemnify; unless it be meant that from the fact of taking the deed, there resulted a liability to pay the purchase money, from which such a promise would be implied, notwithstanding the acknowledgment of the receipt of the money in the deed. Nor does any such promise appear in any part of the proceedings. The present plaintiff, in his answer to the former bill of M'Dowall & Black, only says that he "does not remember that James Hunt, the sheriff, ever called on him for the purchase money of said property; but if he had, this defendant would not have paid him, as he was confident that it was due to this defendant under the

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liens above stated." On the contrary, *the former bill of Gist and Hunt was dismissed, so far as respects Gist, exclusively on the ground that he had shewn no interest in himself or liability to Hunt, which authorized him to interfere between the other parties, or call for the aid of the Court. It is said in the opinion of this Court, that "it does not appear so far as the effect of the judgement is concerned, that he needs any relief. He has both land and money in his own hands. Hunt made him a conveyance and discharged him of the purchase money, and M'Dowall & Black may enforce their judgement against Hunt; yet, on principles of law, Hunt cannot recover over against Gist." It is added, "To be sure, if as suggested, he has given a bond of indemnity to Hunt, he may be liable on that; not as being bound by the judgement, but as being rendered liable by his own act." The existence of such a bond was surmised in argument, but the quotation shews that it formed no part of the case then made, but was expressly excluded from the consideration of the Court. Can it be said that the rights of the plaintiff, (if he has any,) in consequence of his liability on that bond, were actually adjudicated by the Court?

It seemed to be argued, however, on the part of the plaintiff, for what purpose it is difficult to conceive—as if this opinion of the Court were erroneous, and that from the facts stated in the former bill, a promise on the part of Gist to indemnify Hunt would be implied.

The deed acknowledges the receipt of the money, and the general rule is unquestionable, that a party shall not be permitted to allege any thing in contradiction to his deed. There is a case, however, that of Sheppard v. Little, 14 Johns. 310, in which, notwithstanding such an acknowledgment in a deed, evidence was received to show that the consideration had not been paid. The case was, that the plaintiff being indebted to a third person $180, defendant advanced the money to pay that debt, and plaintiff assigned to him a lease worth $500, upon agreement that he should sell it, re-imburse himself, and pay over the surplus to plaintiff. Defendant sold the lease, but refused to pay over the surplus, and plaintiff bringing his action, was permitted to show these facts. The determination is rested upon the cases in which evidence has been received to shew an additional consideration beyond that expressed in the deed, and those in which evidence has been received to contradict or show a mistake

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in a receipt. But the *authority of that case may well be questioned. In the case of Curry v. Lyles, decided by this Court, 2 Hill, 404, evidence was received to shew a further consideration than that expressed in the deed. But the authorities which establish that such an averment may be made or such evidence given, go upon this—that it is not to contradict the deed, but is consistent with it. The principle is explained in Mildeway's case, 1 Co. 176, that if no consideration be expressed, yet a consideration may be shewn; or, if it be said, for divers considerations, a particular consideration may be averred; or where, as in the case of Villers v. Beamont, there quoted, a money consideration was expressed, it might be shewn that the deed was also in consideration of marriage; because, as is said, "although there was a particular consideration mentioned in the deed, yet an averment in the same case might be made of another consideration, which stood with the indenture and was not contrary to it." See also the cases on the same subject, collected by Philips, in his Treatise on Evidence, p. 424, et seq. There is no English case determined on any other principle, unless upon charges of fraud, usury, &c. But, can it be said that when a party acknowledges the receipt of money by his deed he does not contradict the deed by shewing that the money was not received? Then, as to the cases respecting receipts: A receipt is not a contract; it is merely an admission of a fact, and if the fact be not true, the party is not estopped to shew the truth by writing merely. But is there any doubt but that a party is estopped by that which he recites or admits in his deed? The decision in Sheppard v. Little seems not to be sustained by

authority or reasoning; though it strikes me that the case might, perhaps, have been rightly determined on the score of the defendant's fraud. But admit the authority of that case in the fullest manner. An express agreement was proved that the defendant was to sell the lease and pay over the surplus. But suppose no such agreement had been shown, and nothing had appeared but the mere facts that defendant had advanced the $180 and received a transfer of the lease, for the expressed consideration of $500 acknowledged to be received. Could the Court have implied the agreement? There is nothing in the case or in any other case to warrant it. I suppose, in the case before us, that the sheriff, Hunt, knowing the facts, and taking upon himself to know the law, and being satisfied that Gist was entitled to the money, executed

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the deed, intending to *discharge him and take upon himself the risk of being made liable to M'Dowall & Black. On what principle could the Court imply a promise to indemnify on the part of Gist? But this was the precise case, as it appeared from the pleadings and evidence on the former bill. Nothing was shewn but the purchase and the execution of the deed aeknowledging the receipt of the consideration; and in the absence of any shewing to the contrary, parties must be supposed to have intended what they have done. It may be further observed, that if any promise could be implied, it would not be a promise to indemnify, as the Chancellor supposes, but to pay the money; but could we imply such a promise in contradiction to the express statement, that he claimed the money as his own (of course with Hunt's knowledge) and would not have paid it if demanded?

I conclude, therefore, that the plaintiff has made out a new case by his present bill; that he is not bound by the former decree, and that the plea must be overruled.

And here I might properly stop—the plea being the only matter now before us. But the whole merits of the case (about the facts of which there does not appear to be any dispute) were fully gone into, and it may save litigation and expense, that the views of the Court should be expressed. Of course, if there is any misconception of facts, the parties will not be concluded.

It is said in the former opinion of the Court, that although the sheriff Hunt, is concluded by the judgement at law, yet Gist is not concluded, not having been a party to the suit. None but parties or privies are bound by a judgement. As the case then appeared, he would not be regarded as privy. A question arises, whether by giving the bond of indemnity, as is now shewn, he did not make himself privy, so as to be bound; especially if he had notice to defend the suit, (of which there seems little doubt) as well as that he did in fact defend it. But before going into that question, I shall consider the case as it would stand if there were no such judgement, or as if the suit at law were still depending. It is held in the former opinion of this Court, that if the purchase money had been actually paid over to the sheriff, the plaintiff would have been entitled to it; and I refer to the reasoning of that opinion for the grounds of the conclusion. And he would have been entitled to it on equitable principles, and might have sustained a suit in Equity for it. It is

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true, he might have brought *an action for money had and received; but that action is in the nature of a bill in equity. It would have been a case of concurrent jurisdiction, and he might have chosen his jurisdiction. So, if the sheriff had paid over the money of his own accord to M'Dowall & Black, the suit might have been maintained against them. A man may recover his money from any one into whose hands it may come. And it would have been immaterial if the money had been recovered of the sheriff by suit. There would, then, have been no ground for regarding Gist as privy to the suit, or estopped by the judgement to show a preferable title to the money. And if such a suit had been brought, he might have brought his bill against both parties to enjoin it and establish his own claim to the money. But instead of paying the money, he gave the bond of indemnity. If the suit at law were still depending, he would have precisely the same ground of equity (or a clearer one as being liable on the bond of indemnity) to enjoin that suit and establish his own claim. And this right he still has, unless the judgement at law must be regarded with respect to him as res adjudicata.

I come, then, to inquire if, as I suppose, the present plaintiff had notice of the suit at law and was in truth the real defendant, whether he is estopped by the judgement. And certainly it should seem that he ought to be so bound. Certainly the plaintiff does not appear to come within the reason of the rule which declares that none but parties are bound by a verdict or judgement—that he had not an opportunity to give evidence or cross examine witnesses. It is essential to the just administration of law, that no one should be condemned without having an opportunity of being heard. But it is an equally well settled principle, and necessary to the peace of society, that when he has once been heard, he shall thenceforward be silent; that when he has once had an opportunity of litigating before a tribunal of competent authority, he shall not bring into question again. Where a party has had an opportunity of defending himself fully at law, equity will not relieve. Winthrop, Todd & Winthrop, v. Survivors of Lane, Son & Fraser, 3 Desaus. Eq. Rep. 324-5, et note. Maxwell v.

Connor, 1 Hill's Eq. Rep. 22. It was urged with some degree of pertinacity, by the counsel on the part of the plaintiff, that the proper defence was offered to the Court of law and rejected, and that this forms a ground of relief. But this seems to be contrary to the fact, as appears from the report of the pre-

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siding Judge, made to this Court *on the trial at law, and as is now stated by the same Judge. Evidence was offered to shew that the title of the land was in the purchaser, Gist; but, as determined in that case, this would not have been a defence. In Maxwell v. Connor, the defence had been offered at law and rejected, and it was held to have been the defendant's laches that he did not appeal. But certainly there was no such ground of appeal in the case at law of Davis v. Hunt. The ground of appeal taken (see 2 Bail. 415) "that the presiding Judge erred in rejecting evidence that the Weavers had neither right, title nor interest in the land sold by defendant," is inconsistent with any such defence having been offered. The very ground of the defence was, that the Weavers had an equitable interest in the land to compel a sale of it, and this alone constituted Gist's title to the money. My own impression on the case at law was, that Gist's title was absolute, and that as a matter of indulgence to the Weavers, he had consented to a re-sale, to afford them the chance of an enhanced price, being ignorant that the judgement of M'Dowall & Black had been entered previously to his own, so as to entitle them to the money.

But I feel constrained, on authority, to come to the conclusion, that although in point of fact we may be satisfied that Gist was the real defendant at law, yet, in a legal point of view, he cannot be so considered; but that we must regard that judgment as res inter alios acta—in effect, that this is a case in which he has a right to be twice heard.

There is no question respecting the general rule, that none but parties and privies are estopped by a verdict or judgment. Who are privies? According to Coke, 1 Inst. [352, a,] there are "privies in blood, as the heir; privies in estate, as the feoffee, lessee, &c.; and privies in law, as the lords by escheat; tenant by the curtesie, tenant in dower, the incumbent of a benefice, and others that come under by act in law, or in the post." All persons claiming in any manner under either of the parties, will be regarded as privies. "Hence the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding a fact, or the judgment of the Court on facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers."—Per De Grey, C. J., in Duchess of Kingston's case, 11 State Trl. 261. Now, can Gist be regarded as claiming under the sheriff, Hunt? The lat-

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ter was merely a stake holder, *for the person entitled to the money. I may observe here, that the giving of notice to defend the suit, has nothing to do with determining whether the parties were or were not privies. That relates to another matter, which I shall hereafter consider. If one should come by finding into the possession of a chattel, which was claimed by two other persons, and being sued by one, should defend himself by setting up the title of the other, a verdict against him would be no evidence against the other claimant, in a subsequent suit for the same chattel; and though he had given him notice to defend his title, this would be supererogatory; he would still be a stranger to the first suit.

There is a class of cases in which verdicts have been held to be evidence, and sometimes conclusive evidence, against persons neither parties to the suit nor privies. As in the case of Green v. The New River Company, 4 T. R. 589, where a master had been sued and damages recovered against him for the neglect of his servant, it was held by the Court that the verdict would be evidence in an action by the master against the servant, not as to the fact of the injury, but the quantum of damages. This case is said by Philips, p. 228, to be no exception to the rule which forbids a verdict to be evidence against any but parties or privies. The verdict was not res adjudicata as to the servant, but constituted or evidenced the very damage which the master had sustained. But the other party would have nothing to do with this. He might sue both master and servant; but a verdict for or against one would be no evidence in an action against the other. So in the cases in which a vendee, being sued for property, gives notice of the suit to the vendor who has warranted his title. Here the very undertaking of the vendor is to defend the title, and his failure to do so when notified, constitutes of itself the cause of action. So, where the surety to a note being sued, gave notice to the principal to defend the action, the verdict was held to be conclusive in an action against the principal by the surety. Here the implied contract between the principal and surety was, that if the latter should be compelled to pay the money, the former would reimburse him, and the judgment by which he was compelled to pay, went to make up the cause of action. But though the principal had had notice of the suit, and had in fact defended it and failed, the verdict would have been no evidence in a subsequent suit by the payee against the principal. Here the

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principal would have *been twice heard. So, in the case before us, if Hunt gave Gist notice of the suit at law, the verdict would be conclusive in a suit by him on the bond of indemnity against Gist, as being itself the cause of action. But this does not make it

evidence in a suit between Gist and M'Dowall & Black.

The case of Kinnerley v. Orpe, Doug. 517, seems to be in point. In that case, the plaintiff had recovered in an action for trespass on a fishery against a servant of C. In another action against another servant of C., who committed the trespass by C.'s command in order to try the right, the former verdict was offered in evidence and received by Baron Perryn, who held it to be conclusive. But on a rule for a new trial before the King's Bench, though the cause went off on another point, the Court thought the evidence admissible, though not conclusive. Here certainly then was the same real defendant, though not the same nominal one, in both actions. In commenting on that case, however, in Outram v. Morewood, 3 East, 366, Lord Ellenborough says: "It is extraordinary that it should have been for a moment supposed that there could be an estoppel in such a case. It was not pleaded as such; neither were the parties in the second suit the same as those in the first. The doubt seems either to be, whether the former record in the action of trespass was at all admissible in evidence upon the subsequent action against the defendant, who was not a party to the former action, rather than as to any conclusive effect which it could have had." He evidently inclines to the opinion that it was not admissible, and indeed it is difficult to reconcile its admissibility with the acknowledged general rule on the subject. But if we regard the judgment as admissible in this case, yet if it be not conclusive, I think Gist's title to the money very clear on the reasoning of the former opinion of the Court(*a*). Regarding the plaintiff then as not having been a party to the suit at law, nor bound by the judgment, but coming properly and for the first time to establish his claim, he has made out a clear case for relief. But though we have held that Hunt is concluded by the judgement at law, yet we cannot afford Gist

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the relief to which he is entitled, *without relieving him also. If the judgement of M'Dowall & Black were enforced against him, he would be plainly entitled to recover against Gist. If the judgement be not conclusive against Gist, it is as if the action were still depending; in which case he would have the clearest equity to enjoin it. The judgement must therefore be enjoined. I am better satisfied to arrive at this result, as it seems to meet the true merits of the case.

The plaintiff, however, must pay the costs. The present suit has been rendered necessary by his neglect in failing to make out a proper case by his former bill. It is true that he states the bond of indemnity to have been out of his possession, and only recovered since the filing of his present bill; but he knew of its existence; it does not appear but that with proper diligence he might have found it before; or if he could not, that he might not have established its existence, contents and loss. The former bill says nothing of the bond, nor does it charge any liability to Hunt, which was the plaintiff's only ground of equity.

It is Ordered and adjudged that the decree of the Chancellor be reversed, and the defendant's plea be overruled.

JOHNSON, J., concurred.

O'NEALL, J., dissenting. I dissent from this opinion on every ground assumed to give the plaintiff relief. My concurrence in the former opinion in Equity was altogether in the result, not in the principles or reasoning by which my Brother HARPER established Gist's right to sell and obtain the benefit of Weavers' equitable estate in the manner in which he did. The case of Davis v. Hunt, 2 Bail. 412, was decided correctly. The principle laid down in it, "that only the defendant's interest in the land, whatever that might be, was sold in the present instance, and if the purchaser bought his own land it was his own folly," is good law, and it does not cease to be good, when Equity is called on to administer it. That principle excludes Gist, as I think, from relief both at law and in Equity. The plea in law is, I think, good: the very matter now decided was, as I conceive, adjudged in a contrary way on the former bill. That the judgement at law is conclusive against Hunt, is admitted: it is also admitted that if he was compelled to pay that judgement, he could sue Gist on his bond of indemnity, give the recovery in evidence,

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and compel *him by the judgement of a Court of law, to pay the recovery in Davis v. Hunt. If this does not make Gist a privy in law, I confess I do not know what would. He stands exactly as Hunt does, and is concluded.

(*a*) In M'Dowall & Black v. Gist and others, and Gist and Hunt v. M'Dowall & Black, Columbia, May, 1833.

2 Hill, Eq. 351

ELIJAH HINSON, Administrator of Phil. Starke, v. JAMES B. PICKETT.

JOHN MYERS, Administrator of B. Starke, v. JAMES B. PICKETT.

(Columbia. June, 1835.)

[*Equity* ⟸392.]

Rule laid down that a rehearing in Chancery will not be granted, on the ground of after discovered oral evidence.

[Ed. Note.—Cited in Brown v. Smith, 3 Rich. Eq. 541; Simpson v. Watts, 6 Rich. Eq. 368, 62 Am. Dec. 392; Hill v. Watson, 10 S. C. 276.

For other cases, see Equity, Cent. Dig. § 846; Dec. Dig. ⟸392.]

[This case is also cited in Ex parte Knox, 17 S. C. 212, as to facts, and in Durant v. Philpot, 16 S. C. 125; Ex parte Carolina National Bank, 56 S. C. 20, 33 S. E. 781; New York Life Ins. Co. v. Mobley, 90 S. C. 560, 73 S. E. 1032, regarding questions of procedure.]

Fairfield, July 1834.

De Saussure, Chancellor. The petition by the defendant, Mr. Pickett, is for a re-hearing.

The petition which accompanies this decree, sets forth, that since the decrees of the Court of Equity, and of the Conrt of Appeals in the year 1832, whereby it was decided, that the sale of certain negroes (the subject of the dispute in the above cases) by the said James B. Pickett, to one James A. Knighton, was not a real sale, but colourable and collusive, the said defendant, James B. Pickett, has discovered, and is prepared to submit ample testimony, to establish the fact that he did on the 30th December, 1829, really and bona fide sell and deliver to the said James A. Knighton, all his right, title and interest, in and to the slaves in dispute: that is to say, he has procured the testimony of James A. Knighton himself, who resided in distant parts at the time of the trial; also the original bill of sale given by defendant to said Knighton, and the testimony of the subscribing witness to said bill of sale, Jeremiah Gaither, (who was examined on the trial of the said cases, to prove the sale of the negroes, but was excluded from giving evidence upon the most important parts of the transaction, on account of the non-production of the bill of sale,) and which bill of sale it was not then in the power of the defendant to produce, being then in the possession of James A. Knighton, who resided some where far distant in the Western country. Also the testimony of Nathan Knox, (lately discovered,) who knew the negroes, or some of them, whilst they were in the possession of said Knighton in the Western country, and will prove that Knighton held and used them, and finally sold some of

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them as his own proper*ty, and not at all as the property of the petitioner, (J. B. Pickett.) Also the lately discovered evidence of Joseph Hinson, the brother of the plaintiff Hinson, and the evidence of Mr. Austin Peay, that before the petitioner (Pickett) sold said negroes to Knighton, he actually offered to sell all his interest therein to the plaintiff, E. Hinson, upon just and reasonable terms, to wit, the payment of the money due to him from Baldy H. Starke, then deceased.

The petitioner humbly insisted, that upon the above stated testimony being heard, it would be decided by the Court that he has incurred no liability to the plaintiffs, or either of them, by selling the said negroes to Knighton: or, if he should be held liable at all, that he ought to be held liable for the value of the negroes on the 30th December, 1829, and hire until that time, (the day on which he sold to Knighton,) instead of their value on the 11th June, 1833, and hire until that time, the day on which it would have been his duty to deliver up the said negroes to the plaintiff, Hinson, as administrator of Phil. Starke; (if he had not in fact sold them) inasmuch as from the testimony above referred to, and ready to be produced, it will appear manifestly that the petitioner could not possibly produce or deliver up the aforesaid negroes in conformity with said decree, which he would gladly have done had it been in his power. The petitioner therefore prayed for a rehearing of said cases on the matter above stated. The Commissioner made his report in these cases on the reference ordered by the Court of Appeals under the decrees, and exceptions were filed. These have been argued and decided at the present Court.

The counsel for the defendant also argued the motion for a rehearing on the petition above stated, and I am now to decide thereon.

It is a serious application for a grave purpose, and should be well considered. That the Court should set its face inexorably against applications for rehearings, would imply a degree of confidence in its infallibility which would illy comport with the humility and modesty becoming men and judges. That it should yield too readily to them, would lead to such renewed and prolonged litigations as would weary out the patience, and exhaust the funds of suitors of small fortune. It therefore requires the exercise of a sound discretion and judgement to know in what cases it would be proper to grant or refuse them. As far as my mind possesses these faculties, they shall be exercised in this

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cause. To *induce the Court to grant a rehearing after decree, there must be a strong case made that a clear mistake has been made, and that new evidence has been discovered, which materially varies the case from that which was made at the former hearing.

In Mitford's pleadings (afterwards Lord Redesdale) it is laid down: "That the object of a bill of review is to procure an examination or reversal of a decree made upon a former bill signed and enrolled. It may be brought upon error at law appearing in the body of the decree itself, or upon the discovery of new matter. If it be sought to reverse a decree signed and enrolled upon discovery of some new matter, the leave of the Court must be first obtained: and this will not be granted, but upon allegation upon oath that the new matter could not be produced, or used by the party claiming the benefit of it, at the time when the decree was made. If the Court be satisfied that the new matter is relevant and material, and such as might probably have occasioned a different determination, it will permit a bill of review to be filed." Mitford, p. 78–9. To render a bill of review necessary, the decree sought to be impeached must have been signed and enrolled. If this has not been done, a decree may be examined and reversed upon a species of supplemental bill in nature of a bill of review, where any new matter has been discovered since the decree. And a decree not signed and enrolled, may be altered upon a rehearing without the assistance of a bill of review, if there be sufficient matter to reverse it appearing upon the former proceedings. The investigation of the decree must be brought on by petition for rehearing. The office of the supplemental bill in nature of a bill of review, is to supply the defect which occasioned the decree upon the former bill. It is necessary to obtain the leave of the Court to bring a supplemental bill of this nature; and the same affidavit is required for this, as is necessary to obtain leave to bring a bill of review on discovery of new matter. —Mitford, 81–2. Such is the clear exposition of that learned equity lawyer, Mr. Mitford, of the course of the Court on this subject. In this he is supported by other elementary works, as well as by decided cases. See 2 Comyn's Dig. Tit. Chancery, letter G. p. 252, letter (Y. 5.) p. 321. And that great master of Equity, Chancellor Kent, has made corresponding decisions. See Wiser v. Blachley, 2 John. Ch. Rep. 488, and Livingston v.

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Hubbs, 3 John. Ch. Rep. 124. Nor *has our own Court of Equity been barren of decisions on this subject.

Before I refer to them, however, it is proper to notice, that as we have no enrolment of decrees in this State according to the English and New York practice, the signature of the decree by the Chancellor of the Circuit Court, and by the Judges of the Court of Appeals, with delivery to the recording officer to be recorded is held to be equivalent to enrolment.

I should also notice, that prior to December, 1824, there existed no Court of Appeals: and the Chancellors more readily listened to applications for rehearings, to enable them to revise their own errors or oversights.

In the case of Brailsford and wife, v. Heyward, executor of Heyward, 2 Desaus. Eq. Rep. p. 34, the Court granted a motion for rehearing, certainly on looser grounds than would now be listened to. The petition for a re-hearing was on the ground of error in law on the face of the decree, in deciding that the defendant was accountable, and accountable without deduction. The Court granted the rehearing, but decided after the argument that the first decree was correct.

In the case of Burn v. Administrator of Poaug, 3 Desaus. Eq. Rep. 596, 610, &c. a petition for a bill of review or rehearing was rejected by the Court, because the petition did not make a case which comes within the rules as to bills of review—for there is no error apparent on the face of the decree—nor any allegation of new matter affecting the justice of the case, which could not have been (procured) used at the time of the first decree—nor is the petitioner entitled to a rehearing; as the facts existing in the decree, do not warrant the conclusions drawn from them by the petitioner, but support the decree.

In the case of Harvey v. Murrell, in Harper's Eq. Rep. 257, there was a petition for leave to file a bill of review, on the ground of the discovery of new matter. The new matter was the inventory and appraisement of the estate of John Murrell, deceased, and a receipt which was in the hands of the executor, the existence of which was not known at the time of the trial. The Court decided that the application should be discharged, because, if the inventory had been considered essential in the investigation of the case, it could have been easily procured at the Ordinary's office, where it was recorded; and having neglected to do so, furnished no

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ground *for the application; and as to the receipt, it was irrelevant to the subject in litigation, and could not have varied the case.

In the case of Haskell v. Raoul, in 1 M'C., Eq. 22, 28, 32, it was decided, by the then new Court of Appeals, that the petition for a re-hearing should not be granted.

The Court then examined the grounds on which bills of review and applications for re-hearings were granted in England, and in the courts of this country, (see p. 28, 29, 30,) and concurred in the preceding decisions. The Court, in page 30, denied the propriety of allowing bills of review, in cases of alledged error of law on the face of the decree of the Supreme Court; though it admitted that a bill of review for newly discovered evidence might be granted.

The Court also cited and relied on the case of Perkins & Lang, [1 M'Cord, Eq. 30, note,] decided by the old Court of Appeals in Equity, by which it was decreed that a bill of review lies where there is a discovery of new matter made since the decree, which new matter the party applying could not have had the benefit of in the first instance; making a new case, and one proper for Equity jurisdiction. In that case, it being clearly shewn that there was evidence (a deed) newly discovered after the decree, and which had been in the possession of the other party, and not disclosed, the Court overruled the demurrer to the bill of review.

The decision of the old Court of Appeals in Equity, in another case, illustrates the course of the Court, and the great caution used in granting re-hearings, and directing new trials. In the case of The Administrator of Jenkins v. The Administrator of Smith, not reported, at law a verdict was obtained for the amount of a note of hand, given by the deceased Smith to the deceased Jenkins for $5000. After the verdict and judgment at law, the administrator of Smith was informed by three gentlemen that there had been no consideration for the note, which had been given to Jenkins for a special purpose, and that transaction not being carried into effect, the note ought to have been cancelled. The Court of law refused to grant a new trial, because the newly discovered evidence was parol. The administrator then filed his bill in Equity for relief against the note. It appeared clearly by the evidence of three witnesses that there had not been any consideration for the note which was given to carry into effect an operation of Smith's own, but which failed, and he dying very soon after, Jenkins kept

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the note, and *he then dying, his administrator brought suit on the note. The Court of Equity gave relief, but required the most clear and positive testimony that the evidence was not known to the administrator on the trial at law.

In the case now before the Court, the petition is to grant a rehearing (or bill of review) on the ground of facts discovered since the decree of the Circuit Court of Equity and Court of Appeals, which are relevant to the merits of the case, and which would materially vary the case formerly made, and entitle the defendant to a decree.

The alleged discovery of new matter is stated as follows: That the defendant, James B. Pickett, has procured the testimony of James A. Knighton himself, (to whom the alleged sale was made) who resided in distant parts at the time of the trial; also the original bill of sale given by defendant to said Knighton; and the testimony of Gaither, the subscribing witness to said bill of sale. And the testimony of Mr. Nathan Knox, (lately discovered,) who knew the negroes, or some of them, in possession of Jas. Knighton, in the western country, who used them as his own, and sold some of them as his own property; and also the lately discovered testimony of Joseph Hinson, the brother of plaintiff, and the evidence of Mr. Austin Peay, that defendant, before he sold the negroes to Knighton, actually offered to sell all his interest in them to the plaintiff, Hinson.

We must now examine whether these allegations make such a case as entitles the defendant to a rehearing or bill of review, according to the rules above laid down. It is not pretended (for it would have been absurd to do so) that the defendant had discovered the evidence of Mr. Knighton and the bill of sale since the decree, but that he had procured it subsequently. He knew perfectly well who was the person to whom he alleged he had sold the slaves, and that he had given a formal bill of sale for the slaves. This then was not a discovery of new evidence. He knew he had executed a bill of sale, and had delivered the negroes. He knew that the validity and the reality of that sale was in question. It was alleged by the bill to be collusive, and a mere cover to remove the slaves out of the jurisdiction of the court, and out of the reach of persons claiming an interest in them. The bill made it a question, and the answer met the question. The defendant then was fully aware that he was called upon to sup-

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port the sale by *proofs. And his counsel would advise him, of course, what proofs were necessary. Nor could there be any complaint of want of time, for the bill appears on its face to have been filed on the 29th January, 1830, and the cause was not brought to a hearing till the 17th July, 1832, which was a period of about thirty months; giving time enough to have procured the evidence from Europe, and even from Calcutta.

If then the party neglected to take proper measures to obtain the evidence necessary to sustain his case in due time, it is his own fault, and he has himself alone to complain of. That he is thus in default is manifest from the fact, that the evidence in question now presented to the Court, was all procured, even after the hearing of the cause in July 1832, for the commission on which the examination of Knighton was taken, bears date, the 11th May, 1833, and the execution of it by the examination of Knighton, is endorsed on the fourth of June, 1833; shewing how promptly the evidence could be procured when the party was in earnest to procure it.

With respect to the rest of the evidence

alleged to be new and furnishing a ground for a re-hearing or bill of review, the greater part of it was in the knowledge and the reach of the defendant, and might with reasonable pains have been procured before the trial in July 1832.

The petition alleged the discovery (in contra-distinction to the procurement of the evidence) of the evidence of one Nathan Knox, who knew the negroes, and that Knighton treated them as his own, and not as the property of Pickett.

This evidence would have been merely subsidiary to that of Knighton. And it would have been perfectly easy before the trial, to have procured evidence from any persons residing near Knighton, (and his residence is not denied to have been known to Mr. Pickett) as to his possession of said slaves, and of his treatment of them as if they were his own. Even on the supposition of a mere pretended sale, the possession and the treatment would seem to indicate ownership in Knighton.

The question then recurs, and is now to be decided, whether the petition makes such a case of newly discovered evidence, as entitles the defendant to the re-examination of the decrees of the Circuit Court and Court of Appeals.

I have examined the subject very fully,

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very carefully, and with *some anxiety; for the answer of Mr. Pickett, that it was an actual sale, made a strong impression; and if the evidence which produced a stronger impression had been contradicted, either at the original hearing, or by newly discovered evidence not known, and not attainable before the decree, I should have been gratified that he should have the benefit of it. But I dare not violate rules made with great deliberation and on great experience, to gratify my wishes. I am not at liberty to receive newly procured evidence which was in the knowledge and reach of the party, as newly discovered evidence; and if I did receive, I do not know that it would materially change the impressions made by the other evidence in the cause. There is one overruling fact. The new evidence does not show how, or when, any payment was made by Knighton to Pickett. The petition must therefore be refused.

I cannot forbear making one or two further remarks growing out of the transaction.

Mr. Pickett knew that he did not hold, nor did he ever pretend to hold, the slaves as absolute owner. He knew that he had but a limited interest in the slaves, yet he undertook to send them out of the State and out of the reach of those persons who had an interest in them, either by absolute sale as he alleges, or by an improper or covinous transaction appearing to be a sale. This was exceedingly improper. In the exercise of his own rights and powers, he should have respected the rights and interests of others. This Court grants injunctions to restrain persons, having life estates in slaves, from transferring the property out of the State, on the ground of danger to the interests of remainder men. It is more than a quarter of a century since I made the first decree on the subject, in Lattimer v. Elgin, 4 Desaus. Eq. Rep. 26, restraining such transfer, in which the grounds and reasons are given largely.

The Courts have followed out the principle, and the present Court of Appeals has gone further. Upon very slight grounds of apprehension, it has, as I am informed, sanctioned restraints on tenants for life, from carrying slave property out of the State.

The present immense and unfortunate emigration, where persons are carrying off a vast number of slaves, held by various titles and some of them for short terms,

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seems to require great vigilance *in the Courts, to protect and preserve the interests of the citizens who remain faithful to their country.

Defendant appeals, and moves to reverse the decision of the Chancellor in this case, upon the ground:—

That the facts and circumstances set forth in the petition for a re-hearing, are sufficient in Equity to entitle him to the same.

Clarke & M'Dowell, for the motion.
M'Call, contra.

JOHNSON, J. We concur entirely in the conclusions of the Chancellor, and propose to add to what has been already so well said, only a few remarks in reference to the point decided in the case of The Administrators of Jenkins v. The Administrators of Smith, in which relief was granted on the discovery of oral evidence after the trial.

The rule at law, as long and well settled in this State, is, that a new trial will not be granted on the ground of after discovered testimony. It was so ruled in the case of the State v. Harding, 2 Bay, 267, and has been followed ever since. (See Ecfert v. Des Coudres, 1 Mill, Con. Rep. 69, [12 Am. Dec. 609;] Executors of Evans v. Rogers, 2 Nott & M'Cord, 563.) And I am unable to perceive that there is any solid foundation for a different rule in Chancery. The delay to which it would lead, and the danger of subornation of perjury, in which the rule is founded, is precisely as great in the one Court as the other. And that is most obviously the leaning of Chancellor Kent, in Livingston v. Hubbs, 3 Johns. Ch. Rep. 124, although the question was not directly decided; and such is obviously the conclusion to be drawn as

to the rule in England, from the remarks of the Lord Chancellor, in Taylor v. Sharp, 3 P. W. 371, referred to by Chancellor Kent. During our present sitting, the question came indirectly before the Court, in the case of Perry v. Mays, [2 Bailey, 354,] in which the same opinion was expressed. The question cannot depend on the number or the respectability of the witnesses—one unsuspected, irreproachable witness, would obtain credit for what he would swear, as soon as an hundred of doubtful and suspicious character, yet it would be difficult to discredit an hundred of such witnesses, who,

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without any concert *testified to the same facts, and which were in their nature probable. I am therefore very decidedly of opinion, that a re-hearing of a cause in Chancery ought not to be granted in any case, on the ground of after discovered oral evidence.

Motion dismissed.

O'NEALL, J., and HARPER, J., concurred.

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CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA, IN DECEMBER, 1835.

JUDGES PRESENT.

HON. DAVID JOHNSON, President.
" J. B. O'NEALL.
" WM. HARPER.

2 Hill, Eq. *361

*ANN BRYAN, and Others v. JOHN MULLIGAN, Executor of —— BRYAN, Deceased.

(Columbia. Dec., 1835.)

[*Executors and Administrators* ⟸118.]

An executor or administrator is only required to manage the estate in his charge as a prudent man would his own, and in case of loss, the question of his liability cannot be resolved by any general rule but depends on the particular circumstances of each case.

[Ed. Note.—Cited in Boggs v. Adger, 4 Rich. Eq. 411; Rhame v. Lewis, 13 Rich. Eq. 301; Nance v. Nance, 1 S. C. 222, 223; Pope v. Mathews, 18 S. C. 448.

For other cases, see Executors and Administrators, Cent. Dig. §§ 472–482; Dec. Dig. ⟸ 118.]

[*Executors and Administrators* ⟸158.]

Generally it is the safer rule for an executor to sell the produce of the estate in the market usually resorted to: but when acting in good faith and under a reasonable expectation of a greater profit, he shipped the cotton to Liverpool, instead of selling it in Charleston, and the Liverpool price was less than he was offered in Charleston, he will not be chargeable with the loss.

[Ed. Note.—Cited in Nance v. Nance, 1 S. C. 223.

For other cases, see Executors and Administrators, Cent. Dig. § 646½; Dec. Dig. ⟸158.]

Heard at Barnwell, February 1835.

This was a bill for an account of the defendant's administration and management of the estate of his testator; and came on for a hearing upon an exception filed by the plaintiffs to the Commissioner's report upon the accounts. The single question involved in the exception, and decided by his Honor, will be sufficiently understood by his decree.

De Saussure, Chancellor. This case came up on the report of the Commissioner, and an exception thereto filed by the plaintiffs. The report of the Commissioner was satisfactory to both parties, except on one point, which is stated in the following words: "For that the Commissioner, in and by his said report, ought to have charged the defendant for the

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nine bales of cotton, which he *shipped to Liverpool in the year 1825, with the price which the said cotton might have been sold for in the Charleston market, and with the interest thereon."

The exception involves a question of considerable importance to the community. The testimony presented to the Court was as follows:

William R. Ball, testified that Mr. Mulligan, the executor, shipped to Liverpool nine bales of cotton of the crop of the estate of the year 1824. The shipment was made in the year 1825. Mr. Mulligan informed the witness that he had been offered 24 cents per pound for it in Charleston. The bales of cotton made on the plantation generally averaged from 330 lbs. to 350 lbs. weight. It appears that by the sales in Liverpool a smaller price was obtained for the cotton of the estate than the price offered to Mr. Mulligan in Charleston; and the object of the exception is to charge the defendant, the executor, with the larger price. It is admitted that Mulligan shipped cotton of his own, at the same time, and suffered also in the same way; and there is no doubt that he intended what he honestly thought was for the benefit of the estate. The decision of the question will depend upon the right which an executor has to act as this executor has done.

In my judgment he had no right to enter into such a speculation as he did. It was his duty to send the crop to the regular markets of the country, and to have accepted the best price which they afforded; and not to have speculated on the possibility of a better market abroad. That was an uncertain risk—a risk not only of the price, but of the capital itself. It would be dangerous to estates to sanction such a course, and would open the door to great abuses, especially where the intentions of executors were not as pure as those of this executor are admitted to have been.

It is therefore Ordered and decreed, that the report be referred back to the Commissioner, with instructions to correct the same, by charging the executor with the amount of the nine bales of cotton, at the price of 24 cents per pound, which he was offered in Charleston, and refused.

From this decree the defendant appeals, and moves that the same may be reversed, or modified, on the following grounds:—

1. That the law imposes no other restraint upon an executor, in selecting a market for the disposal of the produce made by him upon the estate of his testator, than the exercise of

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of a sound discre*tion in determining as to which of the several markets accessible to him, will be most advantageous for the estate: and that under peculiar circumstances, he would not only be justifiable in selecting the ultimate market, although in a foreign country, but might even subject himself to deserved censure for not doing so, especially as he might guard against all the risks of transmission by insurance at an almost insignificant premium.

2. That whether the defendant, in sending the cotton made on his testator's estate to Liverpool, acted within the limits of a sound discretion, or indulged a wild unjustifiable spirit of speculation, for the result of which he should be held chargeable, depends altogether upon the circumstances under which the shipment was made; and his liability is therefore a question of fact, upon which the judgment of the Commissioner in his favor, ought to have been regarded by the Chancellor as conclusive.

3. That if the decision of the Commissioner were not regarded as conclusive, still it was not impeached by any evidence; and the Chancellor has decided a question of fact as a question of pure law, without reference to the evidence.

4. That, in point of fact, the propriety of sending the cotton to Liverpool was not impeached by a title of evidence bearing upon the question; and the decree therefore operates as a surprise upon the defendant, who has been precluded from producing evidence, which it was in his power to obtain in Charleston establishing the propriety of the shipment at the time when it was made, and shewing, in fact, that not to have made it, would, under the circumstances, have argued a gross disregard of the interests in his charge. And it is submitted that, in the absence of evidence impeaching the propriety of the shipment, the Chancellor, if he entertained any doubt of it, should have done no more than to direct an inquiry by the Commissioner.

5. That even if the liability of the defendant were conceded, the extent of it should not have been settled by loose, uncertain and speculative evidence, as to the weight of the cotton, and the prices which might have been obtained for it in Charleston, when it was in the power of the plaintiff to have produced exact proof from the scale books on the first point, and the prices current of the period, and the testimony of factors in Charleston, as to the second. And it is submitted that, on this question also, an

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inquiry *by the Commissioner should have been directed, if the exception were not itself overruled.

Colcock, for the appellant.
Patterson, contra.

JOHNSON, J. The rule laid by the Court in Taveau v. Ball, 1M'C. Eq. Rep. 464, is, that executors, administrators and others, acting in a fiduciary character, are bound to manage the funds committed to their care, with the same care and diligence that a prudent and cautious man would bestow on his own concerns; and I am not aware that the correctness of this rule has ever been called in question. In all cases, therefore, where a loss arises in the management of funds by an executor, or other person acting as a trustee, the question arises whether the loss happened from casualties against which no one can be expected always to guard, or from his want of care and circumspection; and is an unmixed question of fact which cannot be resolved by any rule, but must depend on the particular circumstances of each case.

In the management of an estate by an executor or administrator, it would be generally safe to sell the produce of the estate in the market usually resorted to in the country where it is situated, because it would furnish evidence of ordinary care and circumspection, but as an arbitrary rule, it never could be tolerated. The town of Columbia is, for example, the common market of the districts lying north of it; and would an administrator, managing an estate in York, be excused for selling his crop there, when it was notorious, or even probable, that it would command a much higher price in Charleston? Certainly not: for a prudent and cautious man would send it on to Charleston to ob-

tain the better price—And precisely so here: if the defendant acted in good faith and with the reasonable expectation of making a greater profit for the estate which he managed, by sending on the cotton to Liverpool, instead of selling it in Charleston, he has done all which the law requires of him. Produce is bought in Columbia to be sold in Charleston, and in Charleston to be sold in Liverpool, on a profit; and I cannot consent that a sale in the market, where the highest price is expected to be obtained, should be considered as negligence by a settled rule of law.

The report of the Commissioner as to the

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facts out of which *this question arises, has not been brought up; and the Court is consequently ignorant of the precise state of the markets in Charleston and Liverpool, at the time the cotton was sent to market. There may have been something which would have rendered the shipment imprudent, but the Chancellor has founded his judgment, on the ground that defendant was bound to sell in the markets of the country; and as we cannot concur in this, the case must go back to the Commissioner to ascertain and report the facts.

It is therefore Ordered that the case be referred back to the Commissioner, to ascertain and report to the Circuit Court, the facts connected with the question before the Court.

O'NEALL, J., and HARPER, J., concurred.

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2 Hill, Eq. 365

JOEL RIDGELL, and Others, v. PHILIP BETHEA.

(Columbia. Dec., 1835.)

[*Courts* ⇐169.]

The Act of 1824, authorizing ordinaries to make partition of real estate not exceeding in value $1000, applies only where the entire estate in how many districts soever situated, does not exceed that amount.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 415; Dec. Dig. ⇐169.]

[*Partition* ⇐109.]

If the ordinary should be deceived as to the value, the title of a bona fide purchaser will not be affected; but the facts should appear in his proceedings, and if it thus appears that he did not enquire as to the value of the entire estate, or that it exceeded $1000, his proceedings are void.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 375–397; Dec. Dig. ⇐109.]

Before Chancellor Johnston, at Marion, February, 1835.

Bill for account and partition. The only question made in the case was in relation to the real estate of the intestate, under the following facts, reported by the Commissioner: "That Joel Ridgell, the intestate, lived and died in Marion district, and Philip Bethea administered on his estate there. He had at his death, two tracts of land in Marion, and one in Marlborough. Application was made to the Court of Ordinary, in Marion District, for partition of the two tracts there. They could not be divided, and a sale was recommended and made—one tract to Philip Bethea for $512; the other to Charles Miles for $288.50. The evidence of the value of these two tracts, adduced to give the Ordinary jurisdiction, did not fix any definite value, but merely stated that they were not worth $1000. Philip Bethea afterwards went to Marlborough, and administered there. Application was made to the Court of Ordinary for partition of the land. The witnesses, as to its value, in order to give the Ordinary jurisdiction, testified that it was not worth exceeding $300. It could not be divided, and was regularly sold by order of the Ordinary for Marlborough, and bought by Philip Bethea for $100." The Commissioner recommends that the sale be confirmed.

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*The plaintiff excepted to the Commissioner's report:

1. Because the sale of the tract of land in Marlborough district is null and void, having been made by the Ordinary of that district, who had no jurisdiction.

2. That the Commissioner should have reported the sale void, and recommended a resale.

Ervin, for the appellants.
Graham, contra.

HARPER, J. It is a matter not without difficulty to give a proper construction to the Act of Assembly of 1824, authorizing the Ordinary to make sale or division of real estate, provided the value of such real estate, to be ascertained by the judges of the said Courts of Ordinary respectively, upon the oath or oaths of a credible witness or witnesses, shall not exceed $1000. We are satisfied, however, that the Act was only intended to apply where the entire value of the estate, in how many districts soever situated, does not exceed $1000. Yet, both from the Act of 1799, (2 Faust, 315,) establishing Courts of Ordinary "in each district," and from the general law, we are also satisfied that no Ordinary can order the division or sale of lands out of his own district. It results, that when application is made to the Ordinary for this purpose, it is his duty to inquire the value of the entire real estate of the deceased wheresoever situated in the State, and not merely in his own district, and if it shall be found not to exceed $1000,

to order the sale of that portion which lies in his own district. This construction is not without difficulty, but we cannot discover any other practical one.

If the Ordinary, however, should be deceived by the evidence brought before him, either through the fraud or mistake of the parties, or the ignorance or omission of witnesses, certainly the title of a bona fide purchaser ought not to be affected. The Ordinary is a judge of a special jurisdiction, and the circumstances which give him jurisdiction should appear on the face of his proceedings. If it thus appear that he did inquire respecting the value of the entire estate, and that upon clear examination it was found not to exceed $1000, then his judgment is conclusive, unless under particular circumstances of fraud; nor can parties afterwards be permitted to shew that the whole of

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the estate was not *taken into the estimate, or that its value exceeded $1000. He is the judge on both points, and his judgment conclusive. The latter point has been already adjudged by this Court,(a) and the reasoning extends to the former.

But if it should appear from the face of the Ordinary's proceedings, that he did not inquire respecting the value of the entire estate, or that the value exceeded $1000, then he is without jurisdiction, and his proceedings void. If, in such case, a purchaser be deceived, it is by his own laches, for he might have inspected the proceedings.

In the present case, the proceedings of the Ordinary in relation to the land in question are not before us, and the cause is remanded that the matter may be inquired into and ascertained according to the views herein expressed.

JOHNSON, J., and O'NEALL, J., concurred.

(a) Chambers v. Watson, 1 Bail. 511.

2 Hill, Eq. 367

JACOB R. HARLEY, and ELIZABETH, His Wife, v. CHARLES DEWITT, and Others.

(Columbia. Dec., 1835.)

[*Executors and Administrators* ⇐91.]

The £10 rule in regard to the hire of negroes is not an arbitrary rule of value, but may be varied with the circumstances of the case. It imports no more than that the trustee of a planting interest who renders no accounts shall not be charged less than £10 per hand, and does not apply where greater profits were or might ordinarily have been made.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 400; Dec. Dig. ⇐91.]

[*Executors and Administrators* ⇐91.]

The rule does not apply where the hands were engaged in other and more profitable pursuits than planting.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 400; Dec. Dig. ⇐91.]

[*Guardian and Ward* ⇐44.]

Guardian who is co-tenant with his ward liable for rent, although he may not have used beyond his own interest. He should have made her land productive.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 198; Dec. Dig. ⇐44.]

Before Chancellor De Saussure, at Barnwell, February 1835.

The bill alleges that George Bruton, the father of the plaintiff, Elizabeth, died intestate, possessed of a valuable plantation and several slaves and other property, leaving a widow, and this plaintiff, his only heirs at law; that some time after, the defendant, De Witt, married the widow, and administered on the estate; and was appointed the guardian-in-chief of the plaintiff Elizabeth, then an infant. That he took possession of the plantation and slaves, and all the other property; and cultivated the land, and worked the slaves and hired them out; sold part of the property including some of the slaves, and appropriated the profits of the plantation and the labor and hire of the slaves, and the sales, to his own benefit, without rendering satisfactory returns, either as administrator or guardian. That the wife of the defendant, De Witt, and plaintiff's mother, has lately died, and the plaintiffs are entitled to a distributive share of her estate. The bill prays

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for an account *from De Witt, as administrator and guardian, and for partition of his wife's estate.

No answer was filed, and the matters of account were referred to the Commissioner.

On the reference, Richard Road, who had been for seven years an overseer for De Witt, testified as to the rent of the land and negro hire, and that De Witt was getting out timber for sale nearly all the time he was with him. He planted cotton two years and worked all the men hands two seasons on the Rail Road. Two other witnesses were examined as to the value of the hire of the negroes and rent of the land. Their evidence is not important.

Exceptions were filed to the Commissioner's report by both parties; but it is only necessary to notice those which were made the subject of appeal, viz: on the part of the defendant:

1. That the Commissioner has allowed more than £10 per annum for the hire of the negroes; whereas defendant submits that the plaintiffs are only entitled to £10 for full, and £5 for half hands.

2. That the Commissioner has charged the defendant with rent of the plantation;

whereas he submits, that not having cultivated beyond his interest, he was not chargeable with rent.

The Chancellor sustained these exceptions; and the plaintiffs appeal from his decision in these particulars.

Patterson, for the appellants, insisted that the £10 rule, as laid down in Lyles v. Lyles, 1 Hill's Ch. 76, and other cases, was inapplicable to this case. That the rule was only intended to furnish a standard by which trustees should account, where regular accounts were not reported, and in the absence of all evidence going to fix a higher rate of value. That the actual value of negro hire was established in this case with sufficient certainty, by competent and credible witnesses; and their opinion, especially as the negroes were not employed in ordinary culture, should be taken in preference to an arbitrary rule of value, not applicable to the circumstances of the case. That the defendant was bound to have kept regular accounts of his receipts and expenditures, and failing in his duty in this respect, to diminish his responsibility by this arbitrary rule, would be to permit him to take advantage of his own fraud, or negligence equivalent to fraud. And as

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guardian and *trustee, he was responsible for the management of the plantation, and consequently liable for rent. Cited, Frazier v. Vaux, 1 Hill's Ch. Rep. 206; Hovenden on Frauds, 421; 13 Ves. 53.

Bellinger, contra. As to the £10 rule—Cited, Lyles v. Lyles, 1 Hill's Ch. Rep. 86; Frazier v. Vaux, Ib. 206; 2 Eq. Rep. 499; 4 Eq. Rep. 270. As to the rent—Volentine v. Johnson, 1 Hill's Ch. Rep. 49; Lyles v. Lyles, Ib. 86.

JOHNSON, J. The questions arising out of the grounds of this motion, are:—

1. As to the rule by which the value of slave hire is to be ascertained.

2. Whether the defendant is bound to account to plaintiff for the rent of the wife's land.

In the case of Lyles v. Lyles, 1 Hill's Eq. Rep. 87, and in some other cases there referred to, the Court adopted the old rule of allowing £10 for the hire of full task hands as the standard of the value of slave hire, not as an arbitrary rule of value, but the result of calculations founded on observation and experience, and of course liable to be varied by circumstances; and notwithstanding the care that has been taken, it still appears that the principle of the rule is not universally understood. Where an estate in the hands of an administrator consists of lands and negroes, it is obviously the interest of those entitled to it, that the negroes should be kept together and employed on the lands, although the annual income might fall short of what the slaves and lands might rent and hire for; the lands would probably be less deteriorated in value, than in the hands of a tenant who would feel no other interest in it than for the time which he occupied it; generally the slaves would be better provided for, and more attention bestowed on the old and the young, than in the hands of strangers, who would feel no sympathy for them; and the object of adopting the £10 rule, so far from being intended as a favour to the administrator, was to charge him in the absence of regular accounts, with the full value of what he might reasonably be supposed to have made with ordinary care and industry—and that will appear by referring to the note annexed to the case of Lyles v. Lyles. Cotton estimated at 12½ cents per pound, is the basis of that calculation, and in Myers v. Myers, the evidence established that price, as the average

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of a *series of years. If, therefore, the price of cotton should be greater for one or more years, or the average price through a succession of years should be higher, the rule must be necessarily varied to suit the particular case, and a corresponding increase of hire allowed. Or, if from adventitious circumstances, such as unusually productive lands, favourable seasons, and the superiority of the hands, greater crops than the general average were actually, or might, with ordinary industry, have been made, a corresponding increase of hire of slaves and rents of land ought to be allowed. The rule imports no more than that the administrator shall not be charged with less than £10 per hand, where no accounts are rendered, and certainly does not protect him where greater profits were or might have been made with ordinary industry. Let us suppose, for example, that the average price of cotton was 20 cents per pound, and that two and a half bags of 300 lbs. each was the average crop for a single hand, that would amount to one hundred and fifty dollars; and if we deduct from this $51.54 the estimated expenses on each hand, adopted in the note in Lyles v. Lyles, and which would not be materially varied by the increased price of cotton, it would leave a balance of $98.46 to be credited to the hire of the slave, for which the administrator would be bound to account. The rule was never intended to operate imperatively, but to supply a principle by which the extent of the liability of persons standing in this situation was to be ascertained.

In this case, however, the slaves were employed but a small portion of their time in planting, but for the most part in preparing timber for market, and working on the rail road; and the necessary inference is, that these were more profitable pursuits; consequently a rule based on an estimate of cotton planting cannot apply, and for the reasons before given, the usual prices paid for hire, would be an unsafe rule. The nett income which might be reasonably calculated on

from these employments after deducting the probable expenditures, furnishes therefore the only practical and safe rule, and the Commissioner will adopt it in the reference which will be ordered.

As to the land rents.—The Chancellor is certainly correct in laying down the rule, that if one of several co-tenants cultivates or uses no more than his own share of the lands, he is not liable to his co-tenants for rent; but with great deference, it has no application to the case in hand. It is true, the parties were

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co-tenants, but the *defendant stood also in the relation of guardian to the plaintiff, Mrs. Harley, and in that character he was bound to make her lands productive if he could, and is liable, if he has neglected to do so.—He must therefore account for rents.

It is therefore Ordered, that the case be referred back to the Commissioner to examine and report to the Circuit Court on the matters before noticed, according to the principles of this decree.

O'NEALL, J., and HARPER, J., concurred.

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2 Hill, Eq. 371

PETER CHEWNING v. LOUISA SINGLETON.

(Columbia. Dec., 1835.)

[*Lost Instruments* ⟸20.]

A party who has lost a note payable to bearer although past due, may come in Equity for relief. The ground of jurisdiction is not only that he may give indemnity to defendant, but that he must swear to the loss.

[Ed. Note.—Cited in Smith v. Nelson, 83 S. C. 300, 65 S. E. 261, 24 L. R. A. (N. S.) 644.

For other cases, see Lost Instruments, Cent. Dig. § 29; Dec. Dig. ⟸20.]

At Sumter, February 1835.

This bill was filed against the defendant, as executrix and sole legatee of Mrs. Anne Chewning, alleging that the testatrix, in her life time, for a valuable consideration, gave the plaintiff her promissory note for $650, payable to him or bearer, at ten days after date, and dated in September 1832. That the note was seen by divers persons in his possession, and that in October 1832, (after the testator's death,) he lost his pocket book, and in it the note. That he has (through her agent) given the defendant notice of the note and its loss, and demanded payment, which has been refused. The bill prays that defendant may answer its allegations, and that the payment of the amount of the note with interest may be decreed, on such terms of indemnity to the defendant against any future liability, as the Court may think proper to impose—and for general relief.

The bill was sworn to 15th Jan. 1834, and filed the same day.

The answer of the defendant denies any knowledge of her testatrix's indebtedness to the plaintiff, or of the note, or of any transactions by which such a debt could have been created. That shortly before the testatrix's death, she heard her say she owed the plaintiff nothing, and the defendant does not believe that any such note ever existed. She submits that the plaintiff has an adequate remedy, if any, at law.

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*Johnston, Chancellor. This case was heard upon bill and answer. A motion was made to dismiss the bill for want of equity. The motion is granted, and the bill dismissed with costs. The note alleged to be lost, and which the bill seeks to set up was, by the plaintiff's own shewing, past due when it was lost; and thus the necessity for indemnity no longer exists. The bill is not a bill for discovery; and if it was, all evidence on the plaintiff's part is excluded, inasmuch as the answer gives no discovery, but denies that such note ever existed: and the plaintiff has adequate remedy at law.

The plaintiff appealed, and now moved to reverse the decree on the following grounds:

1. That the Chancellor erred in supposing that the necessity for indemnity is the ground of Equity jurisdiction; whereas it is submitted that the indemnity is the condition which the Court annexes; and that no necessity exists to require the plaintiff to give it, cannot affect his claim to relief.

2. That there is no adequate relief at law, and Chancery will afford it.

Moses, for the motion. The right of the Court to order indemnity does not confer jurisdiction, for there are cases of lost bonds where indemnity has been ordered at law. —Jeremy's Eq. Jur. 261. That the note was past due cannot affect the right of relief; for if one finding the note were to sue on it, before the defendant could get in the defence, she would have to prove that it was lost or transferred after due.—M'Caskill v. Ballard, Col. May, 1832. In fact, that the note is due, should be a strong reason for the Court to grant relief.

The books are full of cases affording relief on lost bonds and notes, and that too, after due. Walmsley v. Child, 1 Ves. 341; Ex parte Greenway, 6 Ves. 812–13; M'Cartney v. Graham, 2 Sim. 285; see also Tarleton & Davis v. Benbow, 2 Bail. 428. The case of Mossop v. Eadon, 16 Ves. 430, was relied on as denying the right to relief. That case has since been overruled by Hansard v. Robinson, 7 Barn. & Cres. 90, and M'Cartney v. Graham, 2 Sim. 285. The plaintiff cannot have relief at law, because he cannot prove the loss of the note.

W. Mayrant, contra. A party may recover, at law, on a lost note, on proof of its ex-

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istence and loss; and but slight evidence *of the loss will be required. Chitty on Bills, 170-1-2. Can he recover in Equity by his own oath of the loss? In this case the alleged maker is dead; her executrix denies all knowledge of the note, and avows her belief that it never existed. There is no proof offered. Will the Court sustain such a claim against the estate of a deceased person, with no other proof to support it than the oath of the party claiming?

HARPER, J. My views of this case may be gathered from what has been said by me in the case of Davis & Tarleton v. Benbow, 2 Bail. 427. I have again looked into the authorities on the subject, and find no reason to change any of the views there expressed. It is not questioned but that in some cases a party may come into Equity to be relieved, when a bill or note has been lost or destroyed. The cases of Walmsley v. Child, 1 Ves. 341, Ex parte Greenway, 6 Ves. 812, and many others, are sufficient to establish this. The Chancellor seems to have decided chiefly on the authority of Mossop v. Eadon, 16 Ves. 430. The Master of the Rolls, in that case, went upon the ground that the only purpose of coming into Equity is to offer an indemnity, and as I gather from the argument in the case, it appeared that the note was not payable to order, so that it could not have been negotiated, and as no action could be maintained upon it by any one into whose hands it might come, indemnity was unnecessary. He therefore dismissed the bill. So the Chancellor supposes that as the note in this case, as appears from the plaintiff's own statement, was lost after it was due, there was no need of indemnity. But with deference, this seems to me to be founded in misconception. The plaintiff does indeed state that the note was lost after due; but who shall assure the defendant of the truth of that statement? Plaintiff states that he has no proof of the loss. It is for defendant's benefit that the party is required to come into Equity. If an action had been brought at law, she might well have said to the plaintiff, how can you assure me that you, yourself, have not negotiated the note before it became due, and that it may not now be in the hands of bona fide holder? The right to indemnity would have been apparent.

But the case of Mossop v. Eadon, seems to have been overruled by subsequent decisions. In the case of Hansard v. Robinson, 7 Barn. & Cres. 90, the bill was lost after due. Lord

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Tenterden, *speaking of the defendant, says: "But how is he to be assured of the loss or destruction of the bill? Is he to rely on the assertion of the holder, or to defend the action at the peril of costs? And if the bill should afterwards appear and a suit be brought against him by another holder, a fact not absolutely improbable in the case of a lost bill, is he to seek for the witnesses to prove the loss and to prove that the new plaintiff obtained it after it became due? Has the holder a right, by his own negligence or misfortune, to cast the burden upon the acceptor, even for not discharging the bill on the day it became due? We think that the custom of merchants does not authorize us to say that this is the law. Is the holder, then, without remedy? Not wholly so. He may tender sufficient indemnity, and if it be refused, he may enforce payment thereupon in a Court of Equity." In M'Cartney v. Graham, 2 Simons, 285, the bill had been indorsed specially to the plaintiff, so that no other holder could maintain a suit upon it, and it was argued, on the authority of Mossop and Eadon, that as no indemnity was needed, the remedy was at law. But the Court said that Mossop v. Eadon had been overruled by Hansard & Robinson.

Sir William Grant, in Mossop v. Eadon, seems to have overlooked a ground of equity on which the greatest stress is laid by Lord Eldon—a still higher authority. This is the necessity imposed on the party coming into Equity to make affidavit of the loss. In Ex parte Greenway, speaking of the decision of the Court of law, in Read v. Brookman, 3 T. R. 151, that in case of a lost deed, profert may be dispensed with, he says: "It is questionable whether sufficient attention was paid to the consideration, that in Equity the conscience is ransacked, and the party alleging that the instrument is lost, must make an affidavit that it is not in his possession or power." And in Bromley v. Holland, 7 Ves. 20, "The protection this Court gives in that case, is most essential to the interest of justice. Here the party pledges his conscience by his oath that the instrument is lost."—East India Company v. Boddam, 9 Ves. 464, was a case of a lost bond. Lord Eldon says, that "if the bond was by a single obligee, the party sued in this Court, stating in his bill that the bond was lost; and accompanying his bill with an affidavit that it was lost; not as evidence of the loss, but as a security for the propriety of jurisdiction." Instances are put in the cases of frauds which might be practiced

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by the wilful suppres*sion or destruction of the instrument, similar to what is suggested in Davis & Tarleton v. Benbow. It may be observed that this applies still more strongly in the case of a lost bill or note than in that of a bond or deed, as, in addition to the danger of fraudulent suppression or destruction, there is the additional danger of the instrument's having been fraudulently negotiated. There is no doubt, however, but that it was intended to apply in all similar cases. Such is the view taken by Fonblanque, in his notes

to the treatise of Equity. (1 Fonb. 15–16–17, n. f.) and by Lord Redesdale, (Mitf. Pl. 105–6.)

It is Ordered and decreed that the Chancellor's decree be reversed, and the cause remanded for hearing.

JOHNSON, J., and O'NEALL, J., concurred.

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2 Hill, Eq. 375

S. C. MULDROW and JOHN B. BRUCE, Trustees, v. ISAIAH DUBOSE and Others.

(Columbia. Dec., 1835.)

[*Creditors' Suit* ⇐29.]

A bill by trustees to marshal assets & calling in creditors, after decree made directing money to be paid in and creditor's claims established, will not be dismissed at the instance of one of the plaintiffs, his co-plaintiff & the creditors objecting.

[Ed. Note.—Cited in Bethia v. McKay, Cheves, Eq. 95; Latimer v. Sullivan, 37 S. C. 121, 15 S. E. 798; State v. Southern R. Co., 82 S. C. 15, 62 S. E. 1116.

For other cases, see Creditors' Suit, Cent. Dig. § 124; Dec. Dig. ⇐29.]

Plaintiffs accepted a trust from B. K. Benton, as follows, viz: that they would hold and manage certain property conveyed to them by Benton, for the benefit of Benton's creditors, his wife and children. The creditors pressing on them for payment, some of them having judgements, Muldrow & Bruce, (the former being the principal manager and actor in the matters,) filed this bill, calling upon the creditors to come in, establish their demands, and receive their portions and praying an injunction against the creditors, as to other proceedings. The injunction was granted, and other creditors came in. At February Term 1834, an order was made by consent against Muldrow and Isaiah Dubose, (who it appeared had all the funds then remaining—the property conveyed, having been sold under the deed,) that they should pay six hundred dollars each, to the Commissioner, by the first of October, then next, to be applied to the claims of the creditors. In the Spring of 1834, Muldrow gave to a creditor in Court, his notes for one thousand dollars, which were received by said creditor as so much towards the payment of his claim already established before the Commissioner to a greater amount; which,

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with some smaller amount paid by *Muldrow, to one or two of the other creditors, amounted to as much as he admitted to be due by him to the trust fund. A further amount of from nine hundred to one thousand dollars was claimed, after giving the notes above alluded to, and before the 1st October, 1834, Muldrow removed from this State, to the West, and wrote word to have his bill dismissed. The creditor to whom the notes were given was the largest but not the only creditor, and the amount due by Muldrow, was not the only available fund. (DuBose owed considerably.) It is not known that any thing was said by Muldrow and the creditor, as to the application and receipt of the notes being instead of the six hundred dollars ordered to be paid to the Commissioner, though doubtless, they at the time supposed that such would be the effect; yet this supposition, on the part of the creditor at least, was coupled with the understanding that the case would go on to a close, and the matters be finally decided by it. A dismission of the bill by Muldrow, after he had left the State, was never thought of by the creditor, nor intimated by Muldrow to him.

In this stage of the proceedings, a motion was made by Muldrow, at February 1835, to dismiss the bill; and resisted by Bruce and the creditors, on the ground that it would operate a fraud upon them—especially upon the creditors, whose claims would be delayed, and possibly barred, before they could again establish them.

The Chancellor refused the motion, and this is an appeal from his decision.

Ervin, for the motion.
Wilkins, contra.

O'NEALL, J. In a case situated like the present, I think the bill cannot be dismissed by the plaintiff. It is true, this Court went very far, in Bossard v. Lester, 2 MC. Eq. Rep. 419, in holding in a case in which the defendant had filed a cross bill, and there had been an order referring the accounts, that the plaintiff might dismiss his bill. The fact, in that case, that the defendant had asked and obtained leave to withdraw his cross bill, constituted a strong reason why a similar indulgence, that of dismissing his bill, should be allowed to the plaintiff. The Court in that case, however, very distinctly recognize the doctrine, that after the decree settling the rights of the parties, the plaintiff cannot dismiss the bill.

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*This case is a bill by the trustees, admitting a fund in their hands to which creditors are entitled, and calling on them to come in and prove their demands; and praying for an injunction to restrain them from proceeding at law. The injunction was obtained; and subsequently a decree for the payment into Court, of a sum admitted to be in their hands: this sum it seems has been paid to one or more of the creditors—a further sum is claimed from one or both of the trustees. Muldrow alone moves to dismiss the bill: this is resisted by Bruce, the other trustee, and the creditors who have come in and proved their demands.

In Lashley v. Hogg, 11 Ves. 602, there was a decree for an account with the usual direction for an advertisement for creditors: a petition was presented under an arrangement, with the consent of all parties and all the creditors who had come in, the time having expired for dismissing the bill and disposing of the fund in Court. The Lord Chancellor said he could not dismiss the bill after a decree, except upon a re-hearing or appeal. But the object as to the disposition of the funds might be obtained by consent upon further directions, though the time had elapsed; yet the Court will let in creditors at any time, while the fund is in Court.

That case was a much stronger one for the dismission than this; there, all parties consented to the dismission: but as there had been a decree for an account, the Chancellor refused to dismiss the bill. In this case, a part of the fund had been decreed to be paid, and other creditors had come in and proved their demands. It cannot therefore be, that this plaintiff, Muldrow, against the wish of his co-plaintiff, Bruce, and all the creditors, should be allowed now to dismiss his bill. The Chancellor was right in overruling his motion:—his decision is affirmed.

JOHNSON, J., and HARPER, J., concurred.

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2 Hill, Eq. 377

THOMAS D. DAVIS v. L. B. DAVIS, Administrator.

(Columbia. Dec., 1835.)

[*Executors and Administrators* ⇐282.]

[If an executor or administrator suffers himself to be sued when he has sufficient funds in his hands and has no defense, he must pay the costs himself.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1117; Dec. Dig. ⇐282.]

An executor or administrator who litigates in good faith, shall be allowed costs out of the estate: but where, with sufficient funds in his hands, he suffers himself to be sued,

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having no *just defence, he must pay the costs himself. On judgement by default, he would be liable for the costs de bonis propriis at law; (Giles v. Pratt, 1 Hill, 244, [26 Am. Dec. 170]) and in Equity, he can only be excused by showing a want of funds.

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2 Hill, Eq. 378

Ex parte J. B. MILLER, Commissioner.

(Columbia. Dec., 1835.)

[*Court Commissioners* ⇐3.]

[A commissioner is not guilty of any neglect of duty in not reporting to the court the case of a guardian who had finally settled with his ward, where the fact had been reported to the courts.]

[Ed. Note.—For other cases, see Court Commissioners, Cent. Dig. §§ 2, 6; Dec. Dig. ⇐3.]

[*Guardian and Ward* ⇐137.]

[The statute of 1824, requiring masters and commissioners to report to the court "what guardians and trustees have not annually made their returns," does not require him to report the case of a guardian who has settled with his ward, and that fact has been reported, or where he is dead or out of the state, and those facts have been reported.]

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 461; Dec. Dig. ⇐137.]

The Act of 1824, p. 21, requiring Masters and Commissioners to report, annually, to the Court, "what guardians and trustees have not annually made their returns," and "to set apart certain days for reference of such accounts, &c," was intended to protect wards and cestuique trusts whose funds were under the control of the Court, and not to impose duties on the Commissioner, which would be impossible or useless and nugatory: And therefore the Commissioner is not guilty of any neglect of duty in not reporting to the Court, the case of a guardian who had finally settled with his ward, and that fact had been before reported to the Court; or where a guardian was dead, and his death had been previously reported; or where a guardian had removed from the State, and which had been before reported.

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2 Hill, Eq. 378

[The following case was decided in Charleston, March 1835, but not received in time for publication with the cases of that Term.]

FREDERICK FABLE, ELIZABETH FABLE and CATHARINE FRANKS v. ALEXANDER BROWN, Executor of John Fable.

(Charleston. March, 1835.)

[*Common Law* ⇐14.]

The civil law may be consulted in explanation of our law, but not as authority.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 3; Dec. Dig. ⇐14.]

[*Slaves* ⇐1.]

The common law doctrine of villenage, does not apply to the condition of slavery here.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 1, 2; Dec. Dig. ⇐1.]

[*Slaves* ⇐1.]

The status of our slaves ascertained by reference to what was anciently held to be the condition and disabilities of alien enemies and Pagans.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 1, 2; Dec. Dig. ⇐1.]

[*Slaves* ⇐1.]

The anomalies in the condition of our slaves referrible to our own legislation.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 1, 2; Dec. Dig. ⇐1.]

[*Slaves* ⟸13.]

A slave being a personal chattel, is incapable of holding property in his own right, and the possession and title must be referred to his master.

[Ed. Note.—Cited in Carmille v. Carmille's Adm'r, 2 McMul. 471; Inglesby v. Beamer, 2 Rich. 426 note; Blakely v. Tisdale, 14 Rich. Eq. 101, 102; Russell v. Cantwell, 5 S. C. 478.

For other cases, see Slaves, Cent. Dig. § 59; Dec. Dig. ⟸13.]

[*Wills* ⟸672.]

Whether a bequest is given absolutely, depending on the friendship and good will of the legatee to deal with it as testator recommends or conditionally and coupled with a trust, depends on this; if it was intended that he should have it entirely in his own power and discretion to make the application or not, it is absolutely given; but if, on the face of the will, there is declaration plain, that he is to take it in trust, though the trust be not declared or ineffectually declared, or become incapable of taking effect, the party taking shall be a trustee for those who would take either under the will or at law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1579-1581; Dec. Dig. ⟸672.]

[*Slaves* ⟸22.]

Where a testator directed his executor out of the funds of his estate to purchase a slave, (his son)—*Held* to be an attempt to evade the law against emancipation, and if purchased, the slave would become part of the estate.

[Ed. Note.—Cited in Carmille v. Carmille's Adm'r, 2 McMul. 470.

For other cases, see Slaves, Cent. Dig. § 94; Dec. Dig. ⟸22.]

[*Slaves* ⟸13.]

Applying the doctrine in respect to alien enemies to the condition of our slaves, it was held: that as an alien enemy may take lands but cannot hold; and as a chose in action given to him is not void, although he cannot maintain an action on it; so a slave may take, but cannot hold land, and his master could only hold until office found for the State; and so of a legacy given to a slave it is not void, but it cannot be recovered from the executor by either slave or master, but may escheat to the State in the hands of the executor. Therefore where testator by his will gave his estate to his children who were slaves—a bill filed by the next of kin against the executor was dismissed.

[Ed. Note.—Cited in Skrine v. Walker, 3 Rich. Eq. 268; Blakely v. Tisdale, 14 Rich. Eq. 97; Craig v. Beatty, 11 S. C. 378.

For other cases, see Slaves, Cent. Dig. § 59; Dec. Dig. ⟸13.]

[*Slaves* ⟸15.]

[Cited in Gist v. Toohey, 2 Rich. 425; Skrine v. Walker, 3 Rich. Eq. 269, to the point that an executory contract with a slave cannot be enforced.]

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 61; Dec. Dig. ⟸15.]

Charleston—January 1832.

The following decree of the Chancellor presents a full statement of the case:

De Saussure, Chancellor. John Fable, a foreigner, settled in Charleston some years ago, and acquired some property, of which

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*a house and lot in the city constitutes the principal and most valuable part. He had two (illegitimate) coloured children by a female slave. Before his death, he made and duly executed his last will and testament, on the 24th June, 1831, by which he bequeathed as follows:—He desired his personal effects to be immediately sold, and out of the moneys arising therefrom, he directed his debts and funeral expenses to be paid. If that fund should not be sufficient, then the executor might sell any other of his property, to satisfy all claims justly due and unpaid out of his personal property. He bequeathed a legacy of $100, to be divided equally among the children of his brother, Frederick. He then says: "The residue of my property I will and bequeath to my children, whom I acknowledge, to be divided share and share alike—Whatever real estate I am now possessed of, it is my will that it should be sold, and the proceeds vested in any public stock of this State, or of the United States. The interest arising from the stock so invested, to be appropriated to the support of my son, John, and daughter, Elizabeth, at the discretion of my executor, whom I constitute and appoint as the guardian of the said John and Elizabeth. It is further my desire that my executor will purchase, if practicable, my son, out of the funds of my estate, previous to a division of the same." The testator appointed Mr. Alexander Brown, the executor of his will. He died not long after, and Mr. Brown proved the will and qualified thereon as executor. The legatees are living. Both the children are in servitude, and held by the same owner. The personal estate, it is said, will pay the debts, and perhaps leave some surplus. The plaintiffs claim to be the next of kin of the testator, and claim his estate as distributees thereof, alleging that the provisions of the will in favor of the illegitimate coloured children of the testator, who are held in slavery, cannot lawfully take effect, and therefore as the property is not well and effectually disposed of, the plaintiffs are entitled thereto. The defendant, the executor, resists the claim of the plaintiffs on the ground that the plaintiffs have not sufficiently established their relationship to the testator, or that they are the only persons in the degree of relationship which entitles them to the distribution of the estate, supposing it distributable. The evidence, I think, establishes sufficiently that the plaintiffs are the relations entitled to distribution, if there be any distributable estate. The evidence of Mr. Abraham Buchan, as delivered

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in the Court, is clear, that *he knew John Fable fifteen years before his death. He heard him say that he had a brother named Frederick, in Philadelphia, and two sisters, his only relatives in this country; he did not say that he had any other relatives. Witness knew all the family. There are no more of them. Both sisters were named. One of them died before her brother, leaving two

children. John Fable died in July 1831. The depositions, which were read but not delivered to me, are not so clear as to the relationship. But there is sufficient before the Court to go on with the cause. Some of the plaintiffs are entitled, if there be any thing for distribution, and further inquiries can be made as to that point, if it should be found necessary. Another, and the most important objection to the recovery of the plaintiffs, is that the property of the testator is effectually disposed of by his last will and testament, and there is nothing undisposed of which remains to be distributed to the next of kin. The executor, being desirous to perform the duties imposed on him, by the will of the testator, in his answer submits the following questions to the Court for its direction:—

1. Whether he is bound or at liberty to purchase the boy, John, (his mistress being willing to sell him) out of the funds of the estate, and to divide the residue of the estate (if any) between the said children, John and Elizabeth; and to sell the real estate and vest it as directed by the will, and pay over the income arising therefrom, at his discretion, to the said children of testator.

2. Whether he is bound to pay the residue of the personal estate, (after payment of debts and legacies aforesaid) and the income of the stocks to be purchased with the proceeds of the real property to the owner of the said children (John and Elizabeth.)

3. Whether he is not bound to pay over the whole residue of the personal estate, to the said owner of the slaves.

The questions involved in this case, are certainly important and difficult, and were so considered by the bar in the argument, though they were not as fully argued as is customary with the gentlemen of the bar. There is one point, which it is as well to put out of the way at once. Our statute prohibits emancipation—there is no attempt at emancipation in the will we are considering. It leaves one of the coloured children of the testator in slavery to the present owner. It directs the executor to purchase the other child from his owner. But it does not direct his emancipation. The executor is bound to purchase him,

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and *he must take the bill of sale, or title deed to himself. This is no violation of our statute, and can, and ought to be carried into effect. In what way he shall treat the boy, and how employ him, is for his own discretion, in which the testator had unbounded confidence. We are next to consider the question, whether the dispositions in the will respecting the property can, or ought to be carried into effect. The executor may certainly sell the property as he is directed by the will—the difficulty is, will he be justified or permitted to apply the income arising from the sales, for the support of the slaves, according to his discretion, as directed by the testator. The objection may come from two quarters. The plaintiffs may, and do contend, that the property, or the proceeds of it, is not so legally disposed of by the will as to be effectual, consequently it is undisposed of; and that whenever a legacy is so given that it cannot take effect, it sinks into the estate, and is distributable. It may be further contended, and it was so argued at the bar, that if those legacies could not be effectual for the slaves, they would take and hold for their master or mistress; and that would defeat the plaintiffs' claim. On the first point, the plaintiffs relied on a decision made by me twenty years ago, and reported in 4 Desaus. Eq. Rep. 266, Executors of Walker v. Bostick & Walker. In the report of that case, the devises and bequests are not set forth. But it is said, the principal question made in the case, was whether the devises and bequests of real and personal estate made by the testator, Joseph Walker, to trustees in trust for his slave, Betsey, and her three children, are valid devises, and can take effect. There was a bequest of freedom to those slaves, which failed. The judge was of opinion that the legatees, being slaves, were incapable of taking such devises under the will, and therefore the legacies sunk into the estate, and were applicable to pay debts, &c. In that case, the estate was greatly embarrassed, and there was no tittle of any thing left. The point was not very fully argued, and there was no appeal. Reliance was placed on one authority, that of Taylor's Elements of Civil Law, (429.) (See also Cooper's Justima, 411.) by which it is laid down that, by the civil law, slaves could not take property by descent or purchase; which was considered to be the law of this country.

Mr. King, in his argument for defendant, in the case we are now considering, contended that the argument laid down by Tay-

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*lor, is not sustainable unqualifiedly by the authorities, and that even if the slave legatee cannot hold for himself, he may take and hold for his master—and that would be sufficient to defeat the plaintiffs, and it would be for the master afterwards to decide what use he would make of his advantage. There is certainly considerable difficulty in this, and other questions which arise out of the condition of slaves. Our statute considers them as chattels, yet, in many cases, they are treated by our laws as persons, and reasonable persons accountable for their actions. They are punished for crimes, which chattels could not be. It is their equivocal condition, which creates the difficulty. It was argued, that by the civil law, persons capable of being executors, are alone capable of being legatees, (Domat, 143,) and that slaves cannot be executors by our law. This is true. But I am not sure that the civil law rule would apply in all respects to the condition of our

slaves; at least I would not venture to pronounce upon it until the case arose, and it was fully argued. I am rather inclined to think that the will of the testator can be carried into effect in this case, without deciding the refined questions which have been made in the argument. I put out of the case the directions, as to the personal property, because it was stated and understood that the personal estate would scarcely do more than pay the debts, and the legacy of one hundred dollars to the relations of testator. The real estate is directed to be sold, and the proceeds vested in stock, and the interest to be appropriated to the support of the testator's son and daughter, at the discretion of the executor. The direction to sell the estate is not against law. The direction to invest the amount of sales is not prohibited. Is it against law to direct the executor to apply the income to the support of two slaves? There is no direct prohibition by any statute; it is only by inference from their condition, that such prohibition can be presumed to arise. But suppose the testator had directed the executor to expend one hundred dollars annually, in support of a favorite old horse, for past service, would not the executor be justifiable in doing so? Would he not be bound to do so, in order to give effect to the will? If he did it, and the charge appeared in his accounts, could his distributees or residuary legatees legally object to it? I think not. Upon the whole therefore, I am of opinion the executor may, and ought to give effect to the will in this case, and that the

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plaintiffs *claiming to be distributees, are not entitled to call the executor to account for performing the will of the testator on this subject. The owner of the slaves is not before the Court; and if she has rights, they are not now in question.

It is therefore Ordered and decreed, that the bill of the plaintiffs be dismissed, but without costs. I would desire that an appeal should be made.

The plaintiffs appeal from the decree of the Chancellor, upon the following grounds:—

1. That by the laws and statutes of this State, no slave is capable of acquiring a title, either at law, or in Equity, by descent, or by purchase, to any property, real or personal.

2. That the bequest and devise to the slaves, John and Elizabeth, in the present case, are null and void, by reason of their incapacity to take; and that the property thus disposed of, is distributable among the plaintiffs, as next of kin.

3. That as a slave is incapable under our laws, of acquiring a title to property, the owner of the slaves in the present case cannot be permitted to claim a title through the said slaves.

4. That the civil law on the subject of slavery, is not the law of this State; that this subject is under the exclusive regulation of our own statutes, and that the decision of the Chancellor in the case of Walker v. Bostick, in 4 Eq. Rep. 266, is in strict accordance with the laws and policy of this State.

5. That if by possibility, said bequest and devise could be allowed to take effect, it would be only as to the income from the residue, during the life of said John and Elizabeth, and at the expiration thereof, the property itself would pass to the plaintiffs.

6. That the negro John, if purchased by the executor, will constitute a portion of the testator's estate, and be distributable among the plaintiffs, as the next of kin.

Finley, for the appellants. The devise to the testator's children, who are slaves, is null and void; for a devisee must be a person known in law, and capable of taking. Slaves are not recognized by our laws, as having any rights, and they are incapable of taking and holding property. Walker v. Bostick, 4 Eq. Rep. 266.

Is that case law? On this question, we

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must look only to our own *peculiar code, differing both from the civil and common law, in many particulars. The civil law which recognized the condition of absolute slavery, may be looked to for explanation, but it is not binding as authority. The Act of 1740, P. L. 163, declares slaves to be chattels personal "to all intents, purposes, and constructions whatsoever." How then can a chattel have rights, or hold property? Or how can a slave enforce his right? He is incapable of maintaining a suit. Is there any authority for exempting a slave from the general disability, which his character of a chattel imposes? There is none. For some purposes, they are regarded by the Act of 1740, and other statutes, as persons—that is, in relation to crimes,—their moral responsibility is recognized for the safety of society; but as regards civil rights, they are mere chattels. By the civil law, whatever the slaves acquires by bequest or otherwise, belongs to the master. Just. Lib. ii. Tit. ix. § 3, 4. Does this rule become a part of our law? By the same law, a slave could be an executor, 2 Domat, 143. He could make contracts, Just. Lib. iii. Tit. xviii. He could trade, and hold his peculium, Just. Lib. iv. Tit. vii, § 4. The slave of the civil law was a white man, and when emancipated, became a citizen; whilst here emancipation is expressly prohibited, and those already emancipated, are denied many civil rights. The civil law rules have not been adopted in this State; for in the case of Sally, 1 Bay, 258, it was held in opposition to the civil law, that a slave might by her acquisitions, purchase the freedom of another, and the purchase did not result to the use of the master; the same doctrine was held in Gregg v.

Thompson, 2 Con. Rep. 31. The 34th clause of the Act of 1740, subjects property in the hands of a slave to forfeiture. (See also Blake v. Clarke, 3 M'C. 279. It appears then from our statute law, and the decisions of our Courts, that the civil law does not apply here, at least, as having any binding authority. And although the common law was adopted generally, the ancient tenures were excepted; and the doctrine of Villenage does not apply to the condition of slavery here; for at common law, the villein had civil rights against every one except his lord. Coke, Lit. 123, b. 124, a. 118, a. And he might acquire real or personal estate, and if aliened before seizure, the lord could not avoid the sale.

But conceding the devise to the slaves to be valid—can it extend beyond a life estate?

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For they can have neither heirs, nor *executors. And if the executor should purchase John, would he not become the property of the estate? 2 Fonb. 118. When an estate is devised on trusts which cannot be carried into effect, the trusts result for the benefit of the next of kin, 1 Mad. 61; 4 Ves. 433; Morice v. Bishop of Durham, 9 Ves. 399; Gibbs v. Rumsey, 2 Ves. & Beames, 294.

Can the Court sustain the direction to the executor, to maintain the slaves? How is this practicable? Or what right has the executor to interfere in any way with the slaves of another, even by maintaining them? But at a events, the direction cannot extend beyond their lives, and a trust in the fund must then result for the next of kin.—Geiger v. Brown, 4 M'C. 427.

M'Crady, contra. Slaves had long been recognized by our laws before the Act of 1740, but wherever that Act prescribes a rule in regard to them, it is imperative; it does not, however, materially conflict with the civil law in relation to slavery. We have the authority of this Court for saying that the civil law does apply to the condition of slavery in this State, in the case of Wingis v. Smith, 3 M'C. Rep. 400. Slaves are property, and are called chattels in the Act of 1740, but merely as giving character to this species of property, and in contradistinction to realty. The Act was not intended to alter their condition, or to deprive them of any privileges which they had before, except in those particulars enumerated therein. Under the Act, a slave may hold any property, except as there expressly prohibited. And if he cannot hold for his master, what security is there for property? Although chattels, they are human beings, and the objects of benevolence. The master has not absolute dominion over his slave, for he is protected by law in the enjoyment of life.

It does not follow because the slaves cannot maintain a suit to enforce the execution of the trust, that it is void. An outlaw or an alien enemy may be a legatee, notwithstanding he cannot sue. 3 Bos. & Pul. 113. So a legacy to an infant in ventre sa mere is good, although no suit can be brought immediately. To make the trust void, it must appear that it is prohibited by law; and although there may be no one capable of enforcing the trust against the executor, if it be not prohibited, its execution may well be left to himself. Is the trust to maintain the children prohibited? By what law? It may be impolitic, but it is not, therefore, illegal. A trust to support bastard children may be very impolitic, but is

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*nevertheless good, and will be enforced. So of devises to charitable uses, but before the statutes of mortmain they were good.

Slaves are not absolutely incapable of taking property. They may acquire and hold for the benefit of their master. Suppose a slave find money; cannot the master claim it against all the world, except the owner? Suppose a slave saves something from a wreck, cannot his master libel for the salvage? In the case of the brig Ariel, salvage, was allowed to a slave, as a person.

There is no action at law for a legacy. It is given to the executor in trust to execute the testator's intentions, and if these are contrary to law, a trust results in favor of the next of kin.

Cases are cited on the other side to show that if the property be not effectually disposed of, a trust results for the next of kin: but there is no question that the estate here is effectually disposed of, for if the slaves, as such, cannot take, their owner can, and is entitled to the legacy, both by the civil and common law. The civil law has been held to be more directly applicable to their condition; and it is conceded that if it applies to this case, the owner is entitled to the legacy.

King, on the same side. The plaintiffs are citizens of a nonslaveholding State, seeking to entail slavery on the children of their brother. So far, then, as the mere justice of the case is concerned, they have no claims on the Court.

Can the slaves, the children of the testator, take under this will? There is no statutory provision prohibiting them; and the case of Walker v. Bostick, 4 Eq. Rep. 266, is anomalous in its character, and unsupported by authority. As there is no statute, the common law is the only law which can apply to the case.

The Act of 1712, making the common law of force in this State, excepted the ancient tenures. Villenage tenure, therefore, never existed here. Villenage, as a common law status, was made of force here. Villenage regardant was attached to the manor, and was not made of force here. Villenage in gross belongs to the person of the master; and this is the condition of slavery here. What was the condition of the villein at common law? Quicquid acquiritur servo acquiritur domino. —Co. Lit. 116 a. 117 a. 119 a; Smith v. Sta-

pleton, Plow. 435. "All acquisitions of property, real and personal, made by the villein, in whatever way arising, &c, belonged to his

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lord."—Hargrave's notes (161) to *Co. Lit. 117 a. This common law rule is of force in this State as applicable to the condition of our slaves, and the Act of 1740 recognizes it by the exceptions which have been therein made to it. The case of Gregg v. Thomson, 2 Con. Rep. 331, is rather in opposition to this rule, but it excepts the very case before the Court:—"That when it is said that whatever they acquire become their master's, it is meant whatever they absolutely acquired by gratuity, &c. of others." So that this case does not decide that a gratuity to the slave would not be the master's; but only that as to contracts made with a slave, if the master approve, the benefit belongs to the slave.

For the civil law doctrine, see Poth. Civ. Law 24: Taylor's Elements of Civil Law, 429. In the case of Sally, 1 Bay, 260, C. J. Rutledge held, in exact conformity to the common law doctrine, that the acquisition of the villein aliened before seizure by the lord, was good.

The slaves may take the gratuity under the will. Whether they can take more than a life estate, must depend on the will. If they take at all, they take absolutely. The case of Brown v. Geiger does not apply; the estate there, was expressly limited for life. But when it is a general bequest, the estate is absolute. 2 Roper on Wills, 331.

Is not the executor the haeres factus under the will, and authorized to do exactly what the testator himself could have done? Unless there is something in the will to the contrary, the whole property is in the executor. In the Executors v. the Heirs of Radcliffe, the testatrix merely made her will naming her executors without making any disposition of the property; and it was held that he was a trustee for the next of kin: but in this case the executor is directed to take and hold against the next of kin; the implication cannot, therefore, arise.—See Wilson v. Wilson, 3 Bin, 562, opinion of Yates, J.

Grimke, in reply. This case is interesting, both as to the principles of law involved, and the general policy of the State. If the defendant succeed, the decision will endanger the safety of our domestic institutions.

Where are we to find the principle by which to decide this case? It is said, in the common law. What common law? Not that which was adopted in 1712. The doctrine of

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villenage was *then obsolete. Villenage never existed in Pennsylvania, 1 Dallas, 167, and never in South Carolina; and the exploded and obsolete doctrines of the common law in relation to it, have no application to the case. The civil law, as it has come down to us, is a Roman statute of Justinian. We cannot adopt it as our guide, nor be governed by it as authority. The slave, both of the common and civil law, was regarded as having a status in society, in relation to other persons than his master. Not so here. Colour here is prima facie evidence of slavery. Not so in England or Rome. In Rome and Greece the mechanic arts and trade were considered degrading, and committed exclusively to slaves. No such idea is entertained here. As, then, the condition of our slaves is different from that of the villeins of England and the slaves of Rome, and as our customs and policy are widely at variance from theirs, neither the civil law of the one, nor the common law of the other, applies to the state of slavery here. We must look then to our own legislation, founded on our own peculiar policy, in order to fix the condition of our slaves.

In 1683, 1690, and 1696, Acts were passed for the regulation of slavery. The Act of 1740 is a mere recognition of the status of the slave, before and at the time of its passage. Slaves were regarded as bona et catalla, before that time. And so, too, they are regarded by the civil law. By that Act they are declared goods and chattels, "to all intents, purposes and constructions whatsoever;" and this excludes the conclusion that in any point of view, (except where so regarded by statute,) they are to be considered as persons. The Acts of 1800 and 1820, shew that slavery is regarded as a political subject, by imposing restraints on the master in regard to emancipation. The general rule for the guide of our Courts, must be, what will best promote the views of the people as expressed in the legislative enactments in relation to this class of persons. The legislature has fixed the character of the slaves as bona et catalla in every point of view, except where it makes them persons—as in relation to crimes. But in all civil matters they are mere chattels, and the mere agents or instruments of their master. As then the slave has no civil rights, as he is a mere chattel, and as there is no statutory provision authorizing him to take, he is wholly incapable of taking a legacy under a will, either directly or indirectly. In Sally's case, 1 Bay, 360, the deed of emancipation from the master, pre-

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vented a reco*very—not that the slave could acquire property. No one can take through a trustee, who cannot take directly. An alien can take, but cannot hold. In North Carolina this question has been adjudged. It was there held, that a slave cannot take by devise. —Cunningham's heirs v. Cunningham's executors, Cam. & Norwood's Rep. 353; and in the same case, Taylor's Rep. 209, that a devise for the maintenance of a female slave and her children is void. That the condition of slaves does not depend on the feudal or civil law.—see 5 Harris & John. Rep. 190. We must look to our peculiar policy as indicated in our own legislation, and in that we

find, that to interfere with the slaves of another is prohibited. The effect of allowing the devise in this case, would be to render the slaves discontented. It would go further. It would defeat the law against emancipation; for they would become quasi free persons.

As to the will. Will the Court permit the executor to sell the land for an illegal or immoral purpose? As to the personal property, the title is in the executor—a principle originating in the Ecclesiastical law, which vested every thing in the Church for the good of the deceased's soul. In this State the executor is regarded a trustee for the next of kin, the devises failing or there being a residuum undevised. In this case, it was plainly intended that the executor should not take. Frederick Fable is not mentioned in the will, and there can be no conclusion against him. It is the ordinary case of a defective devise: it falls into the residuum and goes to the residuary legatee, or next of kin.

HARPER, J. This is a case, both of novelty and importance, and I have considered it carefully, with reference to the authorities within my reach. On the part of the plaintiffs, it is contended that, under our law, slaves being considered personal chattels, "to all intents, constructions, and purposes, whatsoever," they are absolutely incapable of taking a legacy, and that the bequest to them is absolutely void: or that if a trust is created in their favor, it is incapable of being executed, and the estate must be distributed among the next of kin. On the part of the defendants, it is urged —First, that under the civil law, slaves have capacity to take for the benefit of the master, and that this should have much authority with us, as the state of slavery which existed under that law, was analogous

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to that which exists among us; Se*condly, that if we adopt the rule of the common law in relation to villeins, the same consequence will follow; they had capacity to take, though liable to be divested of the property by the lord: or, Thirdly, that if they are considered incapable of taking, this must be considered a beneficial bequest to the executor, for his own use, the testator having intended him to take the property absolutely and dispose of it at his pleasure, relying only on his friendship and good faith, to dispose of it according to his wishes.

With respect to the civil law, however enlightened and admirable a system of jurisprudence it may be, it is not our law, nor have our Courts any authority to declare it so. Our Legislature has adopted another system of laws. Where our law is obscure or doubtful, it is frequently of great utility in explaining or determining it, more especially as a great portion of our law was derived from that source. But if the common law be clear, we are not authorized to depart from it because the provisions of another system may be better and more suited to our circumstances; nor if it be defective, are Courts authorized to supply the deficiency by drawing from a foreign source. Nor do I think the common law, in relation to villenage, can govern in relation to this matter. The status, the entire civil and political condition of the villein, was, in almost every particular, different from that of our slave. He had a perfect, civil and political capacity, and all the rights of a freeman, against every person but his lord; and, with respect to the lord, the relation was very different from that of the slave to his master.—Co. Lit. 123 b; and see the note G. to Thomas' edition, 1 vol. 421.

Though Coke seems to refer the origin of all servitude to captivity in war, yet we know that it often originated in voluntary contract; and I apprehend that the essential distinction between villenage and slavery, is, that the former was supposed, at least in theory of law, to have thus originated. I have no doubt but that, very anciently among the Saxons, perfect slavery existed, such as now exists among us, but this appears to have been much modified by the feudal system.—Blackstone seems to favor this supposition—2 Com. 92. "Under the Saxon government, there were, as Sir William Temple speaks, a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, and their children and effects, to the lord of the soil, like the rest

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of the cattle or stock upon it. *These seem to have been those who held what was called the folk-land, from which they were removable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable that they, who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate, superior to downright slavery, but inferior to every other condition." Reeves, in his History of the Common Law, states that the tenure of villenage was established by the Normans—2 vol. p. 39, c. 2. Mr. Hallam, in his view of the state of Europe during the middle ages, in allusion to the ancient state of slavery, says, that "in England it was very common, even till after the conquest, to export slaves to Ireland, till in the reign of Henry II. the Irish came to a non-importation agreement, which put a stop to the practice." He has also a curious note on the same subject.

If villenage was supposed to be a species of tenure, originating, as all other tenures did, in voluntary agreement, the villein con-

senting to serve in consideration of support and protection, will explain why he was regarded as a freeman with respect to every other person than his lord, and even with respect to him had reserved some privileges. Very different was the condition of the captive taken in war. Lord Coke says, Co. Lit. 1, 16 b., "Fiunt etiam servi liberi homines captivitate de jure gentium, and not by the law of nature, as from the time of Noah's flood forward, in which time all things were common to all, and free to all men alike, and lived under the law natural, and by multiplication of people, and making proper and private those things that were common, arose battles. And then it was ordained by the constitution of nations, that none should kill another: but that he that was taken in battle, should remain bond to his taker forever, and to do with him and all that should come of him, his will and pleasure, as with his beast or any other chattel, to give, or to sell, or to kill, &c. &c." We know that in point of fact, African slaves were generally captives taken in war. After the practice of enslaving prisoners of war was abandoned in Europe, the captor was supposed to have a property in his prisoner, for the purpose of enforcing a ransom. At a later period, prisoners of war were at the disposal of the State.

I think that the true state of the slave

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must be ascertained by *reference to the disabilities of an alien enemy, in which light the heathen were anciently regarded; though certainly modern humanity, the progress of opinion, and positive legislation, have greatly modified their condition. In Calvin's case, 7 Co. p. 33, after speaking of the condition of alien friends, it is said, "but if this alien become an enemy, (as all alien friends may,) then he is utterly disabled to maintain any action, or get any thing within this realm. And this is to be understood of a temporary alien, that being an enemy may be a friend, or being a friend may be an enemy. But a perpetual enemy (though there be no wars by fire and sword between them) cannot maintain any action, or get any thing within this realm. All infidels are in law, perpetui inimici, perpetual enemies, for the law presumes not that they will be converted, that being remota potentia, (a remote possibility,) for between them, as with the devils, whose subjects they be, and the christian, there can be no peace, for as the Apostle saith, 2d Cor. 6, 15, Quæ autem conventio Christi ad Belial, aut quæ pars fideli cum infideli, and the law saith, Judæo Christianum nullum serviat mancipium, nefas enim est quem Christus redemit blasphemum Christi in servitutis vinculis detinere. Register 282. Infideles sunt Christi et Christianorum inimici. And herewith agreeth the book in 12. H. 8, fol. 4, where it is holden, the Pagan cannot have or maintain any action at all. [Quære.]

"And upon this ground, there is a diversity between a conquest of the Kingdom of a Christian King, and the conquest of the kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath vitæ et necis potestatem, he may at his pleasure alter and change the laws of that kingdom, but until he doth make an alteration of those laws, the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjugation, there ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and nature contained in the decalogue, and in that case, until certain laws be established among them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kings in ancient times did with their kingdoms before any certain municipal laws were given, as before hath been said, that is to say, they have no law but the King's pleasure."

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*I am perfectly aware that this law has been denied, and in Omychund v. Barker, 1 Atk. 42, in the opinion of the lord chief Baron, it is said that the enmity of heathens is to be understood of spiritual discord only. He refers to Salk. 46, where is quoted from Sir Edward Littleton's readings on the statute 27, Ed. 3, "Turks and infidels are not perpetui inimici, nor is there a particular enmity between them and us; but this is a common error founded on the groundless opinion of Justice Brooke; for though there be a difference between our religion and theirs, that does not oblige us to be enemies of their persons; they are the creatures of God, and of the same kind that we are, and it would be a sin in us to hurt their persons."

It is not necessary to vindicate the humanity of lord Coke's doctrine, nor its conformity to the spirit of christianity; but that such was the law, not only of England, but of all Europe, he is supported by the most notorious facts, and the practice not only of the English government, but of all the nations of Christendom. Upon this natural enmity of the heathen was founded the claim of the Pope, as God's vicegerent upon earth, to parcel out the countries inhabited by heathens, among the governments of Europe. This was derived no doubt from the commands given to the Jews in the Old Testament, to drive out, extirpate, and enslave, if they could not convert, the heathen nations inhabiting the countries which they (the Jews) were to inhabit, and which commands were supposed to be of general obligation, and to apply to Christians. On this principle, the Spaniards took possession of

the countries in America, and enslaved their inhabitants. In Irving's life of Columbus, vol. 2, book viii. chap. 5, after speaking of the first Indians sent as slaves by Columbus to Spain, the author adds, "the customs of the times, however, must be pleaded in his apology. The precedent had been given long before, by both Spaniards and Portuguese, in their African discoveries, where the traffic in slaves formed one of the greatest sources of profit. In fact the practice had been sanctioned by the highest authority, by that of the church itself, and the most learned theologians had pronounced all barbarons and infidel nations who shut their ears to the truths of Christianity as fair objects of war and rapine, of captivity and slavery."

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Bryan Edwards, in his History of the *West Indies, quotes the bull of the Pope, by which the traffic in African slaves was first sanctioned. I refer also to Hallam, to shew that the traffic in slaves was common over the whole of Europe. The practice of the English government was of the same sort. They took possession as owners of all the countries discovered by them, inhabited by heathens, and we know that in all the colonies of North America, many of the natives were enslaved. On this enmity of the heathen and their destitution of all civil rights, rested the king's right to grant the lands inhabited by them. Though some of the proprietors did make treaties with the nations, and give them a compensation to induce them to relinquish the possession of their lands, yet this was merely a matter of policy or humanity; the title of the proprietors was considered perfect without this. Spain, and I believe France, to the latest period of their having colonies in America, granted to individuals, any portion of the land occupied by the natives, which it was thought expedient to grant, without any treaty with or compensation to them. But it is unnecessary to multiply facts which are perfectly known to any one having the slightest acquaintance with history. At the very moment which the judgment in Omychund v. Barker was pronounced, and that in Ramkissenseat v. Barker, 1 Atk. 51, where the plea of alien infidel was summarily overruled by lord Hardwicke, the English government was notoriously acting on the principles of the doctrine laid down by lord Coke, through the whole of its American colonies. The lawfulness of the African slave trade, which was then and long afterwards protected and encouraged by the government, was a consequence of the same doctrine. I apprehend that the decisions in the cases to which I have referred, and likewise that in Somerset's case, notwithstanding the ingenious argument of Mr. Hargrave, were founded rather upon a consideration of what was due to modern civilization and humanity, than upon the ancient law of England. Sir Thomas Grantham's case, 3 Mod. 120, sustains these views, where an Indian had been exhibited as a show for profit, upon his being baptized a homine replegiando was bought; and in Wells v. Williams, 1 Lord Raym. 282, it seems to be admitted that the law in relation to infidels had been changed.

The Court said, "that the necessity of trade has mollified the too rigorous rules of the old law in their restraint and discour-

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*agement of aliens. A Jew may sue at this day, but heretofore he could not, for then they were looked upon as enemies. But now commerce has taught the world more humanity; and therefore an alien enemy commorant here by license of the king, and under his protection, may maintain debt upon a bond, though he did not come with safe conduct." I by no means contend that our law now is generally as laid down by Coke; it has been altered by opinion, by the decisions of the Courts, and by legislation. I suppose that an alien enemy now permitted to reside in the country, would be considered under a safe conduct and protected in person and property. I suppose that it would be unlawful to enslave, and might be murder to kill one of our native Indians, but in considering the status of our slaves, it is necessary to refer to the origin of our relation to them. It is plain that all our practice and legislation respecting them has had reference to their ancient status.

First, the Act of 1711 supposes the disabilities of slaves to be founded on their infidelity, and it was thought necessary to provide that by being baptized they should not be thereby emancipated, but continue slaves as before. The Act of 1740 declares that they shall be reputed and adjudged in law, to be chattels personal in the hands of their owners and possessors, and their executors, "administrators and assigns," to all intents, purposes, and constructions whatsoever."

On the notion of their being public enemies, who could have no redress for any personal injury, it provides a penalty for any person who shall beat, bruise, wound or maim a slave, and likewise for the payment of damages to his master.

It provides for punishing the murder of a slave, in terms which very clearly indicate that without such provision it would be subject to no punishment.

On the same notion of their being public enemies, not responsible to the civil laws, it provides generally, that a slave committing an act which would be felony in a free white person, shall suffer the same punishment.

It does not disable slaves from giving testimony against a white person, but taking their incompetency for granted, it positively enables them to give testimony against oth-

er slaves. These views may perhaps help to explain some of the difficulties and anoma-

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lies *which have been supposed to exist in the condition of this class of persons. They may furnish an answer to the difficulty suggested in argument, that a slave, for many purposes, may be the agent of his master, which could not be if he were regarded as a chattel to all intents and purposes. He is an intelligent human being, through whom the master's mind may be conveyed.—Through him the master may propose or accept a contract, being capable of acting as his master's agent. This explains the condition of our Indians in many respects. Laws are made for their protection out of humanity; they are treated with, and compensation is made to them for such lands as they may surrender to the use of the whites; but in theory of law they are regarded as having no title to their lands, and only occupying them at sufferance. It explains, too, why, though born and living under our territory, they may make war upon the United States without being guilty of treason. Being regarded as public enemies, they owe no allegiance, and are therefore incapable of treason.

The difficulty suggested in case a slave finds a jewel or any other article of value, that it might be seized by any person who should find it in his possession as if it should be found hanging in the fleece of a sheep, does not, I think, exist. He is an intelligent being, capable of taking and intending possession. The law, however, declares him a chattel personal, which is supposed to attend the person of the owner. His possession is, therefore, referred to the master, and on that possession the master might maintain trover against a stranger who should take an article so found from his slave. So, if land were conveyed to a slave, the master, by parity of reasoning, would be seized of that land—(an alien enemy is not disabled to take land by purchase)—being declared by statute a chattel personal in his master's possession, his seizure or possession must be referred to the master.

It would seem to follow, however, from these principles, that in case of land conveyed to a slave, the master would not take for himself, but only until office found for the State. I know not how to arrive at any other result. An alien cannot hold land; nor could he grant, convey or lease the land.—Co. Lit. 42 b. Com. Dig. Tit. Alien C. 4. So it is of alien enemy's choses in action. "No alien enemy shall maintain any action, real, personal or mixt." Co. Lit. 129, a. Com. Dig. Tit. Alien. C. 5. "So if an alien enemy

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*take a bond, the king shall have it."—Com. Dig. Tit. Alien, C. 2. "Choses in action belonging to alien enemy are forfeited to the crown, but there must be an inquisition to intitle; and a peace before the inquisition, discharges the causes of forfeiture." In the case of inimicus perpetuus, however, there can be no peace. An alien enemy is not disabled to take lands, though he holds only until office found. He is not disabled to take personal property in possession, but there is no provision by law for an inquisition by which this shall be vested in the State. By the old law, an alien enemy had no civil rights, and if any one had taken away property found in his possession, there would have been no remedy. He could maintain no action. But, as I have said, the possession of the slave is the possession of the master. If one, having good title to personal property, should transfer it into the possession of a slave, this transfer would not be void; the title would be changed, but the title and possession must be referred to the master. Whatever chattels the slave acquires, he acquires for his master, and the master might maintain an action for them in the hands of a stranger. But an executory contract made with a slave cannot be enforced. No action could be maintained on a bond or note given to a slave. Neither master nor slave could maintain an action against the executor for the legacy given in this case, and it should seem that it might be escheated to the State in the hands of the executor.

It remains to inquire whether this can be regarded as a personal bequest to the executor, giving the property beneficially to him, and only depending on his friendship and good faith to deal with it as the testator recommends. I have no doubt but that, as observed by the Chancellor in his decree, there might be a legacy to support a favorite horse. This, however, would not be a trust for the horse, who is incapable of being a cestuique trust. It would, I apprehend, according to the terms of it, be either an absolute bequest to the legatee, depending on his good faith to carry into effect the testator's wishes, or it would be regarded as a condition annexed to the bequest. Though such legacies must have often occurred and are spoken of as familiar—"Die and endow, a college or a cat,"—yet in the examination I have been able to make, I have found no case of such an one. It would, I suppose, be similar to the class of legacies spoken of by

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Domat. 2 vol. book 3, *Tit. 1, Sec. 8, vii. Treating of conditions and charges annexed to a legacy, he says, "And in fine it is said of a legacy destined for some purchase or some work, that it is left with this charge or upon this condition, that the said purchase or work be made or done by him who is charged with it." He observes, that "it depends on the terms of the bequest, whether the charge does or does not amount to a

condition;" and in the same section, xxv. he adds, that in such cases "Provision ought to be made for the security of the person interested, according to the nature of the condition, whether it be by the bare submission of the person on whom the condition is imposed, or otherwise, according to the circumstances." Perhaps in case of such a condition, our Courts might require security for the performance of it, as in Aston v. Aston, 2 Vern. 452, where a legacy was given on a condition subsequent, the Court required security to refund, in case of the condition broken. I suppose, if a testator should give a slave bona fide and beneficially, to his legatee, he might give something more to add to his comforts or to maintain him, if he were past labor. Let us see if this was a legacy of this character. It is to be observed that there is no direct bequest to the executor at all. The will first, after legacies, gives the whole of the estate directly to the two children, who are slaves. Then follows the direction that the real estate shall be sold, and the proceeds invested in stock, the interest to be applied to the support of the children, at the discretion of his executor, whom he appoints their guardian. Is this a bequest to the executor in any way? We may infer that the stock was to be purchased in the name of the guardian, by conjecturing that the testator supposed that the slaves could not hold in their own names. But this is not the effect of the terms of the will. He first gives them the whole estate directly, and then directs the proceeds of the real estate to be invested. The natural construction is, that it is to be invested in the legatees' names; that it is applied at the discretion of the executor—that he is appointed guardian, can make no difference. If the legatees were free white children, there would be no doubt at all that it would be a direct bequest to them. The testator knew that guardians were appointed for free negroes, and probably supposed that our laws regarded such persons as being in a state of perpetual minority. We cannot conjecture that the testator supposed them to be in-

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capable of *taking directly. Only the proceeds of the real estate are directed to be invested. There is no disposition of any thing else but the direct bequest to them. The personal estate is said to be very trifling; but if there be any thing at all, or if the testator supposed there was any thing, it rebuts the conjecture that he supposed them to be incapable of taking directly. Then follows the direction to purchase the son, John. Here, I suppose that the purchase was intended to be made, and the title taken, in the name of the executor. But it is plain that he was to purchase as executor, and that no personal benefit to him was intended. Purchased with the funds of the estate, he would become part of the estate. But the whole estate is given to the children. The meaning of this is, that John should be held by the executor as a slave, and be under his control; but that if he labored, he should enjoy the proceeds of his own labor. He is to be held by the executor in trust for himself; he is to have the use of himself. It is an attempt in effect to evade the law of the State forbidding emancipation, a law, I am persuaded, however harsh it may appear to those who have no opportunity of forming a judgement on the subject, is founded on principles of true humanity as well as just policy. With respect to the rest of the estate, as I have observed, there is no trust at all. With respect to John, there is a trust for his own benefit. In Morrice v. the Bishop of Durham, 9 Ves. 399, 10 Ves. 522, where a legacy was given to the defendant, in trust, to be disposed of "to such objects of benevolence and liberality," as he (the Bishop of Durham) should most approve of, it was held that the Bishop could not take for his own use, and that as the trust was too indefinite to be executed by the Court, a trust resulted for the next of kin. The rule is laid down by Lord Eldon, 10 Ves. 536. "I understand a doubt has been raised in the discussion of some question, bearing analogy to this, in another Court; how far it is competent to a testator to give to his friend his personal estate, to apply it to such purposes of bounty, not arising to trust, as the testator himself would have been likely to apply it to. That question, as far as this Court has to do with it, depends altogether upon this; if the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be on this ground, accord-

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ing to the authori*ties; that the testator did not in earnest create a trust; but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and discretion, whether to make the application or not, it is absolutely given." And again, p. 537, "If he gives upon trusts hereafter to be declared, it might perhaps have been as well to have held, that if he did not declare any trust, the person to whom the property was given should take it. If he says he gives in trust, and stops there, meaning to make a codicil or an addition to his will, or where he gives upon trusts which fail, or are ineffectually expressed, in all those cases, the Court has said, if upon the face of the will there is declaration plain, that the person to whom the property is given, is to take it in trust; and though the trust is not declared or is ineffectually declared, or become incapable of taking effect, the party taking shall be a

trustee; if not for those who were to take under the will, for those who take under the disposition of the law." In Gibbs v. Rumsey, 2 Ves. & B. 294, after giving part of her estate to trustees, upon certain specific trusts, the testatrix gives the residue to the same trustees, (by name,) "to be disposed of unto such person or persons, and in such sum or sums of money as they in their discretion may think proper and expedient." In that case, from the uncontrolled power of disposition given to the trustees, it was inferred that the intention was to give to the trustees beneficially for themselves. But in all the cases on the subject, the question is of the intention to give to the trustee for himself. But, in the case before us, there can be no doubt of the intention, that no benefit was intended to the executor. There is declaration plain on the face of the will, that the slaves were the only objects intended to be benefitted.

From the views I have taken, however, the plaintiffs are not entitled. The bequest to the slaves is not void, on the principles before examined. A chose in action given to alien enemy is not void, though while alien enemy he can maintain no action upon it. A trust created in favor of an alien enemy, is not incapable of being executed. "If an alien enemy purchase a copyhold or land in

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*the name of another, in trust for himself and his heirs, the king shall have it." "But if an alien purchase in the name of a trustee, the king cannot be entitled by inquisition, for the estate at law is in the trustee, not in the alien. But he must sue in Chancery to have the trust executed."—Com. Dig. Tit. Alien. C. 3. I do not say what the effect would be if the executor should think proper, of his own accord, to pay over the legacy to the slaves, or their master. But remaining in his hands, it is subject to the claim of the State.

The Chancellor's decree must be therefore affirmed, and the bill dismissed, but without costs.

JOHNSON, J., and O'NEALL, J., concurred.

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2 Hill, Eq. 401

[This case should have preceded the last, but was accidentally misplaced.]

STALLINGS and WIFE v. JACOB FOREMAN, Administrator of Isaac Foreman.

(Columbia. Dec., 1835.)

[*Executors and Administrators* ⊂⊃365.]

An adm'r selling the personal estate of his intestate under the order of the Ordinary, is allowed to become a purchaser, when he sells fairly and pays the full value. Therefore a purchase of a slave by an administrator at his own sale, under an order of the Ordinary at a fair price and without fraud was sustained against the bill of the distributees seeking to set it aside.

[Ed. Note.—Cited in Lay v. Lay, 10 S. C. 218.

For other cases, see Executors and Administrators, Cent. Dig. § 1500; Dec. Dig. ⊂⊃365.]

[*Executors and Administrators* ⊂⊃144.]

The cases in this State, as to purchases by executors, administrators and other trustees, at their own sales, reviewed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 579–584; Dec. Dig. ⊂⊃144.]

[*Executors and Administrators* ⊂⊃144.]

On a review of the rights and liabilities of executors and administrators at common law and under our acts of Assembly, it seems they may acquire their testator's or intestate's property, provided the sale is fairly made under the authority of the will or the order of the Ordinary, and that the price is the true value of the property.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 579–584; Dec. Dig. ⊂⊃144.]

[*Executors and Administrators* ⊂⊃144.]

The reason of the rule which avoids the purchases at his own sale of a trustee to sell, does not apply to executors and administrators; and those entitled by law to administration, would often decline it if prevented from buying.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 579–584; Dec. Dig. ⊂⊃144.]

Barnwell—February 1835.

De Saussure, Chancellor. The bill is filed against the administrator, for an account and settlement of the estate of the intestate, Isaac Foreman. The single point made and argued in this case, is whether the purchase of a slave, named August, made by the defendant, Jacob Foreman, administrator of Isaac Foreman, at a sale of property of the estate of his intestate, authorized by the Ordinary at the instance of the administrator, shall be set aside at the instance of the plaintiffs, who are entitled to a distributive share of the estate. It appears that the slave, August, was, at the time of the purchase by the defendant at his sale as administrator, a boy somewhere about twelve years of age, and capable of being a plough boy. He has since grown up, and is a very valuable servant, and his hire for his annual services, put by the testimony at a high rate, is far indeed beyond the amount of the annual interest of the price at which he was purchased by the

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defendant; *not less, indeed, than three or four times the amount of the interest. The defendant contends that the sale was authorized by the Ordinary, and therefore regular and good; that it was fairly conducted, and that he bid a fair price, viz. $350, which was not only the just value, but a very high price; that he was at liberty to purchase at the sale, and that he is entitled to hold the said slave under his purchase, and to account accordingly for the price and interest thereon. It is admitted, on the part of the plaintiffs, that the sale was authorized by the

Ordinary; but it is contended that the sale was unnecessary, and that the purchase of the slave, August, by the defendant, the administrator, Jacob Foreman, at his own sale, was void, and vested no property in the defendant, who is required to deliver up the slave, and to account for his hire. That the sale was authorized by the Ordinary, who has the power, is sufficient for this Court, unless fraud be shewn in procuring the order. There is nothing in the evidence to lead the mind to the belief that the sale was unfairly conducted, or that any advantage was taken by the defendant to obtain the said slave, at a price below his full value; and I think that the weight of evidence establishes that the sum of $350, which was bid by the defendant, was not an unfair or short price for a boy of about twelve years of age. The question, then, is really reduced to the simple point, whether a purchase, made under such circumstances, should be sustained by the Court, for the administrator who purchased; or set aside, at the instance of the plaintiffs, who are entitled to distributive shares of the estate. It is unnecessary to go into the history of the changes which the doctrine has undergone of the authority of executors and administrators, to sell the property of the estate in their hands, at their discretion, or to take it at their appraisement. These powers have been controlled and regulated by statutes founded on experience of the danger of trusting such powers in the hands of men, who might be tempted to abuse them for their own advantage, to the prejudice of persons who are generally widows or minors, and incapable of taking care of their interests. The authority to take the estate at an appraisement, has been abolished, and the power to sell has been taken from executors and administrators, and transferred to the Ordinary; a confidential officer of the government, who may grant or refuse authority to sell, according to his judgment of the propriety of the application of the executor or

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administrator. Notwithstand*ing these wise provisions of the statute, it was found that abuses existed; and that some executors and administrators and trustees, availed themselves of the advantages of their position of sellers, with the power to manage and control the sales, to become purchasers at their own sales, at a price below the real value of the property put up for sale. To check these abuses, the Courts have been obliged to interfere, and in many cases, to set aside purchases thus made, in order to protect the interests of women and children. This has given rise to a good deal of controversy, as to what cases the Court would interfere in. It has been held that the only safe rule would be to deny altogether the right of executors, administrators and trustees, to become purchasers under any circumstances, and to declare them all void. This however has been considered too strong a course, and even injurious to the estates, as it might prevent these functionaries from interposing their bids to prevent low sales to other persons, and to diminish the circle of competition. The decided cases fluctuated for some time. There was great uncertainty and division of opinion among the judges, as may be seen in the cases of Drayton v. Drayton, 1 Desaus. Eq. Rep. 557, and M'Guire v. M'Gowan, 4 Desaus. Eq. Rep. 486. Many other decisions followed, which were made to turn mainly on the ground of fairness in obtaining authority to sell, correctness in conducting the sales, and fulness of prices bid by the executors and administrators. The abuses were so flagrant and frequent, that there was a strong disposition to declare such purchases void. But the opinion prevailed that they should be held to be only voidable; depending on the circumstances of fairness and propriety and price, in each particular case. This was a pretty good check, but not entirely effectual, because in many cases it was difficult to detect and bring to light the arts and contrivances by which sales were made and purchases at low prices or doubtful prices were obtained. The later decisions appear to me to have settled down on the proper ground. That purchases made by executors, administrators and trustees, at their own sales, were not absolutely void, but voidable —for impositions in obtaining orders for sales without necessity by misrepresentation of the situation of the estate, or fraud and contrivance in conducting the sale, or management in obtaining the property at low and inadequate prices. And finally, one other protection was added, that the persons interested, who thought themselves aggrieved

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by the purchases by executors, &c, *should be at liberty to avoid the sale by dissenting from the same, unless they have done some positive act by which they have given up or abandoned their right.

This renders the guard against abuses complete; for persons in fiduciary situations will not be apt to make purchases at low rates, or even moderate prices, when they know that if ultimately the purchase turned out advantageously for them, they would assuredly be avoided; but if disadvantageously, they would remain bound. In the case of Edmonds and others v. Crenshaw & M'Morris, 1 M'C. Eq. Rep. 252, 260, it was laid down broadly, that the executor's purchase at his own sale was void, and the slave purchased was still the property of the estate. —See also 2 John. Ch. C. 252. In Wiggin's case, 1 Hill's Eq. Rep. 353–4, decided 1833, Chancellor Johnston stated the rule to be, "that according to the decided cases, a trustee to sell cannot purchase whether he is a party interested or not. If he sells, the sale will be set aside, or he will be held to the purchase as of course, at the option of the

parties interested; and as the rule forbidding such purchases is one of policy to prevent fraud, when there is no possibility of proving it, the inquiry is never made whether the sale is or is not advantageous." This was putting the decision on the broadest ground. Judge Harper, who delivered the unanimous opinion of the Court of Appeals, concurred fully with the Chancellor in his expressions. It is true, that in the Court of law the doctrine has not been carried so far, or has been somewhat modified; yet substantially it has been supported by the decisions. In the case of Trimmier v. Trail, 2 Bail. Rep. 480, decided in 1831, the Court decided that an administrator, having an interest in the estate, may purchase to the extent of his interest; and a purchase, by an administrator not entitled to a share of the estate, is not necessarily void, but may be confirmed or set aside at the election of the parties interested in the estate. These doctrines apply to all persons acting in fiduciary stations, executors and administrators, as well as those more technically called trustees. In this case, therefore, although the purchase made by the administrator, who had no interest in the estate, does not appear to have been made fraudulently or at a low price, I feel bound to declare it null and void, because the plaintiffs entitled as distributees, have by their bill signified their option that the sale should be set aside.

It is therefore Ordered and decreed that

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the purchase be set *aside and avoided; and that the defendant should deliver up the slave in question, named August, for distribution, and that in accounting before the Commissioner, as he is hereby ordered to do, for the rest of the estate, he account for the hire and labor of the said slave.

Patterson, for the appellant.
Elmore, contra.

O'NEALL, J. The naked question in this case, is whether an administrator, selling the personal estate of his intestate, under the order of the Ordinary, can be allowed to become the purchaser, when he sells fairly and pays the full value? I think he can; and that in this respect executors and administrators constitute an exception to the rule that "a trustee to sell cannot purchase."

On tracing this question through the various cases decided, it will be found that no decision against this position has been made. In the earliest case which can be found, that of Drayton v. Drayton, 1 Desaus. Eq. Rep. 557, 567, the Chancellors, Matthews and Rutledge, decided the very point, in exact conformity to what I conceive to be both law and equity. Speaking of a purchase made by G. Drayton, one of the testator's executors, at the sale of his estate, they say:—"As to G. Drayton's purchase at the sale of the testator's estate, we consider it in the same light as that of any other individual; there is no law which prohibits an executor purchasing (without fraud) any property of his testator, at open and public sale." This was in 1797, and until M'Guire v. M'Gowan, 4 Desaus. Eq. Rep. 486, (in 1814) the country remained quietly under the rule settled by the case of Drayton v. Drayton. In that case the precise question now before the Court did not arise; the defendant was the husband of the administratrix, and guardian ad litem of the minors in a proceeding in partition in the Common Pleas, in which the land of the intestate was ordered to be sold, and of which at the sale made in pursuance of the said order, he became the purchaser. It was held by a majority of the Court, that his purchase was valid. In 1817, in the case of Perry v. Dixon, reported in a note, 4 Desaus. Eq. Rep. 504, note the question was made, whether an executor's purchase, at his own sale, was good? The Court, without adverting to Drayton v. Drayton which was a direct decision of the point arising in the

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case, and thus constituted a rule (as I *can conceive) for their government, decided the case as one of novel impression. Chancellor Waties, holding that an executor, as a trustee to sell, could not be allowed to purchase at his own sale, Chancellor De Saussure said "he was not prepared to go the whole length of the principle" laid down by Chancellor Waties: "that would (he said) exclude executors and administrators from purchasing on their own account, at sales of the estates under their charge, in any case whatever, and thus place them entirely on the footing of mere trustees." "Perhaps a wise policy would place them on that footing, where they had no interest; but where they have an interest in the property, it would seem to be too severe a rule to prohibit executors and administrators from purchasing at such sales, at least to the extent of their interest." Chancellor James concurred in the principle maintained by Chancellor Waties—Chancellors Gaillard and Thompson dissented, and were for reversing Chancellor Waties' decree. From this time to 1824, there were a variety of cases involving in a greater or less degree, the principle maintained by Chancellor Waties, in Perry v. Dixon; but in none of them did it receive the sanction of the Court. In the case of Bullock v. Williams and wife, not reported, the purchase made by Mrs. Williams, who was the administratrix of her former husband, at her own sale, was attempted to be set aside, and was supported by the Circuit Chancellor, on the ground of its fairness. That decree was affirmed by the Court of Appeals, or acquiesced in by counsel thoroughly acquainted with the cur-

rent of decisions. So far as I am aware, the question, divested of circumstances of actual or legal fraud, has not presented to the Court of Appeals since 1824. In Edmonds v. Crenshaw & M'Morris, 1 M'C. Eq. Rep. 252, it was adjudged by Chancellor Thompson, that the purchase of the executor, M'Morris, at the sale made by himself and his co-executor, was void, and his decree was affirmed by the Court of Appeals. But in that case, the defendant, M'Morris, never complied with the terms of the sale, and was, from insolveney, incapable of paying the price at which he made the purchase, at the time the decree was pronounced. So that that decision can be maintained upon other principles: and I know that the recovery was not rested by the plaintiffs upon the abstract principle of equity, that a trustee to sell is not allowed to buy at his own sale. In Trimmier v. Trail, 2 Bail. 484, I indicated my opinion on this question:

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and as I am *about giving utterance to that opinion, more formally and authoritatively, it is not necessary to take any more specific notice of that case. In Ex parte Wiggins, 1 Hill's Eq. Rep. 353, my brother Harper, with the concurrence of the whole Court, laid down the rule, that the purchase of a trustee to sell was voidable on the application, and at the instance of any of his cestuique trusts. On looking into that case, it will be seen it was a sale and purchase by an assignee: and does not therefore conclude the exception now insisted on, in favor of executors and administrators. After this review of the adjudications in this State, it will be seen that the case of Drayton v. Drayton, has never been reversed; and that on the score of authority, the exception for which I contend is made out.

But independent of this, it is enough for my purpose, that in establishing a principle of law, I am not guilty of the unpardonable sin (as some seem to think it) of reversing some ill-advised and hasty opinion of our own, or of our respected predecessors.

In Perry v. Dixon, Chancellor De Saussure, with his usual good judgement, thought that executors and administrators ought not to be put on the footing of mere trustees: and I hope to be able to demonstrate, that so far as the question before us is concerned, they are not, and they cannot be so regarded.

At common law, an executor or administrator is the legal owner of the goods and chattels of the testator or intestate; and before 1824, he could legally dispose of them to another, without even the order of the Ordinary. The goods and chattels of the testator, after the payment of debts and legacies, were formerly, both at law and in equity, the property of the executor. So too, an administrator, by paying the debts and the shares of the distributees, without even a sale, would, in England, have made the goods of the deceased his own. In England, and in this State, until 1745, P. L. 202, the executor or administrator could only be called on to account for the appraised value of the testator or intestate's goods. This was the only standard by which creditors, legatees or distributees, could charge him. To the goods themselves, if aliened or wasted, they had no right: and until 1745, executors or administrators might lawfully take the goods as their own, at the appraised value. In 1745, the legislature recited, that "Whereas a custom hath too much prevailed among executors and administrators, of taking estates or some parts thereof, at the ap-

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praisement, when such appraisement *hath been under the true value," and for remedy thereof, enacted, "that no executor or administrator shall hereafter be permitted to take any estate, or any part thereof, at the appraisement, and that no appraisement, to be made as aforesaid, shall be binding or conclusive, either upon the creditors, legatees, next of kin, or other person interested in such estates, or upon the executors or administrators: but all, and every such executors and administrators, shall be accountable and chargeable for the true value of such estates, any practice to the contrary notwithstanding."

This review of the rights and liabilities of executors and administrators at common law, and under the act of 1745, clearly shews, that by paying the true value, they might acquire as against their cestuique trusts, the goods of their testator or intestate. For the Act of 1745 restricts their general ownership to an acquisition for the true value. This certainly shews, that an executor or administrator was something more than a mere trustee: for if he paid the full value of the goods to the creditors, neither they nor the next of kin could question his rights. Let it be remembered, that an executor or administrator never was a mere trustee to sell: his trust was and is, to collect the personal assets of the deceased, to pay debts, and legacies, and the residue to distribute according to the will or the law. In 1745, the Ordinary was not authorized to order sales of the personal estate to be made: in 1789, he was clothed with that power, for division, payment of debts, or to prevent the loss of perishable articles: and in 1824, the executor (when not authorized by the will to sell) and the administrator were prohibited from selling without the permission of the Ordinary. These several acts make, as I conceive, the pre-requisites to the validity of a purchase, by an executor or administrator, that the sale should have been fairly made by the authority of the will, or by the order of the Ordinary,

in a case in which he had jurisdiction, and that the price is the true value of the goods. If this be not the result of the Acts of 1824, 1789, and 1745, some one of them must be inoperative. This will not be contended for.

An executor or administrator, however, cannot be regarded as a mere agent to effect a sale. He generally is greatly interested in the estate of which he has the management. Is he to be excluded from acquiring a favorite slave, when he is willing to give more than every other bidder? Can it be that his purchase at one dollar more than A's bid, shall be set aside; and yet, if he

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had suffered the *property to go off at A's bid, the sale would have been good? The reason of the rule—the prevention of secret frauds in the purchases of trustees to sell—does not apply to sales made by executors or administrators. They are made in public, in the neighborhood where the property is known, the sale is conducted by an indifferent person, an auctioneer employed for the occasion; if fraud is committed, it is obliged to be known to the spectators or auctioneer, and can therefore be proved; and hence there is no necessity for an artificial rule to prevent its perpetration.

The application of the principle, that a trustee to sell, cannot be allowed to purchase at his own sale, to executors or administrators, would often compel executors to decline to qualify as such: and would prevent the widow or children of an intestate, from claiming the right of administration, guarantied to them by law. For if they assume any of these characters, (i. e. executors or administrators,) under the rule stated, they cannot buy any of the personal property of the deceased, which may be sold under the will, or the order of the Ordinary. The right to buy at such sales, is often of essential importance to persons named executors, the widow and the children; and hence, if as executors or administrators they could not buy, they would be compelled to forego the executorship, or administration. This would be making a mere rule of equity intended to subserve justice, work a positive legal wrong, and carry out and enforce the grossest injustice.

For these reasons, I have come to the conclusion, that an executor or administrator, is not to be regarded as a mere trustee to sell: that his own purchase at his own sale, when fairly made in pursuance of the will, or under the order of the Ordinary in a case of which he had jurisdiction, for the true value of the goods and chattels so sold, is good; and must be supported both in law and equity.

In this case, the administrator has shewn that he sold by the order of the Ordinary, in a case of which he had jurisdiction; that the sale was fairly made, and that he purchased at the true value.

It is therefore Ordered and decreed, that so much of Chancellor De Saussure's decree, as sets aside the administrator's purchase of the slave, August, be reversed.

JOHNSON, J., and HARPER, J., concurred.

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*☞An Act of the Legislature was passed on the 18th December, 1835, entitled "An act to reform and amend the Judiciary System of this State," which repealed the Act of 1824, establishing a Court of Appeals; and provides, that from the Judges of the said Court of Appeals, two shall be designated by ballot of both branches of the Legislature, to act as Chancellors, and that the remaining Judge shall perform the duties of a Judge of the Courts of law; and that the Law Judges and Chancellors, shall meet and sit at Columbia on the fourth Monday in November, and the third Monday in July,—and at Charleston on the first Monday in January, and the fourth Monday in April, in each year, "for the purpose of holding the Court of Appeals, in hearing and determining all motions which may be made for new trials, and in arrest of judgment, and such points of Law and Equity as may be submitted to them, with the same powers now exercised by the Court of Appeals: Provided, that not less than a majority of the Law Judges, and a majority of the Chancellors, shall hold said court; and provided also, that no Chancellor or Law Judge, by or before whom a case has been heard or tried, shall exercise appellate jurisdiction thereupon in said Court."

In pursuance of this Act, and in the same session, the Hon. DAVID JOHNSON, and the Hon. WM. HARPER, were designated by ballot as Chancellors; and consequently, the Hon. J. B. O'NEALL, the remaining Judge, became a Judge of the Courts of Law.

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT CHARLESTON, IN APRIL, 1836.[a]

CHANCELLORS AND LAW JUDGES PRESENT.

HON. HENRY W. DE SAUSSURE,
" DAVID JOHNSON,
" WM. HARPER,
" J. JOHNSTON,
" J. B. O'NEALL,
" J. S. RICHARDSON,
" JOSIAH J. EVANS,
" B. J. EARLE,
" A. P. BUTLER.

2 Hill, Eq. *411

*A. JACKSON and Others v. JOHN INABNIT and ANDREW INABNIT.

(Charleston. April, 1836.)

[*Deeds* ⇐208.]

Where one signed a deed conveying several slaves in trust to his son with limitations over, and kept the deed; neither the trustees nor the son being present; and the son had possession of some of the negroes at the time, and afterwards got the others; but there was no proof that he ever recognized the deed: *Held*, that there was not such evidence of delivery of the deed, as to subject the property to its limitations.

[Ed. Note.—Cited in Carrigan v. Byrd, 23 S. C. 91.

For other cases, see Deeds, Cent. Dig. § 626; Dec. Dig. ⇐208.]

[*Estoppel* ⇐71, 94.]

Where parties claiming under the limitations of a deed obscure and doubtful in its terms had submitted it to counsel for advice, and afterwards publicly abandoned their claim, and the property was sold at the instance of creditors, and went into the hands of purchasers for valuable consideration; they shall not be permitted afterwards to set up their claims: that would sanction a practical fraud on the purchasers. Their acquiescence is an abandonment of their rights.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 181, 279; Dec. Dig. ⇐71, 94.]

[*Evidence* ⇐374.]

[A subscribing witness to a deed, who has testified that the deed was duly executed, may afterwards be examined to prove that the deed was not delivered.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1611; Dec. Dig. ⇐374.]

Heard before Chancellor De Saussure, at Walterborough, January 1835.

The plaintiffs filed their bill against the defendants, claiming certain negroes under a deed wherein defendants are appointed trustees, executed by Baltus Inabnit, deceased; in which, as they allege, he conveys the negroes in question, to his son Christian, with limitations over in favor of the plaintiffs, in the event of his death without issue. They allege that Christian died without issue, and that they are entitled; and pray that such

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of the *slaves as came into defendants' possession, may be delivered up, and that they account for the remainder, which they charge, have been lost by their negligence and mismanagement. Several questions were made and argued on the hearing of the case on the Circuit, and decided by the Chancellor. But it is only necessary to state the facts connected with those decided by the Court of Appeals.

The first question related to the delivery of the deed. It purported to have been signed,

[a] No Appeals from the Courts of Chancery were heard in the January Term, for the want of a quorum in such cases; one of the Chancellors being engaged in holding the Circuit Court in Charleston, and the late Act requiring a majority both of the law Judges and Chancellors to constitute a quorum, and at the same time disqualifying a Judge or Chancellor from the exercise of appellate jurisdiction in cases tried before him.

sealed and delivered, in the presence of three witnesses—was proved and recorded. George Clayton, one of the subscribing witnesses, testified that he witnessed the signing by Baltus Inabnit, and proved the deed before a magistrate. He did not in fact see the deed delivered; for neither John nor Andrew Inabnit was present, and Baltus took it away with him. It was objected by the plaintiffs, that it was inadmissible to examine the witness as to the delivery, as he had previously sworn on the probate, before recording that he saw the deed "signed, sealed and delivered." On which the Chancellor, in his report, says, "I overruled the objection, because it was manifest that the witness, an ignorant man, when called on to prove the execution, meant no more than that he saw Baltus Inabnit sign the deed. He says he did not see it delivered. On principle, witnesses can be thus examined. On the trial of the due execution, of wills, although the subscribing witnesses have testified that the will was duly executed, they are subjected, subsequently, to a full examination as to the particulars of the execution, to ascertain whether the facts which took place at the time of the execution, corresponded with the course prescribed by the statute. Besides, the proof is clear that John Inabnit was not present, and it was not alleged that Andrew Inabnit was. This is a distinct, independent fact, clearly admissible to proof; and being proved, as it was, even by the subscribing witness to the deed, is conclusive that no delivery in fact took place, for none could take place to them. Now, in this suit, which is to make the trustees liable, this is all important. Again, Baltus Inabnit took away the deed; he kept the control over it, to be used or not, as he pleased. There is, indeed, no proof that the deed was ever delivered by Baltus Inabnit to the persons he had named as trustees in the deed; for when it was desired to have it proved, the witness, Clayton, testified that he was sent for to prove it, by Baltus Inabnit; and there is no proof who ordered the deed to be

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recorded. Nor *is there any evidence that these persons ever accepted, or did any act shewing an acceptance of the trust. This bill then, which seeks to make them liable as trustees, for neglect of duty amounting to a breach of trust, cannot be sustained against them."

The deed itself, as the Chancellor states, "is profoundly obscure; more obscure than the subtlety of learning, designing to conceal a meaning, could have contrived it. It was a gift of the property to Christian Inabnit, with incomprehensible provisions and limitations which are void for uncertainty, and he held the property clear of them." "It appears further," continues the Chancellor, "by the evidence, that Baltus Inabnit had put his son, Christian in possession of this property before the execution of the deed, and that he held the same as his own. So that the father had no right to exercise any control over these slaves, and to make a new gift with limitations. And it seems certain, that Christian Inabnit did not claim, or hold under the deed, (if he knew of its existence), for he treated the slaves as his own absolute property, and mortgaged them to secure the payment of his own debts.

"There is still another ground of great importance. After the death of Christian Inabnit, the brothers and sisters set up a claim, under the deed, and took counsel thereon. On a very hasty perusal of the deed, and without a full knowledge of the facts, the gentleman consulted (who is remarkable for his sound judgment) was of opinion that it was a good and valid deed, and would operate on the property, and give the plaintiffs a good title. Subsequently, on fuller information and on a more deliberate consideration, he changed his opinion. Other counsel of great respectability was also consulted, who informed the plaintiffs that the deed was so obscure, that no intelligible meaning could be made out of it; and that in his opinion the plaintiffs could not sustain their claim under the deed. It was then necessary to come to a conclusion, for the creditors of Christian Inabnit desired to know of the plaintiffs whether they meant to make a claim under the deed, that they might resist the same, and bring it to a conclusion. After a deliberate re-consultation with their counsel, and under his opinion, the plaintiffs gave up their claim. They abandoned their intention to pursue it; and the creditors were informed of this resolution: whereupon, they took no steps to get the judgment of a Court. In consequence of this abandonment, the creditors of Chris-

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tian Inabnit acted upon their liens, *and the slaves in question were sold publicly, and in the presence of almost all the plaintiffs, who made no objection, and some of them even became bidders at the sale. The slaves were purchased by different persons, at high prices, and have been held by them, and in some instances transferred to other purchasers for valuable consideration. The proceeds of these sales were applied to pay the debts of Christian Inabnit. Under these circumstances, it appears to me that these transactions can never be disturbed, and that the plaintiffs cannot have relief, and their bill should be dismissed."

The plaintiffs appealed.

Smith, Attorney General, for the appellants.

Memminger, contra.

Mr. Justice BUTLER delivered the opinion of the Court.

The Chancellor who pronounced the circuit decree, being in full possession of the

whole case, has decided all the questions fairly involved in it. His decision leads to the conclusion that the plaintiffs' bill should be dismissed, and we concur in this conclusion. Whilst it was proper for him to decide on all the grounds taken below, it is not necessary for this Court to take more than will sustain his decree.

The grounds on which we rest our decision, are:—

1. There was not sufficient testimony to satisfy the Chancellor, that the deed which purports to have been executed by Baltus Inabnit, was ever duly delivered by him for the purposes expressed in it; or that Christian Inabnit took the negroes under the deed, and held them subject to its limitations and control.

2. The parties who were interested in claiming under the deed, after Christian's death, having deliberately and upon a full knowledge of their rights, agreed not to assert their claims, they shall not now be permitted to do so after the negroes have been sold to bona fide purchasers for valuable consideration, in satisfaction of the debts contracted by Christian Inabnit on the faith of them.

As it is regards the first ground, it is perhaps sufficient to say, that the Chancellor who heard the testimony was more capable of judging of its force and sufficiency than we can be, who must look at it as it is represented, and not as it was developed during the trial. It is certain, from the testimony

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of the only subscribing *witness that was examined, that the deed was not delivered in fact, at the time it purports to have been executed. Baltus Inabnit kept it in his possession—in his exclusive possession—during his life time. He may have intended to reserve to himself a control over the deed, and the property conveyed by it. But it might be inferred that a delivery had been made, sufficient to give the deed its legal operation, if it had been proved that Christian took under it, or acknowledged its existence in the life time of his father. But such a conclusion does not seem to be authorized. At least, the Judge below did not think so. He says: "It appears further by the evidence, that Baltus Inabnit had put his son, Christian, in possession of this property before the execution of the deed, and that he held the same as his own. So that the father had no right to exercise any control over these slaves, and to make a new gift with limitations. And it seems clear that Christian did not claim or hold under the deed, (if he knew of its existence,) for he treated the slaves as his own absolute property, and mortgaged them to secure the payment of his own debts." From the explanation made in the argument, it is probable that the son had part of the slaves only in his possession, before the deed was executed. The others that went into his possession afterwards, were regarded by him as the first were, as his own absolute property; and as there is no evidence that he knew of, or assented to the deed before his father's death, it is fair to conclude that he held the negroes by a title independent of the deed. But, as I before observed, it was a question of evidence; and the judgment passed upon it, by the circuit Chancellor, is entirely satisfactory to this Court, he having a better opportunity to decide rightly than we have.

We feel fortified in the second ground, by the consideration that the slaves were sold to satisfy the debts of Christian Inabnit, contracted no doubt, on the faith of their being his absolute property. This of itself would not be enough to deprive the parties of their rights under the deed, if they were clearly expressed and definitely secured by the provisons and legal requisites. But the deed is exceedingly obscure, and of doubtful import. So much so, that it would be difficult for any Court to pronounce a satisfactory judgement on its legal construction. The plaintiffs believing, or supposing that they had a legal claim under the deed, submitted it to intelligent counsel for direction and advice. This was at the time the negroes were about being sold. Their counsel

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took *time, by agreement with the representatives of creditors, to investigate the question presented. The plaintiffs were informed that their claim could not be sustained. This was not the hasty conclusion of inexperienced advisers. The plaintiffs, on such advice, agreed to abandon their claim; and by their consent or acquiescence, the property was sold, and bought by purchasers for valuable consideration. Would it be right to set aside these sales, made under such circumstances? To do so, would be to sanction, if not an intentional, a practical fraud on the purchasers. By the conduct and consent of the plaintiffs, the purchasers acquired their title. The law will not disturb their title now, by offending the obvious justice which the whole case suggests.

If the deed under which the parties claim has no legal existence for the want of delivery; or, if it has lost its legal operation by the conduct of those interested in it, then the plaintiffs must fail in their application for redress.

Whether any testimony was properly rejected, as well as some other questions in the case, may only be adverted to, to say that we do not deem it necessary to pass any judgment on them.

It is Ordered and decreed that plaintiffs' motion be refused, and that their bill be dismissed, with costs.

Chancellors HARPER and JOHNSTON, and Justices O'NEALL, RICHARDSON, EVANS, and EARLE concurred.

2 Hill, Eq. 416

GEORGE EDWARDS and Others v. MARTHA S. BARKSDALE, Administratrix.

(Charleston. April, 1836.)

[*Descent and Distribution* ⟸22, 41.]

Under the statute of distributions, first cousins of the whole and half blood are next of kin in equal degree, and equally entitled to the estate of the intestate.

[Ed. Note.—Cited in Ex parte Mays, 2 Rich. 62; Felder v. Felder, 5 Rich. Eq. 516.

For other cases, see Descent and Distribution, Cent. Dig. §§ 59, 116; Dec. Dig. ⟸22, 41.]

[*Aliens* ⟸10.]

[Cited in McClenaghan v. McClenaghan, 1 Strob. Eq. 322, 47 Am. Dec. 532, to the point that the act of 1791 does not contemplate an alien as coming within its provision.]

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 30, 31; Dec. Dig. ⟸10.]

[*Descent and Distribution* ⟸6.]

[Cited in North v. Valk, Dud. Eq. 215, to the point that the various canons of descent have no application under the South Carolina statute.]

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 28–32; Dec. Dig. ⟸6.]

Heard before Chancellor Harper, at Coosawhatchie, Feb. 1836.

It was referred to the Commissioner to inquire and report who are the next of kin of the intestate, Thomas H. Barksdale. He reports on the evidence, that the intestate left a widow, the defendant, and the several plaintiffs his only next of kin; that Thomas B. Bona is a first cousin of the whole blood; and that George Edwards, Mary Holbrook, Mrs. Coe, and Mrs. Kirk, are first cousins of the half blood; and submits to the decision of the Court who are the next of kin. Thomas B. Bona excepts to the report, on the ground that the Commissioner should

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have reported *him the only next of kin, entitled to the estate under the statute of distributions.

Harper, Chancellor. The statute provides, that "if the intestate shall have no lineal descendant, father, mother, brother or sister, of the whole blood, or their children: or brother or sister of the half blood, or lineal ancestor, then the widow shall take two-thirds of the estate, and the remainder shall descend to the next of kin." If no widow, the portion allotted to her is to go as the remainder. The questions are, whether the half blood are included at all under the description of next of kin; or, if admitted, whether they are put on the same footing with kindred of the whole blood, or postponed one degree.

The terms of the Act, in their plain and literal import, certainly do include the half blood. Being descended from a common ancestor, they are no less of kin than the whole blood; and according to the method of computation pointed out by the Act itself, these plaintiffs all stand in the same degree to the intestate. By the English statute of distributions, (22 and 23 Car. 2, c. 10,) which was of force in this State previously to the passing of our own Act of 1791, if there are no children, the estate is given to the next of kin. Under this statute, it has been always held, that the half blood are included, and they are put on the same footing with the whole blood, in the granting of administration and the distribution of estates.

But it is argued, that the Act of 1791 is an act of descents, not of distributions; the disposition of real estate being first provided for, and then it is provided that the distribution of personal estate shall conform to it. In construing a statute of descents, we must have reference, not to the English statute of distributions, which received its construction from the civil or canon law, but to the common law of descents. That law is still of force, unless in so far as it has been altered by the statute; and in giving construction to the words "next of kin," we must take them to mean such next of kin, as, on general principles of law, are qualified to take. For example, if the next of kin were an alien, he is within the letter of the law, yet no one supposes that he can inherit land; or if a statute similar to ours were passed in England, that an attainted person could inherit.

Let us examine the Act by the rules prescribed by Lord Coke, in Heydon's Case, 3 Rep. 7.

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*1. What was the common law, before the making of the Act?

2. What was the mischief and defect for which the common law did not provide? And.

3. What remedy the legislature hath resolved and appointed, to cure the disease of the commonwealth?

We know what the canons of the common law were, in relation to descents; and we perfectly well know the evil which was intended to be remedied. The complaint was, that the estates of deceased persons were distributed, not as it was supposed nature and affection would have prompted the owner to dispose of them, but by certain artificial rules arising out of the feudal system which had ceased to exist. The eldest son was preferred to the younger, though they were equally near in blood, and, it may be presumed, in affection to the father. So sons were preferred to daughters, and in the more remote relations, males in every instance to females. The Act corrects all this, by putting all children on the same footing, and sisters on the same footing with brothers. Why should it not be contended, that under the clause in question, male next of kin should be preferred to female? The

expressed object of the Act is, "to abolish the right of primogeniture, and to give an equal distribution of the real estates of intestates." A general purpose, which runs through the whole Act, and may be detected in every one of its provisions, is to distribute the estates of deceased persons among their kindred, according to propinquity of blood; supposing, what is in general true, that affection is according to nearness of blood. Keeping in view this general purpose of the Act we may more easily arrive at its true construction.

On the same reasoning which was used in this case, it might be contended that the next of kin, to take under the Act, must be of the blood of the first purchaser. But when we recollect the origin of that rule, the strictly descendible nature of feuds, and that upon failure of descendants, they reverted to the lord, and call to mind the general purpose of the Act above mentioned, we shall hardly conclude that a man's land may escheat to the State, though he may have near kindred to inherit it.

So it might be supposed that when the intestate was the first purchaser of the land, the heirs on the part of the father should inherit, in preference to those on the part of the mother. If this were admitted, then the most remote relation on the part of the father would inherit, in preference to a very near one on the part of the mother. But this would be opposed to the purpose of the

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*Act, which puts males and females on the same footing. No distinction is known in nature, between the affection for relations on the part of the father, and those on the part of the mother. Other such instances might be put.

So in the case of the half blood. Mr. Hargrave, in his note to Coke, Lit. 14, a. n. 3, refers to Wright's Ten. 184, where the exclusion of the half blood is supposed to be a consequence of the rule for restricting the succession to the descendants of the first feudatory. Mr. Cruise, in his Treatise on Real Estates, (3 vol. 365,) supposes it to have been derived from the Norman customs, by which the half blood by the mother's side, was excluded when the inheritance descended from the father, and vice versa; which he supposes to have been in time extended to the entire exclusion of the half blood. He refers to the Grand Coustumier, c. 25. There can be little doubt but that it must have originated in some such feudal reason, for it is not founded in nature. Can we suppose it conformable to the spirit of our Act, that the most remote conceivable kinsman of the whole blood shall inherit, in preference to the children of a brother of the half blood? or, if there be none of the whole blood, that the land shall escheat? For if the next of kin of the half blood are not put on the same footing with those of the whole blood, the consequence must be that they are excluded altogether.

With respect to the alien, the purposes of the Act of 1791 have no imaginable connexion with the policy of the law which disables such an one to hold land within the State; and construing according to its spirit, I may well conclude that the Act did not intend to embrace him, though in strictness comprehended within its letter. But certainly I can find nothing in the Act to authorize me to exclude the half blood, who are expressly within the letter.

Nor can the half blood, as contended for, be postponed one degree. According to the reasoning I have used, if the half blood had not been specifically mentioned at all, they would have been included in the Act, and placed on the same footing with the whole blood. In certain enumerated instances, however, they are postponed one degree. Am I from this to infer that they are to be in like manner postponed in every other instance, where no such thing is said. The contrary is rather the legitimate inference. I may suppose that it would have been more conformable to nature, that the half blood should have been postponed one degree throughout, and conjecture that only through

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some casual *inattention of the Legislature, it was not thus expressed. But, certainly, I am not at liberty to depart from the plain terms of the Act, upon such a conjecture.

I am happy to find myself supported in this conclusion by the decided cases on the subject—that of Karwon v. Lowndes, 2 Desaus. Eq. Rep. 210; and by the authority of Chancellor De Saussure, in Guerard v. Guerard, reported in a note to Wren v. Carnes, 4 Desaus. Eq. Rep. 405. Nor do I regard it as at all inconsistent with the determination in Wren v. Carnes, and in Lawson v. Perdriaux, 1 M'C. 456, that by the Act of 1797, amending that of 1791, and providing, that where there is a father or mother, and brother or sister, they shall take equally—brother or sister of the whole blood only is meant. Upon the particular provisions of both acts construed together, I should certainly arrive at the same conclusion.

It is adjudged and decreed, that the said Thomas B. Bona, George Edwards, Mary Holbrook, Mrs. Coe, and Mrs. Kirk, are the next of kin of the intestate, Thomas H. Barksdale, in equal degree, and equally entitled to his estate.

Colcock & M'Carthy, for appellant.
Petigru & De Treville, contra.

Chancellor DE SAUSSURE delivered the opinion of the Court.

In ordinary cases it might be sufficient to say, that the Court is unanimously of opinion the decree delivered in this case by Chan-

cellor Harper is correct, ond must be affirmed. But the very confident tone in which it was Insisted by the counsel for the plaintiff, Thomas B. Bona, that the decree was erroneous in principle, and that the authorities on which it professed to rely, were wholly untenable, or inapplicable, require that something more should be said. The Court has re-examined the statutes which required construction, as well as the cases which have been decided under them; and upon full consideration, is entirely satisfied that the construction heretofore given to the statutes respecting the half blood is the correct construction, and that the cases decided, were rightly decided, and are in harmony with each other.

The Court expresses itself in this decided manner, that it may be understood by the profession and the community, that the construction and doctrine established by this decree, is permanently settled, and the door to further litigation on the subject closed.

It is therefore unanimously adjudged and decreed, that the decree of the Circuit Court be affirmed.

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA, IN JULY, 1836

CHANCELLORS AND LAW JUDGES PRESENT.

HON. HENRY W. DE SAUSSURE,
" DAVID JOHNSON,
" WM. HARPER,
" J. JOHNSTON,
" J. B. O'NEALL,

HON. RICHARD GANTT,
" J. S. RICHARDSON,
" JOSIAH J. EVANS,
" B. J. EARLE,
" A. P. BUTLER.

*EZ. MASSEY v. ANDREW M'ILWAIN, NANCY M'CARDELL and JAMES KING.

(Columbia. July, 1836.)

[*Execution* ⇐264.]

Purchaser at sheriff's sale not allowed the protection of an execution under which the land was not sold.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 747–758; Dec. Dig. ⇐264.]

[*Specific Performance* ⇐43.]

One who has paid the purchase money, taken possession and made improvements under a parol contract for the purchase of land, entitled to specific performance.

[Ed. Note.—Cited in Goodhue v. Barnwell, Rice Eq. 237; Maybin v. Kirby, 4 Rich. Eq. 113; Lee v. Lee, 11 Rich. Eq. 583; Adickes v. Lowry, 12 S. C. 108; Biemann v. White, 23 S. C. 492; Graham v. Nesmith, 24 S. C. 295; Creech v. Long, 72 S. C. 32, 51 S. E. 614.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 135; Dec. Dig. ⇐43.]

[*Vendor and Purchaser* ⇐228.]

One purchasing land, to which another has an equitable title, with notice of the equity takes subject to the equity, and is bound to convey in like manner as the person from whom he purchased.

[Ed. Note.—Cited in Crenshaw v. Thackston, 14 S. C. 442; Coney v. Timmons, 16 S. C. 384; Peay v. Seigler, 48 S. C. 516, 26 S. E. 885, 59 Am. St. Rep. 731.

For other cases, see Vendor and Purchaser, Cent. Dig. § 496; Dec. Dig. ⇐228.]

[*Execution* ⇐272.]

Where land was sold under execution as the property of one who had the legal title, but under a parol contract which had been performed was bound to convey to the plaintiff, the purchaser is invested with all the rights of the judgement creditors at whose instance the land was sold; and want of notice to them of the plaintiff's equity, may protect him; but it seems that the possession of the land by the plaintiff would be sufficient notice to creditors.

[Ed. Note.—Cited in Lamar's Ex'rs v. Simpson, 1 Rich. Eq. 78, 42 Am. Dec. 345; Adickes v. Lowry, 15 S. C. 132; Ex parte Mobley, 19 S. C. 339; Sheorn v. Robinson, 22 S. C. 39; McGee v. Jones, 34 S. C. 152, 13 S. E. 326; Marion County Lumber Co. v. Tilghman Lumber Co., 84 S. C. 509, 66 S. E. 124, 877.

For other cases, see Execution, Cent. Dig. §§ 771, 781–788; Dec. Dig. ⇐272.]

[*Vendor and Purchaser* ⇐213.]

The rule in Equity is, that an agreement in writing to convey will bind the estate and prevail against subsequent liens: so, too, a parol contract to convey which has been performed and set up by the Court, has equal validity with a written covenant; and the party entitled to specific performance may hold the land against subsequent judgement creditors of the vendor.

[Ed. Note.—Cited in Goodhue v. Barnwell, Rice, Eq. 237; Maybin v. Kirby, 4 Rich. Eq. 113; D. C. Roddy & Co. v. Elam, 12 Rich. Eq. 345; Price v. Brown, 4 S. C. 152; Adickes v. Lowry, 12 S. C. 98; Adickes v. Lowry, 15 S. C. 132.

For other cases, see Vendor and Purchaser, Cent. Dig. § 440; Dec. Dig. ⇐213.]

[*Mortgages* ⇐28.]

[Cited in Dow v. Ker, Speers, Eq. 414, 417, to the point that an agreement to mortgage is an equitable lien.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 44, 56–58, 153; Dec. Dig. ⇐28.]

Heard before Chancellor Johnston, Lancaster, July 1835.

In 1826, the plaintiff, and the defendant, King, contracted with Nathan and Abel Funderburk, to purchase of them a tract of land, containing 296 acres, for six hundred dollars. With the consent of the plaintiff, they executed a conveyance to King alone, who gave them his note for the money, with the plaintiff as security, but the conveyance has

never been recorded. It was, however, at the time expressly agreed between plaintiff and King, that plaintiff was to have one half the land, and he (King) should convey the same to plaintiff, when he paid him his portion of the price; but this agreement was merely verbal, and was never reduced to writing. Immediately after the purchase,

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both King and *the plaintiff settled on the land, and went on with building and improving; and not long after, procured a surveyor to run a dividing line between them; and from that time to the present, they have both lived on, improved and cultivated their respective portions as designated by this line. In 1830, or thereabouts, the plaintiff, having previously made other payments, paid the balance in full to King, his proportion of the price of the land, but never obtained a conveyance from him. Previous to this time, King had become much involved in debt, and judgments were obtained against him for a considerable amount, at the instance of sundry persons, and entered up at different times from 1828 to 1830, some of them for debts contracted before, and some of them after plaintiff had paid King his portion of the purchase money, and amongst others, one at the suit of the Funderburks, against both himself and the plaintiff, for $52, being a balance due of their notes given as the price of the land. The entire tract of land, including that in the possession of plaintiff as well as King, in October 1830, was however levied on and sold, in February 1831, as the property of King, under an execution at the suit of one H. Hoey. At this sale the defendants, Andrew M'Ilwain and Nancy M'Cardell, were the purchasers. M'Ilwain, who was the active agent in the purchase, had explicit notice of the possession and nature and extent of the plaintiff's claim at the time he purchased. Defendants, M'Ilwain and M'Cardell, have commenced an action at law against the plaintiff, to try the title and recover possession of the land; and the object of this bill is to set aside the sale to them, and to restrain their proceedings in the action at law.

The Chancellor. In the view which I take of this case, it is unnecessary to examine most of the questions made. Whether M'Ilwain and Mrs. M'Cardell had or had not notice of the transactions between King and Massey, before they purchased from the sheriff, is immaterial, so long as they can stand in the shoes of the creditors of King, to whom, with the exception of the Funderburks, it is not pretended notice was extended by the arrangement of King and Massey themselves. The title was taken to King, which procured him credit on the faith of the land. Massey cannot, therefore, complain that King's creditors should satisfy themselves out of property of which he consented that King should become the ostensible owner; and if the creditors had the

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*sale of the land in their power, a sale by them to a person infected with notice, was as good as if made to one who had no notice at all. To say otherwise, would put it in the power of one, first, to obtain credit, and then, by giving general notice, to defeat that creditor of his remedy, by cutting off all purchasers under the creditor's execution. The well known principle, that one infected with notice may safely purchase from and protect himself under another destitute of notice, is of easy application to this case. This is sufficient to decide the case, as between the plaintiff and the defendants, M'Ilwain and M'Cardell. As to King, the plaintiff is entitled to a decree against him for reimbursement; although at present his insolvency may seem to render that nugatory.

It is decreed that the bill against the defendants, M'Ilwain and M'Cardell, be dismissed; and that, as between the plaintiff and the defendant, King, an account be taken to indemnify the plaintiff for such payments as the plaintiff has made said King, on the score of the land mentioned in the pleadings—the plaintiff to be liable to M'Ilwain and M'Cardell for their costs, and King to be liable over to the plaintiff for theirs, and all other costs of the case.

The plaintiff appealed, and now moved to reverse the Chancellor's decree, on the ground that the case made entitled him to relief.

Clinton & Pearson, for the appellant, contended that it was an established principle of Equity, that, one purchasing a trust estate, or an estate subject to equitable rights, with notice, took subject to all the liabilities of the vendor. That it was not denied that as between the plaintiff and King, the performance of the parol contract for the land, by the payment of the purchase money, and taking possession and making improvements, made such a case as entitled the plaintiff to a specific performance. The proof was clear that M'Ilwain, the agent in the purchase, had explicit notice of the plaintiff's equity at the time he made the purchase, and even before. And if it be insisted that he is invested with the rights of the creditors' executions, it is contended that they too had legal notice. The possession of the plaintiff from 1826, his improvements and general acts of ownership, the creditors living in the neighborhood, constituted such evidence of title in him as should have put the creditors on the inquiry; and amounted to notice of his claim. Besides, these debts

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were not contracted on the faith *of this land. King had no actual possession; he had the deed, it is true, but it was not re-

corded; and if creditors came to a knowledge of the purchase, they would at the same time know the manner of the purchase, and the plaintiff's claim. The defendants cannot be protected under Funderburk's execution, for this creditor was privy to the agreement between King and the plaintiff, and knew of its performance. At the time the agreement was performed, there were no liens on the land, and King had the right to convey. The plaintiff's equity is therefore paramount to that of creditors. Cited Daniels v. Davidson, 16 Ves. 250; 1 John. Ch. Rep. 267; 2 Fonb. 151; 5 John. Ch. 29.

W. F. De Saussure, contra, argued that the defendants, M'Ilwain and M'Cardell, as purchasers for a valuable consideration, were entitled to the protection of the Court. They had not only the rights of purchasers, but were invested with all the rights of the execution creditors, among whom Funderburk had his execution for the balance due on the original purchase.

By the Court.—Was Funderburk's execution levied?

It was not—but the balance due on it was paid from the sales. The debts were contracted subsequent to the purchase of the land, and on the faith of it. The equity of the creditors is at least equal to that of the plaintiff; and where equities are equal, the law must prevail.

As to notice—He insisted that notice to the purchasers was not sufficient; there must be notice to the creditors, whose rights they are clothed with; and there was no proof of notice to them. Possession is only evideuce of title to personal property, not to real. A purchaser with notice of an equity, may protect himself by want of notice to the person from whom he purchased. And here, these defendants will be protected by want of notice to the creditors. Cited Amb. 764; 1 John. Ch. Rep. 274; Ca. Temp. Talb. 187; Brandlyn v. Ord, 1 Atk. 571; Sweet v. Southcote, 2 Bro. Ch. 66; Bumpus v. Platner, 1 John. Ch. 219.

Chancellor JOHNSON delivered the opinion of the Court.

It seems that at the time of the sale of the land by the sheriff, and the purchase by defendants, there was still a small balance of the principal, and the costs remaining due on the judgment, at the suit of Funderburk

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against the defendant, King, and *the plaintiff, for the price of the land; and before I enter upon what are supposed to be questions of more importance, I will dispose of the argument of the counsel opposed to the motion, by which it is insisted, that the debt itself was an equitable lien on the lands, and overreached the claims of the plaintiff as well as all others. However this may be in point of principle, (and I will not stop to examine it,) the land was not sold under that judgment, nor are the plaintiffs in that cause parties to this suit, or claiming the benefit of their lien (if in law they have any,) nor can the defendants shelter themselves under it, for there is no privity between them.

The legal estate in the land was confessedly in the defendant, King, at the time the judgments referred to were obtained against him, and the sale made by the sheriff; and the question is whether the equity of the plaintiff, arising out of the agreement between him and King, that King should convey one half of the land to him on his paying half the price agreed to be paid for the whole, his subsequent possession of the land, and the actual payment of the money, should prevail against the legal rights of the defendants, M'Ilwain and M'Cardell, who purchased with notice of the nature and extent of the plaintiff's claim.

If King was under no legal obligation to convey to the plaintiff, or if the legal title acquired by defendants under their purchase, or the equity of the creditors of King at whose suit the land was sold, is entitled to be preferred, then of course the plaintiff is not entitled to the relief which he prays; but if, on the other hand, the rights of plaintiff are to be preferred, he ought not to be disturbed in the possession. In the consideration of the case, it will therefore be necessary to ascertain—

1. What are the rights of the plaintiff, as between King and himself,

2. What are his rights as between the defendants, M'Ilwain and M'Cardell, purchasers with notice—and

3. What are his rights with reference to those who were creditors of King at the time he fulfilled his agreement with him, by paying his portion of the price of the land.

1. Notwithstanding the statute of frauds, the Courts of Chancery have, for a long period of years, and through a long series of judicial decisions, enforced the specific performance of parol contracts for the sale of lands, where they have been partly

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performed; and *the ground upon which they have proceeded, is not that they are not within the original provisions of the statute, but because the suffering of the party who had accepted the performance, to shelter himself under the provisions of the statute, would enable him to practise a fraud at least as odious as that which the statute was intended to prevent, and thus render the statute an instrument of fraud. It is, however, a doctrine which the Courts have carried out with reluctance, and over which they have watched with a jealous circumspection. Hence the rigid proof which is required of the terms of the contract, and the fact of partial performance, for which

I refer to Thomson v. Scott, et. al.—1 M'C. Eq. Rep. 33.

The proof here is perhaps as perfect as could be expected to be derived from matters depending on memory, not only of the terms of the agreement between King and the plaintiff, but of the partial execution of it by King, in delivering the possession of the land, and running out and marking a dividing line between them, and of the entire performance by the plaintiff of his part of the agreement, by paying the price stipulated; and it will suffice to remark of these circumstances that they constitute the proof required by the most rigid rule.—1 Mad. Ch. 380. The plaintiff is therefore entitled, as between himself and King, to a specific performance. This has not been questioned.

2. Regarding the rights of the other defendants, as derived from King, the rule in Equity is, that one coming into the possession of trust property with notice of the trust, shall be considered as the trustee, and bound to the execution of the trust with regard to that particular property. As in Taylor v. Stibbert, 2 Ves. jun. 437, where tenant for life granted leases for lives under a power, and bound himself upon the dropping in of a life, to grant new leases with the same provisions for the renewal on the death of any person named in any future lease, and afterwards joined in a sale, though the power was exceeded; and it was held that a purchaser having notice would be bound to a specific performance, by granting a new lease, with the same provision, if a life dropped in in the life time of lessor. Now, although the legal estate in the land was in King, yet, by accepting performance of the agreement on the part of the plaintiff, he held subject to his equity, and, as trustee, was bound to convey according to the terms of the contract; and the defendants, having had notice at the time they purchased, are bound by the same trusts.

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*3. Defendants, M'Ilwain and M'Cardell, are not only invested under their purchase with all the rights of King, but they are also clothed with the rights of his creditor, at whose instance the land was sold. The creditor has the right to have his debt satisfied out of the property of his debtor, and if it is sold under execution for that purpose, the purchaser is invested, not only with the rights of the debtor, but those of the creditor also—which is in some degree peculiar. If, for example, the debtor convey lands after judgement signed against him, or even before, when he conspires with the purchaser to defraud his creditors, a purchaser at sheriff's sale, at the instance of the creditor, is entitled to prevail against the voluntary alienee of the debtor, notwithstanding the legal estate of the debtor had been before divested by his voluntary alienation; and in that case, the rights of the purchaser are derived from the creditor, and hence the necessity of the third inquiry proposed.

Some of the debts for which judgements were subsequently obtained against King, were contracted before the plaintiff had performed his part of the agreement to purchase the land, and when the legal title was confessedly in King, and assuming that he obtained credit on the faith that it belonged to him, it is insisted, that in Equity the claims of the creditors ought to be preferred; at any rate that the Court will not aid the plaintiff in doing wrong to the creditors, but leave them to their rights at law. But it will be recollected that at the time plaintiff paid his money, the creditors had no lien on the land, and that the payment of the money alone, if it gave him no legal right, made him as meritorious a creditor of King, as if he had lent him money or sold him goods, and placed him on at least an equal footing with the other creditors. He was also in possession of the land, and that according to some of the English cases, was not only notice to creditors, but sufficient to repel the claims of a subsequent purchaser. In Daniels v. Davidson, 16 Ves. 254, the Lord Chancellor Eldon, observes, that there was considerable authority for the opinion which he held, that where there was a tenant in possession under a lease or agreement, a person purchasing the estate was bound to inquire on what terms he was in possession, and was bound by the terms of the lease or agreement; and refers to the case of Douglas v. Whitrong, in which Lord Kenyon held, that possession was sufficient notice; and to the case of Taylor v. Stibbert,

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2 Ves. jun. *440, in which it was expressly ruled: and if possession alone be notice to a purchaser, it is necessarily so as to creditors. But the claims of the plaintiff rest, I think, on higher grounds and more satisfactory authority.

The rule in Equity is, that an agreement in writing to convey land in consideration of an adequate price paid, will in Equity bind the estate, and prevail against any subsequent judgement creditor; and is so laid down by Lord Chancellor Cowper, in Finch v. Winchelsea, 1 P. W. 282. The reason for the rule is well expressed in 1 Eq. Ca. Abr. 320, Tit. Mortgage, where it is said, "that if a man mortgages by a defective conveyance, and there are subsequent creditors whose debts did not originally affect the land, Equity will supply such defective conveyance against such subsequent incumbrancers who acquired a legal title afterwards; for since the subsequent creditors did not take the lands for their se-

curity, nor have in view an intention to affect them; when afterwards the lands are affected, and they come in under the very person that is in conscience obliged to make the defective security good, they stand in his place and shall be postponed to such defective conveyance." The same question was so ruled in Taylor v. Wheeler, 2 Vern. 564, where a defective mortgage was set up in opposition to the claims of the assignees of the mortgagor who had become bankrupt. In all these cases, it is true, the contracts were in writing, and in that alone they differ from the present case; but I apprehend the principle equally applies. If the contract is binding on the parties, the legal effect is the same whether it is in writing or by parol. A parol agreement to convey lands set up by the Court, has equal validity with a deed containing a covenant to convey.

The judgement of the Circuit Court is therefore reversed; and it is Ordered and decreed that the conveyance of the sheriff to the defendants, M'Ilwain and M'Cardell, for the lands described in the pleadings, be delivered up to be cancelled; that the said defendants, M'Ilwain and M'Cardell, be perpetually enjoined and restrained from proceeding in their action at law against the plaintiff to recover the said land; and that they pay the costs of this suit.

Justices GANTT, RICHARDSON, O'NEALL, EVANS and BUTLER, concurred.

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2 Hill, Eq. *429

*JESSE GORDON, Administrator, v. SARAH W. STEVENS.

(Columbia. July, 1836.)

[*Dower* ⇐56.]

The widow is entitled to interest or mesne profits up to the time her dower is assigned to her.

[Ed. Note.—Cited in Keith v. Trapier, Bailey, Eq. 64; Rickard v. Talbird, Rice, Eq. 172; Woodward v. Woodward, 2 Rich. Eq. 28; Bailey v. Boyce, 4 Strob. Eq. 87; Phinney v. Johnson, 15 S. C. 163.

For other cases, see Dower, Cent. Dig. § 179; Dec. Dig. ⇐56.]

This case has already been before the Court of Appeals, and a decree made, allowing the defendant dower, and directing her to account for the rents and profits of the land of which she had been in possession since her husband's death. (See ante 46.) In June 1835, the case came up again, before Chancellor Johnston, on exceptions to the Commissioner's report in which the defendant was allowed one third of the rent of the land occupied by her, in addition to the gross sum allowed her out of the sales of the land for dower. The Chancellor sustained the plaintiff's first exception objecting to the report in this particular; and the defendant appealed.

J. J. Caldwell, for the appellant. That the widow is entitled to one third of the rents and profits—cited Ca. Temp. Hard. 25; Graham v. Graham, 1 Ves. Sen. 262; Hamilton v. Mohun, 1 P. W. 122; 1 Roper's Husband and Wife, 450; Oliver v. Richardson, 9 Ves. 222; Dormer v. Fortescue, 3 Atk. 130-1; Mundy v. Mundy, 2 Ves. 122.

Herndon, contra.

Chancellor JOHNSTON. I am satisfied I was wrong in sustaining the plaintiff's first exception to the Commissioner's report.

The Court, in Mey v. Mey, (1 Bailey, 277,) say, that a widow is entitled, either to interest or mesne profits up to the time her dower is allowed her: so that, in this case, injustice was done in disallowing both.

The authorities quoted by the appellant's counsel, have fully satisfied the Court, that mesne profits have always been allowed in Equity.

The motion to reverse so much of the circuit decree as sustains the plaintiff's first exception to the Commissioner's report, is reversed. Of course the report stands confirmed.

Chancellors DE SAUSSURE, JOHNSON and HARPER, and Justices GANTT, RICHARDSON, O'NEALL, EVANS and BUTLER, concurred.

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2 Hill, Eq. *430

*EDWARD H. BRITTON and Wife, and Another, v. FRANCIS JOHNSON, Executor of Wm. Johnson, Sen., and WM. JOHNSON, Jun.

(Columbia. July, 1836.)

[*Wills* ⇐506, 524, 531, 634.]

Testator, by his will, made specific bequests to his grand children, and lent the rest of his estate to his wife for life, and then directs viz: —"And at her decease I desire that my executor do advertise and sell, and equally divide all my estate between my children and or their heirs." At the execution of his will, and at his death, testator had a wife, two sons, both of whom had children, & two grand daughters children of a deceased son. On a bill filed by the grand daughters, (the children of the deceased son,) claiming under the residuary clause: *Held*, that the limitation over on the widow's death was a vested interest, and could vest only in such persons as answered the description of "children" and "heirs" of children; and none answering the description of "heirs of children" but the plaintiffs, they took with the two sons, on the widow's death—the sons one third each, and the plaintiffs the remaining third between them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1098, 1122, 1150, 1494; Dec. Dig. ⇐506, 524, 531, 634.]

[*Executors and Administrators* ⟸365.]

Where an executor who was also a legatee purchased at his own sale made under the order of the Ordinary, and appointed one agent to sell and another to buy: his purchases were set aside by Chancellor Johnston, on the general principle, that for the prevention of fraud, a trustee to sell shall not be permitted to buy at his own sale: and if he does, his purchases may be confirmed or set aside, at the option of the parties interested.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1500; Dec. Dig. ⟸365.]

[This case is also cited in Roundtree v. Roundtree, 26 S. C. 473, 2 S. E. 474, and distinguished therefrom.]

This cause was heard before Chancellor Johnston, at Marion, Feb. 5, 1835.

Chancellor Johnston. This case was taken up yesterday, for the purpose of examining two questions.

1. Whether the plaintiffs take any, and if so, what interest, under the residuary clause of the will of Wm. Johnson, sen.

2. Whether, if they take under that clause, they have a right to avoid the purchases made by Francis Johnson, the executor, at his own sale, as set forth in his answer.

The first question is a very difficult one: and I could have wished the counsel had referred more liberally to authorities, and assisted the Court more than they did with the reflections which their own investigation of the case, no doubt, furnished their minds. Left as I am without this advantage, I scarcely hope to make such a decision as will prove satisfactory to the parties. Indeed, I entertain such doubts as induce me to request that the judgement I am about to pronounce, may be taken up and subjected to the review of the Supreme Court.

On the third of October, 1823, the testator executed his will; at that time, his family consisted of the following members:—

1. His wife Celia. 2. His son Francis, who had a child, Saml. W. Johnson. 3. His son William, jun. who had children; and 4. Caroline M. and Frances R. Johnson, two children of James Johnson, another son, who had died in 1815.

The will which he executed, is in the following words:—

"1. I give and devise to my grandson, Samuel Wilds Johnson, at my decease, one negro girl, by the name of Minda; to him and his heirs forever.

"2. I also give and bequeath to my son, Wm. Johnson's children, at my decease, one negro girl by the name of Sarah; to them and their heirs forever.

"3. I also give and bequeath to my two grand daughters, Caroline M. Johnson, and Frances Rebecca Johnson, at my decease, one hundred dollars a piece, to be paid to them, as soon as it can conveniently be raised; to them and their heirs forever.

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*"4. And after all my just debts and expenses be paid, I lend unto my wife, Celia, during her life, the free and undisturbed use of all my lands, plantation, houses, household and kitchen furniture, horses, stock of all kinds, cash in hand—in short, all and every part of my real and personal estate, that I may die possessed of; except what I have devised to my grand children already: and at her decease, I desire that my executor do advertise and sell, and equally divide all my estate, between my children and or their heirs.

"5. And I do make, nominate, and appoint my beloved son, Francis Johnson, sole executor, &c."

He died in 1825, leaving this will in full force—his family consisting of the same members as at the time he executed the will.

His widow, to whom he had lent the bulk of his property for life, died in 1830.

Edward H. Britton, having married Caroline M., one of the daughters of the testator's son, James, now joins with her and the other daughter, Frances Rebecca Johnson, as plaintiffs in this suit, in claiming an interest under the fourth or residuary clause of this will; which claim the testator's sons, William and Francis, who are defendants, resist.

I have derived no assistance from the cases quoted, for the purpose of shewing when the term "childreu" includes grand children, and when it does not.

There can be no pretence here, that the two children of James Johnson can fall within the description of "children" of the testator. If they do not take under the description of "heirs of testator's children," they must be excluded. The cases quoted have therefore no applicatiou.

It appears to me that this controversy turns upon the question—Whether the limitation over, upon the death of the testator's widow, constituted at his death a vested iuterest. And I think it did. The test of a vested interest is, that it is made to take effect upon no other condition than the possession's becoming vacant by the cessation of title in the person to whom the prior enjoyment is bequeathed. Whoever has a right to step in whenever the prior incumbent gives way, has a vested interest; whoever is so described by the testator as to be restrained from taking possession by no other condition than that it be vacated, has a vested right uuder the will.

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*All the rights of a testator pass out of him at his death; and such of them as he constitutes vested interests, must vest in such persons as at his death come under the description he in his will gives of his legatees.

If the testator here had given to his children, and some of them had died between the making of his will and his death, their children would not have answered the descrip-

tion, and would not at common law and independently of the Act of Assembly, have come in.(a)

If he had given to the "heirs" of his children, and all his children had been alive at his death, none of their children could have come in; because, as the children could not have "heirs" until their deaths, there would have been no person, at the moment the will began to operate, to answer the description of the legatees.

As the interest given in this case was a vested interest; as it was not to spring up upon a contingency; as its enjoyment was made to depend on no other condition, than the possession being vacated by the widow's death, it must vest at the testator's death, or never. And it could vest then only in such persons as were designated by the words of the will. It could vest in such persons only as were at the testator's death his "children," or "heirs of his children."

William and Francis Johnson, at that time, answered to the description of "children;" the children of James Johnson answered to that of "heirs of children." And in my opinion, these, among them, took upon the death of the widow.

It is contended that the testator intended that William and Francis should take, if alive at their mother's death, but that if either or both of them should die before that time, his or their "heirs" should take in lieu of their parents, and that these were the heirs meant by the testator.

But we are not to make the testator use unnecessary words; nor hold any words which he has used to be unnecessary, merely to effectuate a supposed intention. This we should do, if we adopt the construction contended for. William and Francis would, as "children," have taken a vested interest in the remainder in question; which would have been transmissible, and would have come to their "heirs," in case of their dying before their mother. So that the "heirs" needed not that the testator should take any notice of them. If we adopt the construction contended for, the provision for the heirs, is mere surplusage.(b)

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*If it be argued again, that the testator looked to the possibility that William and Francis, his children, who were alive when he drew the will, might die before himself, and that in that case he wished their "heirs" to take their place. Can any one shew, from his language, that this was his intent? In such cases as I have supposed, the "heirs" of William and Francis, would have come in only as "heirs of children." Would not the children of James have answered to the same description? Why then, should they have been excluded, while the others were received.

My opinion, then, is that the plaintiffs take along with William and Francis, under the clause in question. And I am somewhat confirmed in the opinion that this was the testator's real intention, from expressions used in the three first clauses.

In these clauses, the testator gives specific legacies; 1st, to the child of Francis; 2d, to the children of William; 3d, to those of James. So far, all the families of his children seem to have stood in equal favour with him. We should not on light grounds, after this, suppose that the testator intended to give the residuum of his estate to two families in exclusion of the third. And the words he uses, in giving to his grand children, by no means show that the specific legacies were intended to be all they should ever receive from his estate. He says they shall have these legacies "at his death;" leaving to them the right of receiving more at his wife's.

But another question is—what share do the children of James take with William and Francis? The direction is, that the residue be equally divided between children and the heirs of children.

At first, I thought that the legatees must each take an equal share. That they should take per capita. But more reflection has inclined me to a different opinion, and one which I the more readily adopt, because it harmonizes better with that equality at which it appears, by putting together the three first clauses and the fourth, the testator aimed. I do not know well how to express the sense in which the phrase, "equally divided between my children, and or their heirs," strikes me. The best I can do, is to say that it appears to me the testator used the words "heirs of children," as an equivalent for a child; that he rated them equally, and directed that the property should be divided equally, upon that principle. I cannot make this as plain as I

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wish. *I cannot convey to others what I think I plainly perceive. And I shall not labor it.

The result is, that the residuum is to be divided into three parts; of which one is to go to the two children of James Johnson, (equally between them,) another to William, and the third to Francis.

The second question is, whether the plaintiffs have a right to set aside the purchases of certain slaves made by Francis, the executor, at his own sale.(c)

It appears, by his answer, he made the sale under an order of the Ordinary; that he appointed one agent to sell, and another to buy for him. These circumstances, he states, as reasons for confirming his purchases. But if

(a) Bankhead v. Carlisle, 1 Hill's Ch. Rep. 357.
(b) M'Donald's case, 2 Mill, Const. Rep. 94.

(c) It will be observed that this part of the decree was not appealed from; and further, that the decree itself was pronounced before the decision of the Court of Appeals in Stallings and wife v. Foreman, ante 401. R.

the doctrine, that a trustee to sell cannot purchase, were at all questionable, (which it is not) I should hold the circumstances relied on, as going very far to condemn the sale.

Here is a trustee blinding the bidders, by employing a by-bidder, and having such a control of the auctioneer's hammer, that he can bring it down instantaneously, whenever he thinks fit. And shall such machinery sanctify what the law would otherwise condemn?

That such purchases are clearly illegal, is too well settled to admit of doubt. I have expressed my opinion briefly in Wiggins' case, and in the case of Crispin v. Taylor,(*d*) in both of which the Court of Appeals concurred with me.

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*In the last mentioned case, the very question was decided which was made here. It was ruled that the circumstance of the trustee being a co-cestuique trust, gives him no right to buy from himself. The ground taken for avoiding such sales is that fraud has been practiced, which cannot be proved. If a trustee to sell, can purchase, he may lock up in his own breast, secret qualities of the article sold, which would, if disclosed, greatly enhance the value of the property. He may keep back offers, and thus prevent competition. He may, by his own bid, or by that of a by-bidder, stifle competition, and purchase at a price less than the property is worth. He may, by his own bid, or by that of a by-bidder, and having such a control of the auctioneer's hammer, that he can bring it down instantaneously, whenever he thinks fit. And shall such machinery sanctify what the law would otherwise condemn?

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(*d*) JAMES R. CRISPIN v. JOHN TAYLOR.

[*Executors and Administrators* ⟸365.]

Purchase by an administrator, (who was also a distributee,) at his own sale, at a price less than the appointment, set aside by Chancellor Johnston, on the ground that a trustee to sell cannot purchase at his own sale; and the administrator ordered to account for the difference between his bid and the real value. Decree confirmed by Appeal Court, as to setting aside the sale; but modified by ordering a resale of the property.

[Ed. Note.—Cited in Britton v. Johnson, 2 Hill, Eq. 434.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1012-1022; Dec. Dig. ⟸365.]

[*Executors and Administrators* ⟸382.]

Practice on sales by executors and administrators being set aside, is to order a resale of the property; and if more be bid than was bid before, that it go to the highest bidder; if not, the first sale is affirmed.

[Ed. Note.—Cited in Britton v. Johnson, 2 Hill, Eq. 434, 437.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1116-1119; Dec. Dig. ⟸382.]

The bill was filed against the defendant, as administrator of the estate of Anne Sibley; and seeks, amongst other things, to set aside the purchases of the defendant at the administration sale made under an order of the Ordinary, of a female slave named Sarah, and some other articles of small value, at an inadequate price. The slave had been appraised at $100, and was purchased by the defendant at $50. There was no evidence of unfairness, in procuring or managing the sale; on the contrary, it appeared that the sale was fairly conducted. The defendant was a distributee; and in his answer states, that the plaintiff was present at the sale, and made no objection. It appeared also that the solvency of the defendant was doubtful; but the evidence on this point was applied exclusively to another ground for relief, and is not adverted to, either by the Chancellor or the Court of Appeals, as having any bearing on the sale.

The cause came on before Chancellor Johnston, at Newberry, July 1833; and in relation to the sale, he made the following decree:

With respect to so much of the bill as seeks to set aside Taylor's purchases at his own administration sale, although very contemptible,

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and evidently thrown in to help *out the other parts of the bill, in case of need; I see not how, on principle, it can be dismissed. I consider the law as settled on the point; and not to be mistaken. No trustee to sell, can become a purchaser; and, if he does, he will be held to his purchases, or they will be set aside, as of course, at the option of parties interested in the property. They are not bound to shew unfairness in the sale. The rule is one of policy, made to avoid abuse, which it may not be in the power of the cestuique trust to prove. Nor does it alter the case that the trustee is one of the cestuique trusts, and, therefore, interested in the property. One who is at the same time trustee, and one of several cestuique trusts, may be benefited, but cannot be injured, by an unfair purchase. The temptation to abuse, although less than when he is trustee merely, nevertheless exists; and the reason of the rule remaining, the rule remains in full force also.(*e*).

The right to set aside such purchases, is a mere equity, and may be waived. I have but little doubt the plaintiff was present at the sale, and acquiesced in it: and if that had been proved, it would have been worthy of consideration, whether it did not amount to a waiver. But there was no such proof; the answer is no evidence on this point.

It does not appear whether the sale was confirmed by the Court of Ordinary which ordered it. If it had been, (a practice which might be adopted with much advantage, all the parties being summoned,) it would be worth while to consider whether the sale would not be good, as res judicata. But no such matter came out in proof. Again, the ground for avoiding such purchases is fraud. If the act of limitations had been pleaded, and the knowledge of the purchases brought home to the plaintiff, more than four years before the filing of the bill; it might have been a question whether the equity to set aside the purchase in question was not barred. But there was no such defence. I throw out these questions, in order to draw the attention of the bar to them in future cases; for purchases by executors and administrators are of daily occurrence; and all the questions affecting them are of the last importance, not only to such officers, but to all the widows and orphans within this jurisdiction: and I believe none of these questions have ever yet been raised in our Courts.

I made some remarks touching them, in Lowry & Lowry, from Sumter, but the case went off on other grounds as well as I recollect. It has not been reported.

There is a question as to the proper practice, on setting aside such sales. Shall a re-sale be ordered, or shall the trustee account for the value of the property?

In my opinion, that depends on the number of applicants for setting the sale aside. If all the cestuique trusts apply, then a re-sale ought to be ordered. If, however, only part of them make such application, an account should be taken. It will be taken for granted, that those who do not complain are satisfied, and affirm the sale. In this case, none of the distributees complain, except the plaintiff. An account will therefore be ordered.

Decreed—That the purchases by the defendant at the sale made by him as administrator of Anne Sibley, so far as they are enumerated in the bill, be so far set aside that the defendant be held accountable for the articles of property so purchased by him, at their true value.

(*e*) Davoue v. Fanning, 1 John. C. Rep. 257, 260-1.

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hance its *price. The case of a gold mine on land, unknown to all but the vendor, has been frequently put. The qualities of slaves may be urged as another. There is no end to the arguments against such sales.

Then, if fraud is the ground for avoiding such contracts, (if contracts they may be called, where there is but one contracting party,) how can the vendor's having an inter-

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est alter the case? What *is lost by him as cestuique trust, is more than made up by his gains as purchaser. While others divide the loss with him, he has all the gains to himself. And, indeed, he cannot be said to sustain any loss, who defrauds himself. What he takes out of one pocket, he puts into another.

The case of Crispin v. Taylor, settles another point. It is, that where such a sale is set aside, the trustee shall not account for the real value of the property; but that shall be ascertained by a re-sale.

I suppose that the plaintiffs, who ask to set the sale aside, cannot affect Wm. Johnson's interests, who chooses to let it stand. Therefore, he will be entitled to his share of what the executor purchased at—neither more nor less, let the property sell for what it may, at the re-sale; for that the executor must account to him, with interest.

As for the plaintiffs, they will be entitled to their share of the re-sale price, with hire of the negroes for the time the executor has had them.

It is decreed that Francis Johnson deliver up to the Commissioner the negroes he purchased, with their increase; and that the Commissioner do proceed to sell them, after giving thirty days notice. And that the said Francis do account for their hire.

The re-sale of the negroes, to be made at Marion Court House, upon some convenient sale day, upon the following terms—to wit: upon a credit of one year from the day of sale, with interest from the said day of sale; the purchasers giving bond with personal security to be approved by the Court, to secure the purchase money.

The defendants appealed, and now moved to reverse the decree on the following grounds:

1. Because, according to the legal construction of the will of the testator, the plaintiffs have no legal claim, and their bill should have been dismissed.

2. Because, according to the provisions of the said will, all the property now sought to be partitioned was given to the defendants.

[For subsequent opinion, see Dud. Eq. 24.]

Graham & Gregg, for the appellants, contended that the intention of the testator is the controlling rule in the construction of wills; but that intention must be ascertained

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and construed accord*ing to the established rules of law. Booth v. Blundell, 19 Ves. 521, 4 Kent's Com. 519. Unless the intention is clearly expressed otherwise, the word "heirs" must be construed technically, and be regarded a word of limitation, and not of purchase. Preston on Est. 365, 368; Thelusson v. Woodford, 4 Ves. 329; Holloway v. Holloway, 5 Ves. 401; Deane v. Test, 9 Ves. 152; Crooke

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*And that all matters of account growing out of, or connected with the pleadings, be referred to the Commissioner to report thereon, with leave to report any special matter.

The Commissioner, at the same Term, reported —That the plaintiff was present at the sale, and made no objection to defendant's purchase, which was fair; that inasmuch as the Chancellor in his decree had said, that if the plaintiff was present at the sale, it might make a different case; and as the plaintiff's share of the difference between the real value of the property sold and the true value is very inconsiderable (but $12.62½;) and as he was as much in fault as the defendant, the Commissioner recommends, that the defendant be not allowed the excess beyond the real value proved.

On the report coming before the Chancellor, he ordered the Commissioner "to add the distributive share of James R. Crispin and wife, of the excess of value of the property proved on the reference over the bids of John Taylor, to the amount reported in their favor;" and for which purpose the report was re-committed, and being amended accordingly, was confirmed.

The defendant appealed on the following grounds:

1. Because the Chancellor erred in setting aside the sale, at the instance of the plaintiff, who was present at the sale, and not objecting thereto; especially after a lapse of four years.

2. Because the Chancellor, after setting aside the sale, erred in decreeing that defendant should account for the difference between the sale and the value of the property as proved; but should have ordered a re-sale at defendant's risk.

Caldwell & Fair, for appellant.

Appeal Court Dec. 1833.

HARPER, J. We concur in the principle announced by the Chancellor, that the defendant's purchase of the negro woman was liable to be set aside at the option of the parties interested. It does not appear to me that the plaintiff's barely being present at the sale, could be construed into an acquiescence. I do not know by what rule he was then called upon to express his dissent. I refer to the case Ex parte Wiggins, 1 Hill, Eq. 353, decided at the present sitting, for my views on the subject. The Chancellor was correct in determining, that the defendant could not hold his purchase. But, in strictness, the course is, not that the executor should account for the difference between his bid and the appraised value, (for the appraisement is but prima facie evidence of value,) but that the property should be re-sold. Any creditor or distributee has a right to require a re-sale. It is to be regretted that so trifling an interest should occasion this protracted litigation: but defendant may stand upon his right. He must, however, pay the costs of the appeal and re-sale.

It is Ordered, that the slave in question be exposed to sale by the Commissioner on some public sale day, on the same terms that she was before offered to sale by the defendant; and that if more money shall be bid for her than was before bid by the defendant, she be sold to the highest bidder; otherwise defendant's purchase to be affirmed.

JOHNSON, J., and O'NEALL, J., concurred.

v. De Vandes, 9 Ves. 205; Hodgson v. Ambrose, 1 Doug. 341; 1 Cox, 67.

This will was drawn before the Act of 1824, when words of perpetuity were necessary; and the word "heirs" was used to convey the fee. Whatever inequality there may be in the disposition of his property, the Court cannot interfere to make a will for the testator; that was his privilege: and to allow the plaintiffs to come in, a vague and conjectural meaning must be affixed to the word "heirs;" or the Court must actually supply other words. Words cannot be supplied on conjecture, although probable, Chapman v. Brown, 3 Burrows. Rep. 1634: nor rejected on suspicion of mistake, Milne v. Slater, 8 Ves. 306. To authorize the Court to supply words, the mistake must be plain and palpable. Horry v. Deas, 2 Eq. Rep. 126; Jackson v. Sill, 11 John. 201; Mellish v. Mellish, 4 Ves. 45.

In what character are the plaintiffs to take? The devise is to his "children." He had at the execution of his will, and at his death, but two, the defendants: it must be that he meant them. The word "children" will not include grand children in a devise, unless there can be no other construction. Reeves v. Brymer, 4 Ves. 693; Radcliffe v. Buckley, 10 Ves. 195; Crook v. Brooking, 2 Vern. 107; Orford v. Churchill, 3 Ves. & Beames 69.

The word "between" is used in this clause. It is not in strictness synonymous with among. Between relates to two, among to more than two. And this distinction is observed in our statute of distributions; and is applied in the construction of wills in many cases—2 Kent's Com. 337. note; 1 Bro. Ch. 117; 1 Cox, 234.

To read the clause in question as it stands, "and or their heirs," it is nonsense. Strike out the word 'or' and the meaning is intelligible—an absolute fee is given to the defendants. Strike out 'and,' and the devise is to his children, or to persons unknown. The Court may suppose an omission—will it supply it? With whose names? Nothing can benefit the plaintiffs but the addition of a clause to the will, in which their names are to be inserted; and then change 'or' into 'and.'

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*The word "their" in the clause, has a grammatical reference to "children." Why should the word "heirs" be changed from its technical meaning, and made a word of purchase to include these plaintiffs? There is nothing in the will to authorize it. The testator had already provided for them, and in doing so, he carefully, and it would seem in contra-distinction to children, used the words "grand children." If the Court resort to conjecture for the testator's meaning, why should it not as well be supposed that he gave the property to his sons then living, and in the event of the death of either before his death, that in such case their children should take? Or if the word "heirs" is to be construed a word of purchase, why should its remeaning be restricted to the children of James? Why not embrace all his grand children? But to enable the plaintiffs to take, the technical meaning of the word must not only be changed without any such reasons drawn from the will as should justify it, but its meaning must be referred exclusively to these plaintiffs. In effect, making a will.

Wilkins, contra. Argued, that unless the construction of the Chancellor prevails, there is such uncertainty and repugnance in the clause in question as to render it void; and the plaintiffs would then be entitled. Wherever there is great uncertainty the heir is to be preferred in England.—Pow. on Dev. 611; Cowp. 99; 6 Cruises, Dig. 173. And the same rule must apply here where all the children are heirs. And the strong inclination of our Courts in all cases of doubt and uncertainty is to give such construction as will let in all the testator's heirs.—Myers v. Myers, 2 M'C. Ch. 257; 2 Binney, 19, 20.

Some meaning and effect should, if practicable, be given to all the words of the testator.—1 Co. Lit. 9 a. 2 Vern. 545; 3 Eng. Con. Ch. Rep. 573; Butter v. Ommany. This can only be done by the interpretation put on the will by the Chancellor; for to make the word "heirs" a word of limitation merely, as designating the quantity of interest given to his sons, would be to discard a part of the will. It is not a direct devise to his children and their heirs; but a direction that his estate be sold and equally divided between his children and their heirs. Now this was impracticable, regarding the word "heirs" as a word of limitation, conveying the fee to the sons. Some other meaning then must be intended, in order to give effect to the will.

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Discarding the word *"or" as inserted by mistake, and the estate is equally divided between, or among, (for the terms are used synonymously) his children and the heirs of his children. Who answers the description of heirs of children? Not the children of Francis and William—nemo est haeres viventis. His son, James, was dead, and left two children. They are the only persons answering to the description of heirs of children; and consequently they must take jointly with the sons, in order fully to carry out the testator's intention as expressed in his will. And this construction is much strengthened by the fact that the children of his son, James, are but slightly provided for in the other clauses, and he evinces a disposition to put them on the same footing as his children. But apart from this view of the case, he insisted that the plaintiffs might well take under the general word "children." Cited Horry v. Deas, 2 Eq. Rep. 123 note;

Wyth v. Blackman, 1 Ves. sen. 196; Deveaux v. Barnwell, 1 Eq. Rep. 497; Roe v. Quartley, 1 T. R. 634; Radcliffe v. Buckley, 10 Ves. 195; Goodtitle v. Herring, 1 East 264; Keith v. Perry, 1 Eq. Rep. 353.

Chancellor JOHNSTON delivered the opinion of the Court.

This Court concurs with the Chancellor who delivered the circuit decree: the motion is therefore dismissed.

Chancellors JOHNSON and HARPER, and Justices O'NEALL, GANTT, and RICHARDSON concurred.

BUTLER, J., dissenting. I cannot subscribe the opinion of the Court in this case. I think the construction given to the will, equally opposed to the actual intention of the testator, and the legal import and technical meaning of the language he uses.

In the three first clauses of the will, the testator gives to his grand children, all that he intended specifically for them; and in the fourth clause, it seems to have been his design to give the residue of his property, to his wife and children. That is, after the determination of the life estate to his wife, to divide the remainder between his children, Francis and William, share and share alike. He uses language sufficiently significant to convey his meaning. After his wife's death, the testator directs his executor to sell and divide the estate between his children "and or their heirs." What children did he mean?

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Did he mean his child*ren alive at the time, or did he have reference to a deceased child? Or did he include in the word "children" his grand children, whom he had specially called, in the clause above, his grand children. He obviously meant his surviving children. To whom then should the adjective pronoun "their" have reference? By every rule of grammar, it relates to and includes only his children; and of consequence then it is to his children, and their heirs, that he gives the remainder of his property. To read the clause in this way, is to give to the word "heirs" its ordinary legal signification, to make it a word of limitation and not of purchase. I do not say that it may not be a word of purchase.—The intention to make it a word of purchase should be very obvious, and the persons to take by it, should be clearly indicated, before the legal construction of it should be violated. If the testator, in the case under consideration, intended to refer specifically to any persons to take by the word "heirs," it was the children alone of his surviving children. That is, in the event of either's death, their children to come in and represent the parent. But I am averse to considering contingencies until they happen. If either William or Francis had died before their father, it is probable the father would have altered his will in conformity to that circumstance. To make the word "heirs" refer exclusively to James' children, is not only to change its meaning, but to give its reference; and in effect, it is to add a clause to the will. It is asked, why should the testator make such a difference between his surviving children, and the representatives of his son, James? I can only answer, that as far as the testator was explicit, he certainly made a discrimination between his grand children. To one grand child he gives a negro; to William's children he gives another negro, and to James' two children he gives $100 each. Whether this was the result of caprice or justice, I will not inquire. It may have been, and probably was the latter. This depends upon the advancements which the testator may have made, and many other circumstances of which we can take no notice. I am not for going out of my way in any effort (perhaps vain and futile) to do imaginary justice. I like that justice which is prescribed by legal definition and usage. This gives the security of rule; the other opens the door to the uncertainty of discretion. The Court makes the word "heirs" refer exclusively to James Johnson's children,

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and I make it refer exclusively to the *representatives of Francis and William, whoever they might be; (that is, if William and Francis had not alienated the property before their death,) and this regards the word as a word of limitation indicative of the quantity of estate given. But if it should be regarded as a word of purchase, I think Francis' and William's children would take by it in preference to James.' I am for letting the fourth clause read as though the word or was not in it; and if the word or is to have any meaning, it cannot make the word heirs refer exclusively to the daughters of James, and let them come in and take an equal share with Francis and William. The pecuniary legacy given to them by their grand father, was all that he intended specifically for them.

EVANS, J., also dissented, but gave no reasons.

EARLE, J., absent.

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA, IN DECEMBER, 1836.

CHANCELLORS AND LAW JUDGES PRESENT.

HON. HENRY W. DE SAUSSURE,
" DAVID JOHNSON,
" WM. HARPER,
" J. JOHNSTON,
" J. B. O'NEALL,

HON. RICHARD GANTT,
" J. S. RICHARDSON,
" JOSIAH J. EVANS,
" B. J. EARLE,
" A. P. BUTLER.

*JOHN M. NIOLON v. JAMES K. DOUGLAS and Others.

(Columbia. Dec., 1836.)

[*Assignments for Benefit of Creditors* ⟸39.]

A debtor executed an assignment of his whole estate to trustees, in trust for the benefit (after discharging existing liens) of all such creditors as should, within six months, establish their demands, accept dividends and give releases in full; and excluding others who should refuse to comply with these terms: On a bill by a creditor who refused to accept to set aside the deed of assignment as fraudulent and void, it was held to be valid.

[Ed. Note.—Cited in Jacot v. Corbett, Cheves, Eq. 78; LePrince v. Guillemot, 1 Rich. Eq. 218; Stewart v. Kerrison, 3 S. C. 294; Jackson v. Patrick, 10 S. C. 199; Claflin & Co. v. Iseman, 23 S. C. 424.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 154–164; Dec. Dig. ⟸39.]

[*Fraudulent Conveyances* ⟸115.]

A failing debtor may give preferences among his creditors; and it seems impracticable to prevent the exercise of this right. The subject considered in reference to a bankrupt system.

[Ed. Note.—Cited in Smith, Wright & Co. v. C. C. Campbell & Co., Rice, 352, 366; Bird v. Aitken, Rice, Eq. 78; LePrince v. Guillemot, 1 Rich. Eq. 219; Tennant v. Stoney's Ex'x, Id., 260, 44 Am. Dec. 213; Stewart v. Kerrison, 3 S. C. 293, 294; Wiesenfeld, Stern & Co. v. Stevens & Cureton, 15 S. C. 564.

For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 370, 375–377; Dec. Dig. ⟸115; Insolvency, Cent. Dig. § 84.]

[*Assignments for Benefit of Creditors* ⟸39.]

The cases where assignments of debtors which required creditors to release, reviewed.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 155; Dec. Dig. ⟸39.]

[*Assignments for Benefit of Creditors* ⟸39.]

In all the cases the vice lies not merely in requiring a release, but in putting the assets in such way as to be inaccessible to ordinary process, and then establishing such control over them in the grantor, that he could at his pleasure make or withhold payment.

[Ed. Note.—Cited in Jacot v. Corbett, Cheves, Eq. 78; LePrince v. Guillemot, 1 Rich. Eq. 218; Stewart v. Kerrison, 3 S. C. 294; Jackson v. Patrick, 10 S. C. 199; Claflin & Co. v. Iseman, 23 S. C. 424.

For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 154–164; Dec. Dig. ⟸39.]

[*Assignments for Benefit of Creditors* ⟸39.]

Our insolvent debtor's act recognizes the right of a debtor to assign for the benefit of releasing creditors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 154–164; Dec. Dig. ⟸39.]

Heard by Chancellor Johnston, at Camden, February 1835. The bill was filed 7th July, 1834, and states the following circumstances:

On the 30th April, 1833, Ralph Johnson executed an assignment of his whole real and personal estate, particularly two town lots in Camden, eight slaves, household and kitchen furniture, working tools, debts, &c. to James K. Douglas, Benj. Bineham, John J. Blair and James S. Stewart, in trust, to sell the same on the best terms they could obtain, either at public or private sale, and on such credit as they may deem proper, and to collect in the debts due to him, and to pay therefrom—

1. All existing judgements against him.

2. To pay all the costs and charges of executing the assignment.

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*"3. Shall pay out of the remainder of said monies in ratable and equal proportions, to all such creditors of the said Ralph Johnson, upon bonds, notes, obligations and accounts, as shall render in the same to the said assignees, and establish their demands, within six months from the date of these presents; and who shall at the time of establishing said demands, signify and accept in writing, that the dividend so to be received, shall be a free discharge of their said claim against the said Ralph Johnson; and upon the ultimate payment of said dividend, shall grant such full and final release: hereby debarring and excluding all and every creditor of the said Ralph Johnson, from any advantage or benefit whatever, under any provision of this assignment, who shall neglect or refuse to render in and establish his, her, or their demand, and signify and assent in the manner prescribed aforesaid, to accept of their dividend as a full and final discharge of their claim against the said Ralph Johnson." The assignees accepted the trust, and undertook the execution of it on 3d May, 1833.

Soon after the execution of the deed, the sheriff of Kershaw levied on the house and town lots, and seven of the slaves, and sold them to satisfy executions in his office against Ralph Johnson, older than the deed of assignment; and paid them in full from the sales thereof. In the year 1833, the assignees sold the remainder of the property under the deed, which produced a large sum of money, how much plaintiff does not know; and now hold the same ready to pay over to the creditors of Johnson, who have accepted the terms of the assignment.

On the 4th April, 1834, plaintiff obtained and entered up a judgement against Ralph Johnson, in Kershaw district, for $2172.99, with interest on $1784.30, from 31st March 1834, with $17 costs of suit, on notes of hand which arose, and are dated previous to the date of the deed. Plaintiff refused to accept under the deed, and issued his fi. fa. to the sheriff, which is still unsatisfied, and was returned nulla bona.

On the 4th April, 1834, Aaron Burr, administrator of D. Dutton, recovered and entered up a judgement against Johnson, for the sum of $102 and interest, together with $15.96 costs of suit, and issued his fi. fa. thereon, which is still unsatisfied.

On the 2d November, 1833, G. H. Dunlap & Co. recovered and entered up a judgement against Johnson, for $57.94, interest and

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*costs of suit, and issued execution thereon, which is still unsatisfied.

Plaintiff alleges that the deed is void in law, because Johnson conveyed his whole real and personal estate in trust, to pay only such creditors as shall accept a dividend of their claims, and thereupon grant a full discharge of their whole demand; thereby delaying and hindering creditors from recovering their full claims; which plaintiff submits is such a fraud upon creditors, as avoids the deed wholly: that if this be true, the monies in the hands of the assignees is liable to be paid over to these executions. Plaintiff has applied to the assignees to pay his execution, but they refuse to do so: plaintiff therefore prays that the assignees may be ordered to pay over to this execution, and the two other executions, the funds in their hands, according to their priority.

The joint answer of J. K. Douglas, B. Bineham and J. S. Stewart admit the facts set forth in the bill, refer to the answer of Blair for their doings in the assignment, and insist that the assignment of Johnson is not "calculated" to hinder, delay or defraud creditors, and is valid in law and Equity; and pray to be hence dismissed with their costs.

The answer of John J. Blair alleges, that the assignees acted in strict pursuance of the Act of Assembly of 1828, on the subject of assignments; and by their order the property was sold—and therefrom he has in hand twelve hundred dollars, eighty eight cents, to be paid on the debts due by Johnson. That claims against Ralph Johnson have been presented to the assignees by the creditors, amounting to $1243.63 without interest, who have accepted the terms of the deed. He insists that the assignment is valid in law and Equity, and prays to be dismissed with his costs.

The answer of Ralph Johnson admits the facts set forth in the bill, and says the deed was not intended to hinder, delay or defraud his creditors, but contained a bona fide surrender of his whole property, and his object was to put his creditors on an equal footing, which he insists he had a right to do in law, &c.

The case, after the reading of the bill and answers, was argued February 23d and 24th, 1835, by Wethers and John M. DeSaussure for the plaintiff, and by M'Willie for the defendants. It was admitted that all the plaintiff's demands on which he recovered judgement were due before the assignment,

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and that Burr and *the others stated in the bill, were also subsisting creditors. The following decree was afterwards delivered:

Johnston, Chancellor. The authorities cited at the hearing of Vaughan v. Evans, 1 Hill Eq. R. 414, certainly left on my mind a strong impression that the mere requiring of a release from accepting creditors, would invalidate the assignment of an insolvent debtor. Under the influence of that impression, I put the defendant's counsel to open the argument of this case. The result of a care-

ful consideration of all that was advanced on both sides, is a thorough conviction that such a position is unfounded, either on principle or decided cases.

I am happy to find, on a recurrence to Vaughan v. Evans, that as the Court was not called upon to express, so it did not express, an opinion as to the soundness of the position I have mentioned. As I shall have occasion to advert, hereafter, to the authorities referred to in that case, I shall take that opportunity to shew that neither those authorities nor that case establish the doctrine in question.

Whatever doubts may have been entertained or expressed, respecting the morality or the policy of permitting a failing debtor to prefer some of his creditors over others, his legal right to do so is too well settled to admit of discussion.

Chancellor Kent, while he expressed the strongest repugnance to the exercise of such a power by the debtor, was compelled to admit its legality: and our own Supreme Court was constrained by the force of authorities to adopt a similar conclusion.—2 John. Ch. Rep. 578, 283; [Moffat v. McDowall] 1 M'C. Eq. Rep. 441, 442.

There is undoubtedly great force in the objections brought against this power to prefer. But a contrary judgement has, for a great length of time, and very uniformly, been practically pronounced by those most deeply interested; and who must, therefore, be taken to have attentively considered the subject, in all its bearings upon the actual concerns of life.

When we turn to the jurisprudence of England, we find that that people has never deemed it prudent or practicable to lay sweeping restrictions upon preferences, except in cases of traders. For them the legislature has provided a specific statutory code: but in cases not falling within it, a much wider range of preference has ever been allowed by the Courts, than in most of these

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*States; yet nothing has come from Parliament to shew that it regarded these judicial decisions as subversive of true policy. Indeed, the very fact that their bankrupt laws have been confined to traders, shews that in their estimation they are unsuited to the mass engaged in the other avocations of life: else, why draw the distinction?

Two things seem essential to a bankrupt system. First—that the subjects of it should be such as from the nature of their business and the habits incident to successful prosecution, have it in their power to be informed, and are generally informed, when insolvency has supervened. This information gives them warning when to stop. It shews them precisely when that crisis has occurred, after which any business operation done by them, if allowed to stand, must effect a preference of some one creditor, at the expense of some other; and therefore their engaging in such operation, having such information, demonstrates that they intended to give a preference. It is not with them as it is with others, who, not having the means of being constantly informed of their exact situation, or the habits leading them to a constant comparison of their effects with their debts, may ignorantly and bona fide do an act, in the prosecution of their ordinary business, which may result in a preference among their creditors. With regard to the mass of the community, this difficulty occurs, therefore, which does not exist as respects traders. You must allow them to give preferences, and that willfully, or you must put an end to all their dealings; for if allowed to deal at all, preferences will result, and it will be impossible to separate those which are designed, from those which are not. If you could pronounce, as in the case of traders, that all preferences given by them must probably have been given willfully, you might set your face against them all; but this you cannot do. See the difficulty. Will you declare that no debtor shall confess a judgment, or give a bond or a mortgage? If he is allowed to do so, a preference may result. But if you prohibit him, every debtor must (at the peril of costs which must fall on him, or, if insolvent, on the mass of his creditors) stand suit, and obstinately and dishonestly defend himself against any just demand. Again, will you require any plain man, when payment is demanded, to stand still and enter into a calculation how much he is worth, and how much he owes, before he can venture to pull out the money he has in his pocket and

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*make payment? If he is not prohibited from paying, it may turn out that from his reserved property proving insufficient, a preference has been given. In short, can you, as to the mass of men, prevent preferences, without putting verbal and written, parol and special contracts, all on a footing; and then attaching a lien (and the same lien) to all; or abolishing all liens? If you do this, you stop all commerce. As long as the law recognizes a distinction between sealed and unsealed instruments; between bonds, mortgages and judgments, and between the liens of judgments and executions, preferences are inevitable the very execution of the instrument may raise the preference.

The second thing essential to a bankrupt system, seems to be, that those to whom it is to be applied shall form a distinct class, engaged in well defined and unmixed pursuits. Even in England, where avocations have a distinctness as yet utterly unknown to us, much confusion exists in the application of their system, and much injustice arises from its enforcement, owing to the

intricate relation which must exist between its subjects and all other portions of the community. But here, where as yet men are in the daily habit of changing their pursuits, and where in fact almost every man is engaged in a variety of avocations at the same time; where there is no such thing as a regular division of labor or employments, and where, from the intricacy and variety of the relations of citizen to citizen, no provision of law can be applied to any one without greatly affecting others, it is very doubtful whether any thing like a bankrupt system is suited to our condition; or whether any restrictions other than those which experience has shewn to be expedient for the mass of men, can be adopted. What says experience on this subject? The federal government, after testing the expediency of a bankrupt system by experience, suffered it to expire, and has not renewed it. And although each State has the right, when no such system is in exercise by the Federal government, to institute one for itself, it is believed not a single State has at any time, by statute, forbidden all preference among creditors.(a) The insolvent laws of most of the States either allow the debtor to draw a distinction among his creditors, in the very act of surrendering under the law itself, or sustain it if already done. So much for the legislatures. With regard to the opinion of the judiciary, it is remarkable, that in those States where the Courts set out with a simple

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allowance of *preferences, no change has been found necessary; while in those in which they attempted to put them down by straining after exceptions to the acknowledged law, they have found it impracticable to carry out their decisions to a system; and many of them have either vaccillated or been compelled, more or less, to retrace their steps.

Surely there is something in all this calculated to raise a doubt whether there is not some fallacy somewhere, in that reasoning which indiscriminately condemns all preferences. Surely, when we see such a long and uniform toleration of the reprobated practice, we must set it down either to the genius of our people, or to a settled conviction in those most conversant with the subject, that if it produces injustice, it is such injustice as human laws cannot remove, unless, indeed, at the hazard of greater evils; and thus we shall be brought the more cheerfully to acquiesce in what our own judgments, or our own feelings, may not in all respects approve.

Chancellor Kent, states his objection to preferences among creditors with his accustomed force. "Experience," says he, "shews that preference is sometimes given to the very creditor who is the least entitled to it, because he lent the debtor a delusive credit; and that too, no doubt, under assurances, or a well grounded confidence of priority of payment and perfect indemnity in case of failure. How often," he continues, "has it happened that that creditor is secured, who was the means of decoying others, while the real business creditor, who parted with his property on liberal terms and in manly confidence, is made the victim?" Now, is it not apparent that in the Chancellor's own mind there is a wide distinction between the two classes of creditors he has mentioned? That one is more and the other less entitled to be preferred? That he would approve a preference if made on grounds which he could sanction? And, after pointing out so forcibly the distinction between him who colludes with the debtor, and the fair business man who is entrapped, is his conclusion a sound one, that the proper corrective is not to examine the evidences of the collusion, and frustrate the fraud; but to put the least meritorious and the most meritorious—him who perpetrates, and him who is the victim of fraud, all on the same footing?

Let us hear the Chancellor further:—"Perhaps," says he, "some influential creditor is

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placed upon the privileged list, to *prevent disturbance, while those who are poor, or are minors, or are absent, or want the means or the spirit to engage in litigation, are abandoned."(b) This picture is well drawn, and addresses itself to our best feelings. But I apprehend the Chancellor would not vacate a judgment obtained by the creditor he singles out. And if not, it deserves to be considered whether the absent, or the minors, or those wanting in means or spirit for litigation, are not just as likely to be left behind, if the preference is left to be established by priority in obtaining judgments.

In some of the cases wherein the assignments of debtors have been set aside, the instant effect of the decision was to create an inequality among the creditors, and to give a preference to the creditor, whose ground of complaint was that all were not put on a footing. The Court, struck with the glaring inconsistency of this, with that equality at which it vainly aimed, has usually attempted to console itself and the suitors, and to cover over the contradiction, with the maxim, vigilantibus, non dormientibus, leges subserviunt. But what is that, but to admit that the law allows the vigilant to be preferred? It is preference still.(c)

Now, while I deny that it is a natural application of the maxim, vigilantibus, non dormientibus, to give the benefit of it to him whose only necessity for coming into Court was, that another, by superior vigilance, had

(a) 4 Wheat. 122.

(b) 2 John. Ch. Rep. 578.
(c) 20 John. Rep. 451.

obtained superior rights, of which a Court only could deprive him, and to deny it to that other; while I contend that this is an inversion of the maxim—while I contend that the creditors who took the assignment in this case, have not been less vigilant, but more vigilant than the creditor who has obtained a judgment; I am at a loss to perceive what moral principle it is, upon which those would proceed, who would set aside conveyances and liens existing—who would disturb things as they find them, merely because they give a preference—and substitute in their room a preference, to which the only title, is vigilance. Vigilance is a very good thing; and if left to depend on that, preferences would not be disturbed. But if they are to be disturbed, is vigilance the only moral quality entitled to consideration? Suppose the preferences complained of, besides being founded on superior vigilance, rest on generosity, humanity, gratitude, piety to parents, parental or conjugal affection, shall these all go for nothing?

The plain truth seems to be, that it is impracticable as to the mass of men, to put all creditors on a perfect equality; and if it

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*was practicable, injustice would often follow. Undoubtedly the power to prefer, may be perverted and abused, even when the abuse discloses no fraud upon which a Court can seize: but "the power, as it may be abused, so, on the other hand, may be very properly exercised." The discretion must be left to the debtor, within the limits of fraud. Society must depend for its indemnity upon the teachings of the debtor's heart and conscience; upon those moral lights, which all men possess; upon that native sense of justice; upon those better feelings, which exert a silent supremacy over even the worst of men. After all, most of the great interests and operations of society, depend mainly upon these. The law can only act in flagrant cases.(*d*)

But, without protracting these observations, I found myself upon this: that whatever may be thought of the morality or expediency of permitting a debtor to grant preferences, his legal right to do so is unquestionable.(*e*)

Then, Ralph Johnson's assignment would not have been invalid, if he had simply preferred his other creditors over the plaintiff. It would have been clearly valid, if he had surrendered to the other creditors without condition. I suppose it would have been equally valid, as against the plaintiff, if in his surrender to them as privileged creditors he had required releases from them. Such a requisition, so far from being a subject of just complaint with the plaintiff, would have operated greatly to his advantage, by freeing the debtor's after acquisitions from claims which might otherwise have stood in the way of his obtaining satisfaction of his debt.

Then, if it would have been no fraud on him to prefer others over him, with or without conditions, is he defrauded by giving him an opportunity to participate with them?—An opportunity which it would have not been fraudulent in Johnson to have withheld from him?

If he refuses to accept the condition, he is only thereby, and that by his own act, reduced to an unpreferred creditor. Not only is he left in this uninjured condition, but, as I remarked before, he is positively benefited by the condition, although he has not accepted it: the acceptance of it by others, having warded off competing claims from the debtor's after acquisitions.

I am not aware of any decision in this State, which concludes any thing on this point. Certainly it did not arise in the con-

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side*ration of Evans' assignment.(*f*) The authorities quoted against that assignment, consisted of cases in which debtors had required a release from their creditors. There was no such provision in Evans' deed; and the Court took notice of the fact, that the cases quoted turned upon the requirement of a release, for the purpose of shewing that they did not apply to that deed. The Court did not, as the occasion did not demand it, enter into an examination of the circumstances under which, in the cases quoted, the releases were required; so as to determine whether that simple requirement, without any other circumstance, would invalidate an assignment. It pronounced no opinion respecting the soundness or unsoundness of the decisions referred to. It merely pointed out their inapplicability to the case on trial.

Nevertheless, the impression they left on me certainly was, that the mere requiring a release would avoid an assignment: and such, I believe, was the impression they produced on the Court of Appeals.

But upon a careful examination of the cases I have mentioned, and such others as are accessible to me, I have not found one wherein fraud was inferred, merely from such requirement. I will first turn to the cases referred to in Vaughan v. Evans, 1 Hill Eq. R. 420, for the purpose of setting out more particularly than I did in the decision of that case, the provisions which the assignors coupled with the requisitions of a release, in order to enable them to drive their creditors to terms.

In Lord v. The Watchman, American Jurist No. 16, p. 284, the trustees were to sell the property, and after paying such creditors as might accept upon the conditions required, pay over the surplus, (notwithstand-

(*d*) 10 Mod. 459; 15 John. Rep. 571.
(*e*) 2 P. W. 427; 10 Mod. 489; 5 T. R. 424; 8 T. R. 528; 3 John. Rep. 84.

(*f*) 1 Hill Eq. R. 414.

ing there might be dissenting and unpaid creditors) to the assignor.

Hyslop v. Clark. (14 John. R. 459.) The assignment contained a provision, that if any of the scheduled creditors should refuse to release, the trust for paying them ratably should not be executed by the trustees; but instead thereof, in that event, the trustees should hold the assigned property in trust, to pay Hyslop & Co. in the first place, and then such other creditors as the assignors should appoint; and upon the further trust, in any event, to pay the surplus (without regarding dissenting or unpaid creditors) over to the assignors.

In Seaving v. Brinckerhoff, 5 John. Ch. Rep. 332, not only was the assigned property bound by judgement and execution, but the

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assignment provided *that the trustee should sell the property, and "if the creditors would not accept upon the condition imposed," (that of releasing and receiving ratably,) "the monies were to be held in trust for the grantors."

Thus, it appears that the debtors, unless the creditors would obey their commands, secured to themselves, a right to have their property reduced to a new form intangible by their creditor's executions, and difficult of access by any process, and in this form re-delivered to themselves. This right of re-delivering was not a resulting trust merely; but was secured by express provision in the assignment: so that the trustees were bound in strict compliance with their duty, and might have been compelled to convert the property to money, and pay it over to the debtors: and nothing but arresting them, and declaring the assignment void, could have prevented this.

This contrivance, this reservation of control over the property, this putting it out of reach of the creditor's process, was held in terrorem over the creditor's heads, unless they would release; and this constituted the fraud which vitiated the assignments. The effort was to put the property out of the reach of the law, and in the hands of trustees so constituted as to be mere instruments in the hands of the debtor, and not to let it go in payment of debts at all, unless on the debtor's own terms. It was not a fair surrender of the property, either with or without conditions. A control over it was still reserved. It was not surrendered. The language was, "I will not surrender unless you come to my terms; if you refuse, the property is sold, and being out of your reach, I will hold fast the avails, and defy the law."

In Austin v. Bell, 20 John. Rep. 442, 448, the deed of assignment required the trustee to pay back to the debtor the proportions of such creditors as should refuse to release. Chief Justice Spencer insists on the distinction between this provision and that contained in the deed, in Murray v. Riggs, 2 John. Rep. 577, in which it was stipulated that the shares of the dissenting creditors should be thrown into the general mass, for the benefit of the accepting creditors. He shews, by an examination of cases wherein assignments had been set aside, that the vice lay not merely in requiring a release, but in putting the assets in such shape as to be inaccessible to ordinary process; and then establishing, by the express terms of the trust, such control over them, in the grantor, that he could make

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or withhold payment, at *his pleasure, accordingly as his creditors should submit to or reject the terms dictated by him.(g)

Our own insolvent debtor's Act of 1759, confirms me in the opinion that, whatever the law may be elsewhere, in this State, as least, a debtor may lawfully assign his whole estate for the benefit of such creditors as will release him.

That Act, P. L. 247–8–9, after reciting among other things that "many persons" (whom, so far from condemning, it pronounces to be "proper objects of compassion") "may be willing to satisfy their creditors to the utmost of their power," provides, that if any person sued, impleaded or arrested, "shall be minded to make surrender of all his effects, towards satisfaction of the debts wherewith he stands charged, or in which he shall be indebted to any persons whatsoever," he may file a petition, accompanied with a schedule of his effects, in the Courts of law; who shall, thereupon, cause not only the suing creditors, but "all other the creditors to whom he shall be indebted, to be summoned." On a day fixed, the debtor is to take an oath, prescribed by the Act, that his schedule contains a full account of his effects and credits, both at the time of filing the petition and of taking the oath; and that he has not, otherwise than as mentioned in the schedule, assigned or disposed of any part thereof, in such manner as thereby "to have or expect any benefit or profit to himself, or to defraud any of his creditors." The Court, if "satisfied with the truth of the oath taken" by the debtor, shall (after making certain reservations of property dictated by humanity) order the effects specified in the schedule to be assigned by the debtor to persons to be named by the Court; which "assignment shall be in trust for the suitors and such other creditors of the petitioner, as shall be willing to receive a dividend of his effects, and shall within twelve months from the time the petition was filed, make their demands."

Now, for the effect of this. The Act gives it the operation of a release from all the accepting creditors. It provides that the debtor shall, upon executing the assignment, and delivering his effects, so far as he has power over them "be forthwith discharged from such suits, and shall also, thenceforth, be acquit-

(g) 15 John. Rep. 571; 20 John. Rep. 450.

ted and discharged from all such other of his creditors, as shall have received their dividends as aforesaid."

It does appear to me, that Ralph Johnson has acted in the very spirit of this statute. He has made the very assignment which it

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*requires him to make; and which if executed under compulsory process, the Act declares, would have released him from all accepting, and been valid against all dissenting, creditors.

Surely it cannot be a fraudulent evasion of the law to do voluntarily what that same law would sanction if done under process.

It seems no answer to this to insist that an insolvent, proceeding under the Act assigns under strict scrutiny and under penalty of perjury. The scrutiny is to ascertain whether the debtor's whole estate is included in the assignment, and the perjury is in swearing falsely that it is. But the bill admits that Johnson has assigned his whole estate; thereby conceding the truth of what the Act would have required him to swear; and rendering unnecessary any scrutiny whatever. If the bill had not done this, then the plaintiff would not have stated a case rendering the aid of this Court necessary to him: inasmuch as, for aught that could be known, Johnson might still have had in hand enough property to satisfy his debt.

An argument was urged, that if no creditor, or but one creditor, holding an inconsiderable demand, had accepted under Johnson's deed, a trust would have resulted to Johnson for the residue of the assigned property; that this would have given him a control over the fund, enabling him to coerce the creditors into the execution of releases: and that the deed was, therefore, void for fraud at its execution, and was not cured by the subsequent acceptance of creditors to an amount sufficient to exhaust the fund.

If the case put by the objection had actually occurred; if after a full surrender by Johnson of all his effects, a trust had resulted to him, and had resulted merely in consequence of the nonacceptance of creditors, I apprehend this would not have vitiated his assignment. The authorities draw a distinction between a resulting and an express trust to the assignor; between cases where the debtor has reserved a control, and given himself a preference over the creditors, and those in which he has surrendered all, in terms which give them a preference over him. If a trust result in the latter case, the remedy of unpaid creditors is to be let in to an account of the surplus in the trustee's hands.(*h*)

The existence of this distinction renders it unnecessary to inquire whether the accep-

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tance or non-acceptance of the other cre*ditors was not matter for their exclusive consideration, and not for the consideration of the plaintiff.(*i*)

It also renders it unnecessary to inquire whether the supposed defect has not been cured. If it were not unnecessary to go into this inquiry, the inclination of my mind is against the plaintiff. The other creditors have, by closing with the offers made them, made a case in which no overplus can result to the debtor's hands; so that he has not any fund, by a control of which he can dictate terms to the plaintiff. It would seem unreasonable to say, that under these circumstances the plaintiff should be allowed to resort, not to the actual case, but to one now altogether supposititious and put beyond the range of possibility, and found a complaint thereon; especially since the entertaining that complaint can have no other effect than to divest the other creditors of rights which it has been shewn, I think, they hold without fraud on him.

The only thing remaining for consideration, is whether the sale made by the assignors is valid. It appears that they called upon the creditors to appoint an agent, under the Act of 1828, Acts 1828, p. 32, and that the creditors failed to do so. The sale is therefore valid. Indeed, I did not understand the plaintiff's counsel to contend against the sale, but only against the validity of the assignment; professing a willingness, if the assignment should be avoided, to take an account of the avails of the assigned property in the trustees' hands.

Upon the whole, I feel bound, much against my first impressions, to sustain the assignment. But as I conceive the plaintiff had strong grounds to question its legality, each party will pay his own costs.

If the plaintiff chooses to have an account of any surplus which may be left after paying the accepting creditors, the bill will be retained until the next term, to give him an opportunity. It is decreed that it be dismissed, in all other respects; and that each party pay his own costs; those of the trustees, to be allowed them out of the assigned fund.

On an appeal by the plaintiff from this decree, the question as to the validity of the assignment, was argued at length by Wethers for the appellant. The Court concurring with the Chancellor, the decree was affirmed.

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*Chancellors DE SAUSSURE, JOHNSON and HARPER, and Justices O'NEALL, EVANS, EARLE, and BUTLER, concurred.

GANTT, J. I entertain serious doubts as to the correctness of the principle established by this decree. Indeed I feel satisfied that it is in violation of the constitution.

(*h*) Prec. Ch. 605; 5 T. R. 420; 2 John. C. R. 579, 580.

(*i*) 2 Bin. 174, 182.

2 Hill, Eq. 457

HUGH M'MULLIN, Administrator of William M. M'Donald, v. JOHN BROWN and Others.

(Columbia. Dec., 1836.)

[*Executors and Administrators* ⇐291.]

After the assent of the executor the title vests in the legatee, and the property is not liable in his hands to executions subsequently obtained against the executor. *(a)*

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1159; Dec. Dig. ⇐291.]

[*Executors and Administrators* ⇐453.]

A decree against executors of an executor is prima facie evidence against the legatee of the first testator on a bill to charge the legacy. *(b)*

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1902; Dec. Dig. ⇐453.]

[*Wills* ⇐867.]

A creditor of the testator has the unquestionable right to pursue a legacy in the hands of a legatee, after assets in executor's hands have in any way been exhausted. It might be different if he had stood by and saw the executor dissipating the assets without making any effort to save himself.

[Ed. Note.—Cited in Lanier v. Griffin, 11 S. C. 581; Brock v. Kirkpatrick, 60 S. C. 343, 345, 347, 348, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see Wills, Cent. Dig. §§ 2204–2209; Dec. Dig. ⇐867.]

[*Wills* ⇐836.]

Lands devised under a general residuary clause liable for debts before a specific legacy.

[Ed. Note.—Cited in McLure v. Askew, 5 Rich. Eq. 169; Laurens v. Read, 14 Rich. Eq. 252; Lanier v. Griffin, 11 S. C. 582; Brock v. Kirkpatrick, 60 S. C. 349, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see Wills, Cent. Dig. § 2154; Dec. Dig. ⇐836.]

Plaintiff decreed to account for hire of negroes while in his possession.

[*Wills* ⇐834.]

The liability of a legatee for testator's debts extends only to the legacy in specie: he is not liable for hire.

[Ed. Note.—Cited in Godbold v. Godbold, 13 S. C. 603.

For other cases, see Wills, Cent. Dig. § 2141; Dec. Dig. ⇐834.]

[*Limitation of Actions* ⇐65, 132.]

If a creditor is guilty of neglect in prosecuting his demand against the executor, the legatee will be protected by the statute of limitations. Ob. dic.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 347, 568; Dec. Dig. ⇐65, 132.]

[This case is also cited in Singleton v. Moore, Rice Eq. 131, and Bermingham v. Forsythe, 26 S. C. 365, 2 S. E. 286, without specific application and in Tibbetts v. Langley Mfg. Co., 12 S. C. 485, on the doctrine of res judicata.]

Chester, 1835.—The following decree contains a full statement of the case:

Johnson, J. (sitting as Chancellor.) The object of this bill is to charge certain slaves, Dinah, Fann, Sam, Tuff, Jim, Ransom, Aggy and Peggy, now in possession of defendant, Brown, with the payment of about $4000, remaining due on a decree obtained in the Court of Chancery by the plaintiff, against John Dunovant and John Kidd, executors of Middleton M'Donald, jr., who was executor of Middleton M'Donald, sen., to the plaintiff's intestate, the said Middleton M'Donald, jr. having died insolvent.

In support of this claim, it is stated in the plaintiff's bill that the whole of the unadministered assets of the said Middleton M'Donald, sen., in the hands of Dunovant and Kidd, had been sold by the sheriff under a fi. fa. founded on the above mentioned decree, leaving the balance above mentioned unsatisfied, and with respect to which the fi. fa. is returned nulla bona; but that Middleton M'Donald died seized and possessed of a considerable real and personal estate, more than sufficient to pay all his just debts, and that his executor, Middleton M'Donald, jr., instead of retaining the same in his hands for that purpose, paid and delivered over to the legatees of his said testator's will, all such legacies as were therein bequeathed to them, and suffered them to take into their possession such of the real estate as was therein also devised to them, and otherwise disposed of the real and personal estate of his said testator, without paying the debt due to the plaintiff's intestate; and that amongst other things, he delivered to the defendant, Brown, the negroes above mentioned, in pursuance of a bequest contained in the said last will and testament of the

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said *Middleton M'Donald, sen., to Tirza, the wife of the said John Brown, and constitutes the only property whereof the said Middleton M'Donald, sen., died possessed, which remains within the jurisdiction of the Court, and can be rendered available to satisfy the plaintiff's demand. The prayer of the bill, so far as it affects the defendant, Brown, who is the only defendant interested in the present state of the case, is that the negroes in his possession be decreed to be delivered up and sold to satisfy the plaintiff's demand; and if that should be insufficient, that he should account for hire during the time he has had them in possession, which is stated in the bill to have been since 1816 or 1817.

The answer of the defendant, Brown, admits that the negroes above mentioned were specifically bequeathed to his said wife, Tirza, in the said last will and testament of the said Middleton M'Donald, sen., and that the said Middleton M'Donald, jr., the executor, assented to the said legacy, and delivered the said negroes to him about the latter end of the year 1817, and that he has had possession of them ever since, and that

(a) See Alexander v. Williams, 2 Hill, 522.

(b) See Vernon & Co. v. Valk & Wife, ante 257.

these facts were well known to the plaintiff. He also states, that the said Middleton M'Donald, sen., died seized and possessed of considerable real and personal estate more than sufficient to pay all his just debts, exclusive of the negroes specifically bequeathed to his wife, which were not subject to pay the plaintiff's debt, until the whole of his estate not specifically devised, had been exhausted: and amongst other things, divers valuable tracts of land, still remaining unsold and subject to the plaintiff's demand, in exoneration of the specific legacies, and to which plaintiff ought first to resort. He denies that the plaintiff's demand is just; and as he has not heretofore been a party to the proceedings, nor had notice to come in and defend his rights, he insists that plaintiff is bound to make strict proof of his demand.

The answer further insists that the defendant is protected against this demand by the statute of limitations, and relies on his possession of the negroes since 1817, with the knowledge of plaintiff. In connection with this question, it will be necessary to state more particularly the nature of plaintiff's demand, and the circumstances attending its prosecution. William M'Donald, who died in 1801, by his will bequeathed to his son, William M. M'Donald, a legacy consisting principally of negroes, and appointed Middleton M'Donald, sen., his executor. Wil-

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liam M. M'Donald died *in 1813, under age and intestate, and administration of his estate was granted to plaintiff. In 1814, plaintiff filed an original bill against Middleton M'Donald, jr., executor of Middleton M'Donald, sen., for an account of the legacy as bequeathed to William M. M'Donald, by his father, William M'Donald, which was continued from time to time, and divers references held until 1816, when it abated by the death of the defendant, and was revived against Dunovant and Kidd, his executors, by bill filed in 1819. This last bill was continued from time to time until 1828, when a final decree was pronounced, and being unable, as before stated, to obtain satisfaction of that decree, the plaintiff filed this bill in 1829.

Supposing the plaintiff's claim to be established by competent evidence, and that there is no other property out of which it can be satisfied but the legacy to Brown's wife, it will not be denied that the plaintiff has a right to pursue it, unless he has lost it by negligence or lapse of time. Conceding this, the questions raised in the defence are—

1. Whether the plaintiff, supposing he has a right to pursue the property in defendant's possession, had not an adequate remedy by levying the execution on, and selling the negroes in the defendant's possession, under the execution against Dunovant and Kidd, the executors of Middleton M'Donald, jr.

2. Whether the decree against Dunovant and Kidd, was competent evidence against the defendant, of the demand against Middleton M'Donald, sen.

3. Whether the plaintiff's rights against the defendant are not barred by the statute of limitations.

4. The fact being stated in the bill, that there were sufficient assets to pay all the debts, whether the defendant is bound to refund on account of the devastations of the executor.

5. Whether in point of fact, there are other assets in the jurisdiction of the Court, chargeable with the payment of this demand, in exoneration of the specific legacy to the plaintiff's wife.

I. The position taken in the defence is very clearly untenable. In theory of law, all the chattels of the testator vest in the executor, and his disposition of them is at law, binding on both creditors and legatees, whether general or specific, so that the delivery of the legacy to defendant's wife, and assenting thereto, vested the legal property in the de-

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fendant, of which he could not *be divested but by due course of law. There was not, therefore, any property in Dunovant and Kidd, on which the execution against it could attach. The right to pursue it in the hands ot the defendant is a mere equity, which the Court of Chancery alone has the power of enforcing.

2. I am of opinion also, that the decree against Dunovant and Kidd was at least prima facie evidence against the defendant, of the correctness and amount of the demand against Middleton M'Donald, sen. Judgments and decrees of Courts of competent jurisdiction directly on the point in controversy, are admissible in evidence, not only between the parties, but all persons standing in the relation of privies in blood, in estate, or in law. And I understand by the term privy, when applied to a judgment or decree, one whose interest has been legally represented at the trial. The heir for example, is privy in blood to the ancestor, and consequently a judgment against the ancestor is evidence against the heir. So, if several remainders be limited by the same deed, the remainders are privies in estate to each other, and a verdict for one will be evidence for the rest in remainder; and privies in law are such as derive their interest through the parties. Starkie's Ev. pt. 2, p. 192-3-4.

In the case against Dunovant and Kidd, the point in issue was, whether Middleton M'Donald, sen. was indebted to the plaintiff's intestate, and how much; and that is precisely one of the questions here—the right of the plaintiffs to recover here, depends on that indebtedness. The questions are therefore the same. In the former suit, Dunovant and Kidd, as the executors of Middleton M'Donald, jr., who was the executor of Middleton

M'Donald, sen., were clothed with all the rights, and represented the interest which had appertained to Middleton M'Donald, sen., and it is from him that the defendant derives his right to the property constituting the legacy bequeathed to his wife, and which is sought to be charged with the payment of this debt. His rights are subordinate to the rights of the plaintiff as a creditor, and were therefore properly and legally represented on the former trial; he is therefore a privy to that decree and is bound by it. I am not prepared to say, however, that the decree is conclusive. Chancery would relieve unquestionably against the fraud and combination of the creditor and the executor, and possibly against the negligence of the executor, when

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the rights of the legatee had been *compromised by it; but these questions do not arise out of the case.

3. The statute of limitations does not in terms apply to demands that are merely equitable, but the rule which it prescribes is adopted in Chancery, in cases that are analogous to those in which it applies at law. Stackhouse v. Barnston, 10 Ves. 466-7; and in analogy to the rule at law, I take it for granted that it will not run until a known cause of action or suit has arisen. The principle of the statute will not apply to those technical and continuing trusts which are alone cognizable in the Court of Chancery, (Kane v. Bloodgood, 7 John. Ch. 90, Van Rhyn v. Vincent, 1 M'C. Eq. 310,) until the trust is put an end to by the refusal of the trustee to account, or by some other act by which he throws off the character of trustee.—(See Stark v. Stark, and Montgomery v. Montgomery, decided in this Court.) But this is not one of those technical continuing trusts, but one of those constructive trusts, implied from the circumstance of the defendant having obtained possession of a fund out of which the plaintiff was entitled to have his demand satisfied, and with respect to which the authorities all agree that the statute will bar a recovery. I have before remarked, however, that the statute could not operate before a cause of suit or action had arisen, and was known to the plaintiff—and the question now is, when did the plaintiff's cause of suit against the defendant arise, and when was it known to the plaintiff.

Middleton M'Donald, jr., the executor, and after his death, Dunovant and Kidd, his executors, were previously liable, and the defendant only in the event of plaintiff's being unable to recover payment from them. Both bill and answer state, that over and above the specific legacy to defendant's wife, there were abundant assets to pay all the debts of the testator; and one ground of the present defence is, that even now there are sufficient assets to pay this decree, and until the plaintiff had exhausted his remedy against them, he could not certainly know that the assets would prove insufficient: and there is no evidence to show that there was any reasonable ground to suppose that they would be insufficient. It is said that defendant might have been joined in the bill against Middleton M'Donald, jr., and against Dunovant and Kidd, and the case of Trescot v. Trescot, 1 M'C. Eq. 432, sanctions that mode of proceeding; but even that case concedes, that according to the general rule, the proceedings

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ought to be against the executor *only in the first instance, and that a departure from it is only justifiable when it is known that the assets remaining in the hands of the executor are insufficient. If, therefore, the plaintiff had joined Brown in either of the former bills, and it had turned out that the other assets were sufficient, as to him, the bill would have been dismissed with costs. I think, therefore, that he was not bound to join the defendant, and having no certain knowledge that the assets would prove insufficient, it cannot be said that a known cause of action or suit had arisen, until the remedy against Dunovant and Kidd was exhausted, and that the defendant is not protected by the statute.

There is a common sense view of this question, which, is in my judgment, equally conclusive. The claim of the plaintiff, being founded on a valuable consideration is more meritorious than that of defendant, which is merely voluntary. The plaintiff has, for more than twenty years, pursued his claims with unremitting diligence, precisely in the course prescribed by the rules of law and the practice of the Courts. He could not know the necessity, nor had he the power of restraining the executor in giving an illegal preference to the defendant, in assenting to and delivering his legacy; and it is unjust and unreasonable that the defendant should be entitled to avail himself of the advantage thus gained.

4. The cases of Executors, Gregory v. Forrester, 1 M'C. Eq. 326, and Trescot v. Trescot, Ib. 431, are decisive on the question that the plaintiff has the right to pursue the legacy to defendant's wife, for the satisfaction of the demand. If, after the legacy had been delivered to the defendant, the plaintiff had stood by and saw the executor dissipate the assets of his testator, without making an effort to secure himself, Equity would not have relieved; but so far from this, a suit was pending against the executor at the time, and although it afterwards abated by his death, it was revived with all possible despatch.

5. In the residuary clause of the last will and testament of Middleton M'Donald, sen., he devised to his son, Middleton M'Donald, jr., his executor, all his lands not before disposed of for life remainder to his eldest son; and some evidence was given on the trial that two tracts of land passed under this devise, amounting in value to a sum much greater than the plaintiff's demand; and unless these

lands were disposed of in the due course of administration, being general and not specific

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legacies, they were unques*tionably liable, before the plaintiff could resort to the specific legacy to defendant's wife. The plaintiff's counsel stated to the Court that he was able to prove that those lands had been disposed of in due course of administration, but was not then prepared to do so. The cause was heard at the last hour of the term, and when in truth there was not time for the examination of the matter, and the cause was left open by consent for further evidence on the point. Since that time, an execution has been put into my hands at the suit of Canty & M'Rae v. Middleton M'Donald, jr., executor of Middleton M'Donald, sen., from which it appears that a tract of land, containing 1,129 acres, had been sold to satisfy that and other executions, but I have no means of ascertaining whether it is any part of the land devised by the residuary bequest; and from the hurry in which the case was tried, the circumstances have not been sufficiently developed to enable me to form a judgment satisfactory to my own mind on this branch of the case, and have therefore concluded to refer it to the Commissioner to collect further evidence on the matter.

In 1813, or thereabouts, the plaintiff, under some pretence of right in himself, took possession of the negroes now in controversy, and retained them until 1817, when they were recovered from him in an action at law, by Middleton M'Donald, jr., as the executor of Middleton M'Donald, sen., and the defendant insists, that if any thing should be decreed against him, the plaintiff is bound to account for or credit his demand with their hire during the time he had them in his possession—but this cannot prevail. In the action at law, which I understand was detinue, the plaintiff was entitled to recover hire by way of damages for the detention, and I presume did so. At any rate, the judgment is conclusive, and he is not bound to account again for their hire.

In the event of the liability of defendant, and the sales of the negroes proving insufficient to pay the balance due on the decree, it is insisted for the plaintiff that defendant is bound to account for the hire of the negroes during the whole time he has had them in his possession; but this cannot be allowed. The defendant's possession was legal and rightful, and in retaining possession of them, he withheld no right from the plaintiff and did him no wrong, until the fact of the indebtedness of Middleton M'Donald, sen., which was controverted, was judicially ascertained, and until he had notice that a resort to this fund would be necessary to satis-

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fy *the demand. The rule is, that when one lies by and suffers another to enjoy property or funds as his own, under an apparent bona fide title, which might have been brought into discussion, he will be restricted in his demand for an account to the time of the demand made, or to four years before filing the bill. Rowland v. Best, 2 M'C. Eq. 320. And the circumstances of this case appear to me to justify the application of the rule to its fullest extent. The plaintiff will therefore only be entitled to an account of hire from the filing of the bill.

It is therefore Ordered and decreed, that it be referred to the Commissioner to ascertain and report whether the testator, Middleton M'Donald, died seized of any lands and tenements, and if any, their value, and whether they have been sold and disposed of, and in what manner and by whom and on what account.

To provide also for the event of the defendant's ultimate liability, it is also Ordered, that defendant do account before the Commissioner for the hire of the negroes mentioned in the bill, from the time of the filing of the bill.

The defendant, John Brown, gave notice that he would move the Court of Appeals to reverse the decree in the above case, upon the following grounds, to wit:

1. Because the decree against Dunovant and Kidd was not competent evidence against the defendant, Brown, of the demand against Middleton M'Donald, sen.

2. Because the plaintiff's rights against the defendant, Brown, were barred by the statute of limitations.

3. Because the defendant, Brown, was not bound to refund on account of the devastation of the executor, Middleton M'Donald, jr.

The defendant, Brown, also gives notice, that upon failing to have the decree reversed, he will move to reform the same in the following particulars:—

1. That the plaintiff's demand should be credited with the hire of the negroes in his possession from 1813 to 1817, as well as the value and hire of one other negro, bequeathed to the wife of the defendant, Brown, in plaintiff's possession from 1813 up to the present time.

2. That as the estate of Middleton M'Donald, sen., was more than sufficient to pay all the debts, and as the other devisees and legatees have received their portions thereof, de-

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fendant, Brown, *should not be charged with more than his wife's share or proportion of said debt.

3. That the defendant, Brown, should not be charged with negro hire.

Blanding, for the appellant, argued these grounds at length, and cited Smith v. Groggins, 1 State Rep. 52; Chappell v. Brown, 1 Bailey, 530.

Clarke, contra. That the decree against Dunovant and Kidd, executors of Middleton M'Donald, jun., was competent evidence, and

that legacies in the hands of legatees were assets for the payment of debts after exhausting those in the hands of the executor—cited Executors of Elliot v. Drayton, 3 Eq. Rep. 29; 1 Vernon, 94; Screvin v. Bostick, 2 M'C. Ch. 410; Milligan v. Milligan, 3 Cranch 28. As to the statute of limitations.—He insisted that there was no cause of action against defendant until the remedy had been exhausted against the executors. That the executor is a trustee as well for the creditors as the legatees, and a legatee takes subject to the paramount equity of creditors—the legatee is also in such case a trustee, and the statute will not run—Kane v. Bloodgood, 1 John. Ch. Rep. 99; Drayton v. Drayton, 1 Eq. Rep. 559; High v. Dunwoodie, 2 Ves. 87; Irby v. M'Crae, 4 Eq. Rep. 422; Saxon v. Barksdale, 4 Eq. Rep. 522; Hovenden v. Annesley, 2 Sch. & Lef. 638; Decouche v. Savetier, 3 John. Ch. Rep. 217; Van Rhyn v. Vincent, 1 M'C. Ch. 310.

As to the liability of legacies after devastavit of executor—Lupton v. Lupton, 2 John. Ch. Rep. 614; Anonymous, 1 P. W. 495; Gregory v. Forrester, 1 M'C. Ch. 325.

JOHNSON, Chancellor. The Court instruct me to say, that they concur in the decree of the Circuit Court, except so far as it goes to discharge the plaintiff from his liability for the hire of the negroes while in his possession, from the time of the rendition of the verdict in the action of detinue, at the suit of Middleton M'Donald, jun. against the plaintiff, until they were delivered to the said Middleton M'Donald; and so far as the decree charges the defendant with the hire of the negroes in his possession from the time of filing the bill. On the first of these points, the Court is of opinion that the plaintiff is

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bound to account for the hire *of the negroes during the time they remained in his possession after the verdict; and in this opinion I entirely concur, and should have so decided, if the fact that the negroes did remain in his possession, had been brought before me on the Circuit. I do not know now, how the fact is, and the counsel differ about it: the truth will be ascertained on a reference. On the second point, the Court have instructed me to say, that the liability of the defendant extends only to the legacy in specie which he has received, and that he is not liable to account for the hire of the negroes, even after the filing of the bill; and in these respects the decree of the Circuit Court must stand corrected and reformed.

On the argument of the cause here, the counsel have, for the purpose of putting a final end to all litigation between the parties, conceded that the defendant is in possession of another negro called Ben, part of the legacy to his wife Tirza, under the will of Middleton M'Donald, sen.; and that the plaintiff is now, and has been for a long time in possession of another negro called Mary, part of the said legacy; and have consented that the rights of the parties in these negroes should be adjusted in this cause, although their names have been accidentally omitted in the pleadings.

The negro, Ben, is certainly subject to the payment of the plaintiff's demand, on the same principles that the other negroes of the legacy are held to be so; and the plaintiff is chargeable with the value and hire of the negro, Mary, on the same principle that he is held liable for the hire of the other slaves.

It is therefore Ordered and decreed, that so much of the Circuit Court decree as directs the defendant to account for the hire of the negroes in his possession, be set aside and reversed; and that the plaintiff do account for the hire of the negroes mentioned in the bill, from the time of the rendition of the verdict in the action at law against him at the suit of Middleton M'Donald, jun., executor of Middleton M'Donald, sen., until they were delivered to the said Middleton M'Donald, jun., or to some one else authorized to receive them; and that he do also account for the value of the negro, Mary, and for her hire during the time he has had her in possession, the amount thereof to be credited to the balance due on his judgment against Dunovant & Kidd, executors of Middleton M'Donald, jun.

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*In concurring in the decree of the Circuit Court on the question arising out of the statute of limitations, the Court desire not to be understood as laying down the rule broadly, that a legatee will in no case be protected by the statute against the claims of the creditors of the testator; on the contrary, it is thought, that if the creditor is guilty of neglect in the prosecution of his demand against the executor, the legatee would be protected by the principle, if not the letter, of the statute.

Chancellors DE SAUSSURE and HARPER, and Justices O'NEALL, RICHARDSON, EVANS and BUTLER, concurred.

Chancellor JOHNSTON having been of counsel in the case, gave no opinion.

2 Hill, Eq. 467

JOHN ROBINSON, and Others, v. NATHANIEL GIST, Administrator of Hiram Coleman.

(Columbia. Dec., 1836.)

[*Executors and Administrators* ⇐269.]

Where an administrator rendered an erroneous statement of assets, and paid the creditors their proportion thereof, and took their assignments for the balance:—*Held*, that he should not be permitted to retain to his own use the funds afterwards collected. As a trustee, he cannot make profit to himself of the trust estate.—Assignm'ts set aside, errors corrected, and adm'r ordered to account.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1092; Dec. Dig. ⇐269.]

Union, Special Term, September 1835.

O'Neall, J. (sitting as Chancellor.) The plaintiffs are creditors of the late Hiram Coleman, of whom the defendant is the administrator.

In 1828, three years after the death of his intestate, the defendant exhibited to the plaintiffs a statement of the Ordinary, by which it appears that after paying preferred debts, the defendant had in his hands only $1895.40 of available assets, for the payment of their debts. Of this sum he paid to them their proportions, and took their receipts for the same, with an authority to himself to receive to his own use, any further sums applicable to the said debts which he might be able afterwards to collect from the assets of his intestate.

It appears, on looking into the accounts made up by the Ordinary, and on which his statement was predicated, that they were erroneously made up, in allowing defendant commissions on paying a very large debt due by his intestate to himself; and in computing interest on the amount of that debt, from 1825 to 1828, and not applying annually to its extinguishment the annual balances in the hands of the defendant since 1828.

The defendant has collected and received

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of the doubtful assets *of his intestate, $1410.47, which he now contends, under the settlement and the receipts of the plaintiffs, he is entitled to retain to his own use.

There can be no doubt that the plaintiffs accepted of the sums paid them by the defendant, under the belief that the Ordinary's statement of the account was correct. When this is shewn to have been incorrect, it follows that this was such a mistake in fact, as would have made that settlement not binding on the plaintiffs.

But, independent of this, the defendant cannot be allowed to set up these receipts as a purchase or gratuity from the plaintiffs of their interests as creditors in Hiram Coleman's estate. The defendant was their trustee, and he cannot be allowed to speculate upon his cestuique trusts. It is a settled rule that he shall not make profit out of his trust. For collecting the funds, which was a duty imposed on him by law, he would claim that they should become his own. It is true that the plaintiffs assented to this in 1828: but it is equally true that they now object to it, and the defendant has not even the pretext of a consideration on which he can claim to hold for his own use, their dividends of the funds in his hands. It cannot therefore be allowed that he should be regarded as the assignee of the plaintiffs.

But, if there had been an assignment on some slight consideration, I should hold that the relation of confidence between the defendant and plaintiffs, would render it invalid.

It is Ordered and decreed that the defendant do deposit with the Commissioner, the evidence of his intestate's indebtedness to the plaintiffs—that the Commissioner do report the balances due to the plaintiffs, after deducting the payments made by the defendant in 1828—that he do also advertise in the papers published in Charleston and Columbia, for three months, for the other creditors of Hiram Coleman to present sworn statements of their debts to him on or before the 15th of February next; and that he do examine and report the amounts due to them, together with the amounts due to the plaintiffs, to the next Court of Equity for Union District.

It is also Ordered that the Commissioner do charge the defendant, in his account on Hiram Coleman's estate, with the amount retained by him as commissions for paying his intestate's debt to himself, and the interest thereon.

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*It is also Ordered that he do correct the defendant's accounts made up by and before the Ordinary, Rice, by applying the annual balances in the hands of the defendant, from 1825 to 1828, to the payment of his intestate's debt to himself, and that the amount of the difference between his debt thus ascertained and paid, and as it was allowed by the former Ordinary, Rice, be charged with interest, to the defendant.

It is also Ordered that the defendant do account for the assets of his intestate, collected since 1828, with interest thereon.

The defendant contends, that in making these last collections, he has been put to extraordinary trouble, and has claimed compensation beyond the regular commissions.

It is therefore Ordered that an issue be forthwith made up and tried at the ensuing term of the Court of Common Pleas for Union District, to ascertain whether the defendant is or is not entitled to compensation beyond the commissions of two and a half per cent for receiving, and two and a half per cent for paying out the assets of his intestate; and if this issue be found for him, then that commissions of two and a half per cent for receiving, and two and a half

per cent for paying out the assets since 1828, and such extra compensation, be deducted from the amount decided to be charged against him; if not, that the commissions of two and a half per cent for receiving, and two and a half per cent for paying out, be alone allowed; and that the balance found to be due by the defendant, as administrator of Hiram Coleman, be apportioned by the Commissioner, among the plaintiffs and the other creditors of Hiram Coleman. Let the defendant pay the costs of this suit.

Thomson & Dawkins, for appellant.
Herndon, contra.

O'NEALL, J. This Court instruct me to say, that they are satisfied with the decree of the Judge, who sat for the Chancellor in this case. It is necessary barely to remark, that one of the grounds of appeal is founded in error. There is no limitation in the decree, such as the ground supposes, preventing the jury who may try the issue from allowing five per cent on the whole estate, if, under the instructions of the law Judge, they

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should think the *defendant entitled on the facts, to so much extra compensation. The Circuit decree is therefore affirmed.

Chancellors DE SAUSSURE, JOHNSON, HARPER and JOHNSTON, and Justices GANTT, RICHARDSON, EVANS and BUTLER concurred.

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2 Hill, Eq. 470

JAMES PICKETT v. JAMES B. PICKETT, and Others.

(Columbia. Dec., 1836.)

[*Execution* ⟸249.]

Sheriff's sale to defendant set aside, where the defendant, with a knowledge that the sheriff had agreed to postpone the sale, urged him to sell when the crowd had dispersed, and then purchased himself at a great sacrifice.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 697–702; Dec. Dig. ⟸249.]

[*Fraudulent Conveyances* ⟸130.]

Defendant assisted a debtor to remove his property out of the State, with the view to defeat liens existing here against it, and to obtain priority for himself in another State: *Held*, that this was such a fraud as will deprive him of his priority in the foreign jurisdiction; and he was ordered to account here, for the funds received there.

[Ed. Note.—Cited in Bird v. Aitken, Rice, Eq. 79; Bryan v. Robert, 2 Rich. Eq. 14; Pettus v. Smith, 4 Rich. Eq. 205; Cureton v. Doby, 10 Rich. Eq. 413, 73 Am. Dec. 96; Anderson v. Aiken, 11 Rich. Eq. 237; DuPont v. DuBos, 52 S. C. Append. 601.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 405; Dec. Dig. ⟸130.]

[*Usury* ⟸126.]

On a bill by one judgement creditor against another to set aside a sheriff's sale of debtor's property as fraudulent, and to recover funds which defendant had fraudulently obtained, it was held by a majority of the Court, that the defendant could not avail himself of usury in the original cause of action on which the plaintiff's judgement was founded. Ch. Harper & Js. Gantt & O'Neall, dissenting.

[Ed. Note.—Cited in Jones v. Kilgore, 2 Rich. Eq. 66; Ryan v. Southern B. & L. Ass'n, 50 S. C. 189, 27 S. E. 618, 62 Am. St. Rep. 831.

For other cases, see Usury, Cent. Dig. § 397; Dec. Dig. ⟸126.]

Fairfield, July 1835.

The following is the brief of the appellant's counsel:

The bill in this case was filed by the plaintiff, as a judgement creditor of Reuben Pickett, Robert L. Knox and Susannah Pickett, against the defendants, on the 1st of February, 1832.—1. To set aside the sale of three tracts of land, situate on Wateree Creek, in Fairfield; one belonging to the said Reuben Pickett, another to the said Robert L. Knox, and the third to the said Susannah Pickett, and which defendant, Pickett, purchased at the sheriff's sale on the 8th April, 1828; on the ground of alleged fraud and imposition in effecting a levy and sale of said lands, and the inadequacy of price: 2. To set aside two judgements in favor of said James B. Pickett; one for $3,000, against Robert L. Knox, Renben Pickett and Susannah Pickett, and the other for $2293.53, against Robert L. Knox and Susannah Pickett, both confessed on the 8th of April, 1828; on the ground of alleged fraud in obtaining said judgements, with a view to deprive plaintiff of the means of obtaining satisfaction of his judgment: 3. To set aside the sales of certain negro slaves alleged to have been the property of the said Renben Pickett, Robert L. Knox and Susannah Pickett, made by the sheriffs of Lancaster and Fairfield, and purchased by defendant, Pickett, and his agent, on the ground of alleged fraud and imposition on the part of said defendant, in procuring a levy of said negroes and a sale of them at an under value: 4. To compel said defendant to account for the value of certain negro slaves and other property, which the said Reuben Pickett carried from the State of South Carolina to Mississippi or Louisiana, on the ground that defendant,

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Pick*ett, aided said Renben Pickett in carrying off said property, with a view to defraud plaintiff.

The defendant, in his answer, denies all the allegations of fraud.

The Reporter has no statement of the evidence. The leading facts, however, are stated in the following decree:

Johnston, Chancellor. The testimony respecting the sale of the Wateree lands, leaves no doubt of the invalidity of that sale. The sheriff announced that his sales were over, and thereby dispersed the crowd, among whom

was a man of substance who attended to bid, and who only left the ground in consequence of the sheriff's public declaration that he had closed his sales. The defendant, Pickett, with a full knowledge that the sheriff had put off his sales, and that the crowd had dispersed, assisted in urging on the sales after a considerable lapse of time, and within a very few minutes before the expiration of the selling hours, when few persons were present, and no time was left for them to collect, and bought at an enormous sacrifice.

Now, if he had not urged the sale, (which he does not deny—his denial is that he delayed it,) if he had not urged it, but as a mere spectator had seen the sheriff first openly declare the sales over, and then at a late hour, in the presence of a very few persons, all the rest having gone off in consequence of the sheriff's declaration, put up the land, could he conscientiously assist the sheriff in such a fraud by purchasing from him? But the evidence is that he drove the sheriff to it.

With respect to the sales of the slaves, there is something suspicious; but not enough to set them aside. The prices of those sold at Lancaster must be placed to the credit of the executions, according to their priority.

It appears to me unsafe, upon the evidence offered, to pronounce the judgements held by the defendant, James B. Pickett, which are impugned, fraudulent.

The testimony, (the weight of it,) I think, goes to establish that defendant, Pickett, did assist Reuben Pickett in carrying his slaves and other personal property, beyond the reach of the liens which bound them here; and that

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with a view to defeat those *liens. This I take to be such a fraud as will deprive him of the priority he obtained in payment in the foreign jurisdiction to which he aided in carrying the property. He must therefore account for what he received in Louisiana, and apply it to the executions here, according to their rank.

It is decreed that the sales of the Wateree land be set aside; and that the Commissioner do (after duly advertising) proceed to sell the same for cash, on the first convenient sale day; and that he do hold a reference and state the accounts according to the foregoing opinion, to shew how the sums received in Louisiana, the funds of the Lancaster sale, and the proceeds of the re-sale of the land, shall be applied. James B. Pickett to pay the costs.

Defendant, Pickett, moved to reverse the decree of the Chancellor, on the following points:—

1. Because there was no sufficient ground for setting aside the sale of the Wateree land. A sale by the sheriff cannot be set aside for inadequacy of price; and if there was any misconduct in offering the land for sale at the time it was offered and sold, it was the misconduct of the sheriff alone, and for which defendant ought not to be answerable.

2. Because it appearing, from the investigation of the case, that the negroes sold at Lancaster Court House did not belong to Reuben Pickett, for whose debt they were sold, but to another person; and the same having been returned by the defendant, Pickett, to the rightful owner, none of the judgements against Reuben Pickett should be credited with the sum which said negroes brought at said sale.

3. Because Reuben Pickett, having died in the State of Louisiana, (the place of his domicil,) his property in that State was subject to the laws of Louisiana, where alone it could be legally administered; and the defendant, Pickett, had a right to avail himself of the opportunity of obtaining payment of his just demands against the estate of said Reuben Pickett, in conformity to the laws of the State; and he ought not to be deprived of the priority of payment given by the foreign jurisdiction; more especially in favor of plaintiff's demand, which was clearly proved to be usurious.

4. Because plaintiff's demand was clearly proved to be usurious and fraudulent, and

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therefore he was not entitled to the aid *of a Court of Equity for the purpose of giving him the priority in payment of such a demand.

Clarke & M'Dowell, for the appellant.

In July 1836, the Court of Appeals made the following decree:

It is ordered and decreed, that the decree of the Chancellor be affirmed, so far as respects the setting aside of the sale of the land made by the sheriff of Fairfield District to the defendant, James B. Pickett, as the property of the deceased, Reuben Pickett; and that the land be re-sold in pursuance of the decree.

Chancellors JOHNSON and HARPER, and Justices O'NEALL, GANTT, RICHARDSON, EVANS, EARLE and BUTLER concurring.

At this Term, Chancellor JOHNSTON delivered the following opinion:

The majority of the Court is satisfied with so much of the Circuit decree as concludes from the evidence, that James B. Pickett assisted Reuben Pickett to carry his personal property beyond the operation of the plaintiff's lien, for the purpose of defeating it and obtaining a preference on it; and entertain no doubt that this conduct was a fraud against which the plaintiff is entitled to relief.

There is another point, however, of some difficulty. The answer of James B. Pickett charges that the plaintiff's judgment is founded on a usurious contract; and (without of-

fering to pay the principal and interest actually due) insists that the usury deprives the plaintiff of all right to the relief he seeks.

This point has occasioned much hesitation here. My firm conviction, after mature reflection, is that the objection is flagrantly against principle, and but indifferently supported by authority: and I shall now proceed to give the grounds of this opinion.

In 1 Fonblanque, 25, the general principle is laid down, that if one come into Equity to have an instrument given on an usurious consideration cancelled, he will be relieved only on terms of his paying what is bona fide due; and if his bill does not contain an offer to do this, a demurrer will lie to it. But if the party claiming under such instrument comes into Equity to set it up, the Court will resort to the letter of the statute, which condemns this contract.

In Fitzroy v. Gwillim, 1 T. R. 153, the plaintiff had pawned goods on an usurious contract; and without paying principal and lawful interest, brought trover for the goods.

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Per Lord Mansfield *Ch. J. "A lender upon an usurious contract is precluded from recovering any thing on that contract; but if the borrower seeks relief, he must first do what is right between the parties. Here the plaintiff did not tender what had been actually advanced."

Mason v. Gardiner, 4 Br. Ch. Rep. 436, was a bill to have a bond infected with usury delivered up. A demurrer was sustained because the borrower made no tender of the real debt.

Rogers v. Rathbun, 1 John. Ch. Rep. 367, was a bill to enjoin a suit then pending, on the ground that the suit was on an usurious contract. The injunction was denied because the bill did not offer to pay the sum actually due.

In Scott v. Nesbit, 2 Br. Ch. Rep. 641, (S. C. 2 Cox Ch. Rep. 183,) the bill was by Mrs. Scott against the executors of her debtor for an account of assets, and another creditor came before the master and proved a judgment debt, which the plaintiff objected to on the score of usury. The objection was overruled because the judgment was not examinable. (2 Cox 184;) the Lord Chancellor (Thurlow) at the same time observing, that if this were not so, still the plaintiff was not entitled to object, inasmuch as she had not offered to pay the sum really due on the usurious contract. I shall have occasion to recur to this case.

These authorities sufficiently support the doctrine laid down by Fonblanque. They establish this and no more—that while the contract remains in pais, not having passed into judgement, it is examinable. That if suit is brought to obtain a judgment on it, or, as Ch. J. Kent expresses it, in Jackson v. King, (10 John. Rep. 195,) if the suit is upon the very instrument itself, no recovery can be had. That if, on the other hand, relief is sought against it, this will be granted only on equitable terms. If the lender is the actor, he will be turned out of Court: if the borrower is the actor, he also will be turned out, unless he will do equity.

But no case can be found, it is believed, where the borrower has been relieved, or the lender ejected from the forum, when judgment has been obtained on the contract, except when the proceeding is in bankruptcy, or when the judgment has been obtained by fraud, or, perhaps, when the judgment was a constituent part of the usurious agreement itself.

In bankruptcy the rule is peculiar. No part of the debt is allowed, whatever be the form of the security. That never was the rule in Equity.—9 Ves. 84.

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*When the judgement has been obtained by fraud, it will be set aside, on account of the fraud, not on account of the usury.—Thompson v. Berry and Van Buren, (3 John. Ch. Rep. 395,) is very much to the point. That was a bill by the borrower to be relieved of the usury contained in two judgements; one held by each of the defendants. There was no doubt of the usury in both instances. Van Buren's judgment was allowed to stand as a conclusive protection of the contract behind it, because obtained fairly; but that of Berry was set aside because obtained by fraud; and the contract itself was thus exposed to examination.

On what principle was Van Buren's judgement allowed to stand but this—that all objections to the contract were closed by the judgement? and that the usury was res judicata?

On what principle was Berry's judgment denied to be decisive on the usury, as res judicata, but that the borrower had been shut out of his defence by fraud?

With respect to judgements taken as part of the usurious agreement itself, it might be conceded that they cannot stand: but this concession would not affect the position I have taken. Such judgements might be viewed, as mere stipulations inserted in the usurious contract, to waive the benefit of the law. This is the light in which a case might be viewed, when, cotemporaneously with the usurious agreement and as part of it, a warrant of attorney was given by the borrower to enter up a judgement; or when the loan was made on a confession of judgement for the usury.

That a judgement fairly obtained upon a usurious contract is conclusive, has been repeatedly held in this State. As, for instance, in Stewart v. Fowler, [Harp. 403,] where the suit was on a judgement which had been rendered on usurious notes. The defendant was not allowed to go behind the judgement and examine the contract on which it was found-

ed. Numberless cases of a similar character have occurred where a like decision was made. See also 1 Murphy, 225, Branton v. Dixon.

The cases I have referred to, shew that when relief has been refused to the lender, or granted to the borrower, the usurious contract had never passed into judgement, except in bankruptcy; or when the judgement was unfairly obtained, or was itself the usurious security.

To allow the borrower to neglect his defence at law, and then make his omission the ground of application to this Court, would

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*be no better than a permission for laches. It would give him choice of jurisdictions—authorize him to fold his arms when the law gave him ample remedy, and when the death of witnesses or other accident had deprived his creditor of power to disprove his allegation of usury, come into this Court and obtain an advantage, to which, perhaps, by the real facts of the case he is not entitled. But such neglect is not favored in this Court; the settled doctrine of which is truly stated by Lord Eldon, in Ware v. Horwood, 14 Ves. 31, to be, "that the omission to take advantage of the usury, at law, is no ground for relief in Equity." If the borrower, when sued upon the judgement rendered on the usurious contract, may raise the objection which he neglected when the judgement was obtained, what is this but to give him two opportunities to try the same question? What would this be, but to prostrate the whole doctrine of res judicata, and open the way to endless litigation?(*a*)

One of James B. Pickett's judgements against Reuben Pickett, is junior to that of the plaintiff.

It is not doubted by any one that the plaintiff's judgement is conclusive on Reuben Pickett. The true question, then, is whether Reuben Pickett's junior creditor can take an advantage to which it is conceded Reuben himself is not entitled. I think the junior creditor has no better right than his debtor, and that whatever binds the latter, binds the former, unless when the former is defrauded.

Was it ever heard of, that a creditor who had proved his demand and obtained judgement on it against his debtor, was obliged to prove it over again when the contest was between himself and another creditor? Unless obtained by fraud and collusion between him and the debtor, it is conclusive on all others.

If instead of James B. Pickett's fraudulently obtaining possession of the avails of Reuben's property, the sheriff had sold that property and the avails were now in his hands, can any man be found to contend for a proposition so absurd, as that James B. could question the plaintiff's right to draw from the sheriff the amount of his judgement? And shall this defendant keep money to which he is not entitled, merely because he has got it by unfair means? Shall he be permitted to change the unquestionable rights of the parties, by fraud? and because that fraud renders it necessary to the plaintiff to come here to restore things to that

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*posture in which the law had placed them, take advantage of his own wrong?

It is a great misconception to suppose the plaintiff came here to set up the usurious contract. He had already recovered on that, and obtained a lien on his debtor's property. The law gave him that lien. He has been deprived of it by fraud; and he comes here to undo that fraud. That is his only purpose; he asks no more.

He does not come here to sue on his contract; but to insist on his judgement lien. The contract lies behind the judgement, and can never be assailed until the judgement has been set aside.

It has been argued that Scott v. Nesbit, 2 Bro. Ch. Rep. 641, one of the cases I have mentioned, authorizes James B. to assail the plaintiff's judgement.

That case is reported twice. The case is stated, and the argument and the summary of the Chancellor's judgement given by Brown. The judgement of the Chancellor is more fully reported by Cox.(*b*)

The case is briefly this: Mrs. Scott brought her bill to have an account of assets from the defendants, who were the executors of her debtor. The case was referred, with leave to other creditors to prove their demands before the master. Among the demands presented, was a judgement obtained by the executors of the Countess of Macclesfield against the defendants, on an usurious bond given by their testator. Mrs. Scott objected to this judgement for usury, and the master rejected it. On appeal to the Lord Chancellor, (Thurlow,) he allowed the judgement to stand, and that for the full amount. The objection to the judgement was, that there was no judgement in the life of the testator—that at his death the matter rested in contract infected with usury, and that a judgement, obtained against the obligor's executors, gave no preference over fair creditors. That the latter were at liberty to take things as they stood at the debtor's death, and insist on the usury. Lord Thurlow's judgement on this point was, that "This judgement, if fairly obtained before the decree here, gained a priority, as if gained in the testator's life time."

What was this but to concede, in the fullest terms, that if the testator had been alive, the judgement would have bound both him and the junior creditor?

The master's decision was reversed, and the judgement stood for the full amount.

(*a*) Maxwell v. Connor, 1 Hill's Eq. Rep. 14.

(*b*) 2 Cox's Ch. Rep. 183.

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*It is true, the Lord Chancellor did say, that, "at any rate"—that is, whether the junior creditor was bound by the judgment or not, she could not object to the usury, inasmuch as she had not offered to pay what was really due. But this was evidently by way of offering an additional reason for his judgment.

That my construction of this case is not singular or unfounded, appears by what Lord Eldon says of it, in Ware v. Horwood, 14 Ves. 31. He states his understanding thus: "In Scott v. Nesbit, the master having disallowed a debt on the ground of usury, Lord Thurlow allowed the debt to stand." For what reason? Not because the junior creditor had not tendered principal and interest, but—"holding that the omission to take advantage of the usury at law, was no ground for relief in Equity."

Chancellor Kent quotes the case in French v. Shotwell, (5 John. Ch. Rep. 565.) with the same understanding of it.

Having mentioned the very instructive case of French v. Shotwell, I must say, that in my judgment, one more conclusive on every position I have taken, cannot be required. The plaintiffs, who were purchasers of lands bound by a judgement founded on usurious bonds, filed their bill to have the lands exonerated from the judgement. Chancellor Kent, after shewing that Ten Broeck, the vendor of the land, was concluded by the judgement, goes on to shew by the clearest reasoning, that subsequent purchasers under him, with notice of the judgement, (not of the usury,) could not impeach the judgement, or assume a remedy which he had neglected. He insists that the entering up of the judgement was notice of the lien to all subsequent purchasers: and observes, that "He who confesses a judgement, or suffers it to pass by default, is concluded from defence, according to the general language of the cases. And if the party himself, who is the victim of the fraud, or usury, chooses to waive his remedy and release the other party, it does not belong to a subsequent purchaser under him, to recall and assume the remedy under him. If a judgement was fraudulent by collusion between the parties to it on purpose to defraud a subsequent purchaser, the case would present a very distinct question. But if the judgement was fraudulent only as between the parties, it is for the injured party alone to apply the remedy. If he chooses to waive it and discharge the other party, it cannot consist in justice, or sound policy, that a subsequent voluntary purchas-

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er, knowing of that judgement, should *be competent to investigate the merits of the original transaction as between the original parties."

What can be more conclusive than this view? It shews clearly, I think, that persons claiming through a debtor, cannot object to a senior claim on that debtor, unless defrauded by it; that such persons cannot object to usury as usury, but as fraud. That when they purchase from or credit the borrower, with notice of his prior obligations, they are bound by them, because not defrauded by them.

In Moffat & Cochran v. McDowell, (1 M'C. Eq. Rep. 441.) the same view was taken by my brother Johnson in delivering the opinion of the Court. In this case, by the way, the usurious instruments objected to by the other creditors had not passed into judgement.

A similar view was taken in Smith v. Fisher, 2 De Saussure's Rep. 275. A junior creditor filed his bill against a senior creditor, whose demand had not passed into judgment, for a discovery whether the senior demand was not usurious, and to be relieved against it. The Court sustained a demurrer on the ground that the bill charged usury only, and not fraud. Is not this case completely decisive of the one before the Court?

It seems to be some how conceived, that the allowing the plaintiff's lien a preference over James B. Pickett's, would defraud the latter, merely because it would diminish the fund out of which he is to be paid.

If loss occasioned in this way constitutes a fraud on a junior creditor, how could the decisions in Smith v. Fisher, and Moffet v. Cochran, have been made? They appear to conclude the very point.

If the sheriff had sold the debtor's property, and held the avails, the plaintiff could have drawn the amount of his debt. It will not be contended that that would have defrauded James B. Pickett. But would not his loss have been as great in that case as in this?

My opinion is, that the Circuit decree should be affirmed throughout: and the majority of the Court concurring in this opinion, it is Ordered that the motion be dismissed.

Chancellor DE SAUSSURE, and Justices RICHARDSON, EVANS and BUTLER concurred.

JOHNSON, Chancellor. I am not satisfied that the defendant ought to be charged on

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account of any aid he might have given *to Reuben Pickett, in removing out of the State; but on the question as to the right of the defendant to open and examine the judgement obtained by plaintiff against Reuben Pickett, on account of usury in the contract on which the judgement is founded, I concur entirely in the opinion delivered by my Brother JOHNSTON.

HARPER, Chancellor. We concur very fully with the Chancellor on all the points which he has considered and decided. The sale of the land was such a transaction as

can never be permitted to stand in this Court. He has directed, the proceeds of the slaves sold at Lancaster to be paid over to the executions according to their legal priorities, according to the long and well established rule in this State. We perceive no reason to dissent from his conclusion on the testimony that the defendant, James B. Pickett, did combine with Reuben Pickett, and assist him in clandestinely and fraudulently removing his property out of the State, for the purpose of eluding the plaintiff's execution. The obvious consequence on equitable principles is, that he cannot be permitted to retain an advantage which he has gained by means of that fraud.

But there is another point which seems not to have been brought to the view of the Chancellor, and therefore not considered or decided by him. It is, however, made in the cause, and argued as a ground of appeal to us, and it is therefore necessary that we should consider it. It appears from the testimony of two of the witnesses, (and I know of no reason why they should not be credited,) that the contract on which the judgment of plaintiff was confessed was usurious. It is therefore necessary to inquire whether he is entitled to the aid of the Court in enforcing the judgment obtained on such contract.

I believe, on the preponderance of authority, the rule of Equity to be as stated, 1 Fonb. 25. n: that a party coming into Equity to be relieved from an usurious contract, must do equity by offering to pay what is really due, or the Court will not interfere in his behalf; but, if a party comes to enforce an usurious contract, the Court will act on the letter of the statute—that is to say, it will regard the contract as void, and dismiss his bill. It is said, Ib. 39, 40, that if a fraudulent person come into Court, he shall not have what was bona fide lent. So it was said by Lord Mansfield, professing to consid-

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er the subject on equitable principles: *"A lender upon an usurious contract, is precluded from recovering any thing upon such contract. But if the borrower seek relief, he must first do what is equitable between the parties."—Fitzroy v. Gwillim, 1 T. R. 154.

In Mason v. Gardiner, 4 Br. C. R. 436, a demurrer was sustained to a bill brought to have an usurious bond delivered up for want of an offer to pay what was due. It appears from the argument that it was a cross bill, and it was admitted that the original bill brought to enforce the contract must be dismissed. In Benfield v. Solomons, 9 Ves. 84, it was said by Lord Eldon, that the plaintiff to a bill cannot have relief on an usurious contract without an offer to pay; but that an usurious creditor coming in bankruptcy, shall have nothing. But as to this point I am not aware that there is any serious doubt.

A question of more difficulty is, whether, as the plaintiff has obtained a judgement at law, either the defendant himself, or his other creditors, can enter into the consideration of the judgment. It is admitted, upon a well known equitable principle, that if a judgement had been obtained in due course of law, in which the party had an opportunity of defending himself on the ground of usury, and he had omitted to do so, it would have been too late for him to come into Equity for relief. The defendant himself, and all privies, would have been concluded by the verdict. But in this case the judgement was by confession. In Thompson v. Berry and Van Buren, 3 John. C. R. 395, Chancellor Kent relieved against an usurious judgement entered upon a warrant of attorney to confess judgement, though he refused to relieve against one obtained in due course of law. This may have been, though not directly stated, on the ground that the warrant of attorney to confess was part of the original usurious transaction. It does not appear in this case, so far as I can see, whether the usurious note on which the judgement was confessed, was executed with a view to be secured by the confession. It was an old debt, and the note had been several times renewed. But whether the last usurious renewal, when a new party was added to it, was made with a view to the confession, does not distinctly appear.

The case of Scott v. Nesbit, 2 Br. C. R. 641, was one in which an usurious judgement was impugned by the creditors of the defendant. The case is not very perspicuously reported, but appears to be this: A bill

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had been filed on behalf of creditors *generally, for an account of an insolvent estate and payment, and a reference to the Master had been ordered to take the account. The plaintiff's bill was to have an account and to obtain payment of a judgement which had been recovered on an usurious bond. This was referred to the same Master: in fact it was included in the former order. It was argued that the judgement must bind until it was got rid of at law. The Master disallowed the whole judgement. On the cause coming before Lord Thurlow, he thought the general creditors could do before the Master, only what they could do on a bill filed by them against the judgement creditors. They could only displace the judgement by doing what was just—that is, of course, by paying what was really due. The case certainly is authority that the creditors of an insolvent may go into the consideration of an usurious judgement against him. Regarding it as the creditor's bill, he held them bound to offer what was just; leaving us to infer that it would have been different if it had been merely a bill by the usurious judgement creditor, and that in that case the demand would have been disallowed altogether. Indeed, if the creditors were not concluded by the judgement, such is the well established

general rule on the authorities before referred to. I find the note of a case of which I have not the original report, in Hammond's Digest, 648, Tit. Usury. There was a judgement on a warrant of attorney to confess. An issue was directed to try the fact of usury. The assignees of the bankrupt defendant had agreed that the plaintiff might prove his debt under the commission. But the Court held this to mean a proveable debt, and the one infected with usury. It is true that in bankruptcy, judgement creditors, as to the receiving of dividends, are on the footing of other creditors. But the case shews that they are not bound by an usurious judgement against the bankrupt debtor.

The case of French v. Shotwell, 5 John. Ch. Rep. 565, has been supposed somewhat at variance with these views. But I do not perceive the application of that case. There land was purchased which was bound by an usurious judgement which had been obtained against the vendor. The purchaser filed a bill to set aside the judgement. Chancellor Kent decided that he was a privy in estate with the vendor, and therefore bound by the judgement. He could take the land no otherwise than subject to every liability to which it was subject in the hands of the vendor. The vendor, too, had before filed a bill to be

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relieved against the judgement, *and by a compromise obtained fairly and without fraud, his bill had been dismissed. He therefore was certainly concluded.

Certainly creditors are not privies, in any sense in which the words have been used. Is there any question but that the creditors of an insolvent may impeach any judgment obtained against him by fraud and collusion? Is there any question but that they may set aside a voluntary judgment confessed by such debtor? This is exactly on the same principle that they may set aside a voluntary conveyance; and even subsequent creditors may do this, if the party were indebted at the time; which I suppose can hardly be doubted with respect to the debtor in this case. A judgment confessed on a contract declared by law to be absolutely void, is in effect a voluntary judgment. The law imputes blame to both the parties to an usurious contract, and such confession may well be regarded as being always made by collusion to the prejudice of creditors.

The present plaintiff comes to enforce an usurious judgment. It is immaterial what may be the fraud of the defendant; on the principles laid down, it should seem that Equity would interfere in favor of neither.

Justices GANTT AND O'NEALL concurred in this opinion.

O'NEALL, J. I am also against the Circuit decree, on the ground that there was no fraud in sending the negroes out of the State.

2 Hill, Eq. 483

ERVIN BRUNSON and Wife v. JAMES KING, Administrator, and Others, Heirs of Andrew Hunter.

(Columbia. Dec., 1836.)

[*Deeds* ⇐124; *Trusts* ⇐59.]

A. H. having provided for his lawful children, and having several illegitimate children, and about to marry their mother, in order to provide for his natural children and his intended wife and the issue of the marriage, executed a deed of all his real estate and twenty-one slaves, in trust for himself during life, and at his death one-fourth part thereof for his natural children in fee; one-third of the remainder to the use of his intended wife for life, and then to the children of their marriage in fee; and the other two-thirds of the remainder to the use of such persons as his inteuded wife should appoint, reserving to himself the right to revoke or alter such appointment, and in default of appointment, to his said wife, her heirs, executors and assigns. The marriage took place, and A. H. acquired some property after the execution of this deed. By his will afterwards executed, he referred to and confirmed the settlement, and by a general residuary clause, gave all the rest of his estate to the children of his last marriage, and then declares "it is his wish" that his wife and children remain on the plantation until another place be provided, and that his mills be rented and his negroes hired out, &c. and other dispositions inconsistent with the deed. The wife made no appointment. *Held*: 1. That the deed did not authorize A. H. to change its uses, but merely to control his wife's appointments; 2. That the will was not intended, and could not operate, as a revocation of the uses of the deed, and as a declaration to other uses; and 3. That on the death of A. H. his wife took an absolute estate in the remaining two-thirds described in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 348; Dec. Dig. ⇐124; Trusts, Cent. Dig. § 80; Dec. Dig. ⇐59.]

[*Wills* ⇐467.]

Although the words "it is my wish" in a will, generally operate as a direct bequest, yet they will be construed to mean rather an inclination of the mind, than an act of the will, where a different construction would produce inconsistency and repugnance.

[Ed. Note.—Cited in Arnold v. Arnold, 41 S. C. 299, 19 S. E. 670.

For other cases, see Wills, Cent. Dig. §§ 954, 986; Dec. Dig. ⇐467.]

Before Chancellor De Saussure, at Darlington, February 1836.

Andrew Hunter had, by his first marriage, five sons, John, James, Andrew, Dorrell and Isaac; and after the death of his wife, he had four illegitimate children by Mary Andrews—that is to say, Laney Andrews, Solon Andrews, Satyra Andrews, and Cambyses Andrews. In contemplation of marriage with the said Mary Andrews, and for the

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purpose of making a provision for her *and the said natural children, and for the lawful issue of the said Mary, by the testator, begotten or to be begotten, the testator, by deed bearing date the 10th February, 1819, conveyed to George Bruce, all the real estate whereof he was then seized, wherever situ-

ate or being, and twenty one negro slaves, by name, Asia, Africa, America, young Jack, Alfred, Asgill, Salem, Howard, young Peter, young Flora, Becky, Catey, Amey, Esther, Bechard, Maria, Penny, Clarissa, Mowah, Eliza and Louisa, and their future issue and increase; in trust for the said Andrew, the grantor, during his natural life, and after his death, so much thereof to the use of the said Laney Andrews, Solon Andrews, Satyra Andrews and Cambyses Andrews, his said illegitimate children, their heirs and assignees forever, as shall be equal to one-fourth part of the said real estate and slaves, and of such other real and personal estate as he had already given them, or any of them, taking into the estimate of the said one-fourth part such real and personal estate as aforesaid by him given to them, or any of them—intending thereby to make as large a provision for them as by law he was permitted to make, to be equally divided between them, so that their shares at the death of the said Andrew Hunter, the grantor, should be equal; and upon the further trust, that on the death of the grantor, the said Andrew Hunter, the said George Bruce should stand seized of one-third part of the remainder of the said real and personal estate, to the separate use of the said Mary, his intended wife, for life; and after her death to the use of such child or children of the said Mary, by the said Andrew, the grantor, begotten, or might thereafter be borne and be living at the time of her death. And upon the further trust, that the said George Bruce should stand seized and possessed of the other two-thirds of the remainder after the death of the said Andrew Hunter, the grantor, to the use of such person or persons as the said Mary might by deed, under hand and seal, or by her last will and testament limit and appoint; and on failure of such limitation and appointment, to the said Mary, her heirs, executors, administrators and assigns forever; reserving to himself,

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*however, the power of revoking any limitations and appointments the said Mary might make, and of declaring the uses of the said two-thirds parts of the said remainder, for the purpose however, alone, of making provision for any legitimate child or children of the said Andrew, the grantor, now born or hereafter to be born; and reserving also the power of selling, disposing of, changing or exchanging all, or any part of the said real or personal estate, the proceeds thereof being, however, subject to the same uses, limitations and conditions as the original estate.

The marriage contemplated by this deed was had and solemnized, and the issue of the marriage was three children, Mandanna, Mary and Caroline.

On the 16th May, 1822, the testator made and executed his last will and testament, wherein, after the usual introductory clauses, he says: "I do by these presents confirm a marriage deed or settlement, dated the 10th February, 1819, by me made on the day above mentioned and at the time of my marriage with my present wife, Mary, in which deed or settlement George Bruce is trustee." He then recites that he had already sufficiently provided for all the children of his first marriage, and had put them in possession of their estates, and proceeds thus: "I give, devise and bequeath all the residue and remainder of my real and personal estate to my three youngest daughters, Mandanna, Mary and Carolina," with cross remainders in the event of any of them dying without issue, and in the event of all dying without issue, to be divided amongst all his children. He then recites that he had already provided for his illegitimate children by conveyances of record in the Clerk's office, to the extent which the law allowed, and confirms the said conveyances, and proceeds: "It is my wish that my wife, Mary, and my several children by her, remain on my plantation, under the direction of my executors, until my crops be housed and a place comfortably and suitably prepared for them on one of my upper places, at the expense of my estate; and that Silla and all the rest of the family, with old Jack, old Phebe and old Flora, remain on the place where my family shall live; and that the said old negroes be treated humanely by my executors during their lives, but more particularly in old age. The remainder of my slaves to be hired out annually by my executors, and my mills I wish rented for a term not less than ten years, but the rent money to be annually paid my executors. My executors are to allow my wife, during her natural life

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or widowhood, household *and kitchen furniture and farming utensils, horses, and a competency of stock, so as to afford her and my children with her, a comfortable and reasonable support: and the several children, Laney, Satyra, Solon, Cambyses, Mandanna, Mary and Caroline, as they shall marry or arrive at full age, shall receive from my executors their several allotments as before stated; and should my wife, Mary, die or marry, the portion allotted to her for her support and maintenance, is to be sold by my executors on at least one year's credit, and the money arising from the sale to be put to interest for the benefit of my children as above stated." By a codicil which appears to be without date, he authorized the executor to lease the mills annually until a prospect should appear to lease them for the term mentioned in the will.

It is conceded that the testator was, at the time of the execution of the marriage settlement, seized of the mills and plantation

mentioned in the clause of the will last above recited, and it is apparent that the slaves specifically named in the will are not included in the settlement; and although not judicially ascertained, it is understood that he died seized and possessed of property to a considerable amount, acquired subsequently to the execution of the settlement.

The object of this bill is to obtain partition of the estate, according to the rights of the several parties under the settlement and the will. There is no claim interposed on the part of the children of the first marriage, nor do the illegitimate children claim more than the fourth part of the real and personal estate whereof the testator was seized and possessed at the time of the execution of the settlement, including the advancements which he had made to them respectively, and about which there is no controversy; but between the widow, Mary, and the three younger children, Mandanna, Mary and Caroline, the questions arise—

1. Whether by the terms of the marriage settlement, the testator reserved to himself the power of revoking the power of appointment granted to his intended wife, as to the remaining two-thirds of his estate, and to declare other uses:

2. If he did, whether the will can operate as a revocation of the power and a declaration of uses:

3. If the power of revocation was not reserved or not executed, what estate did the intended wife take in the remaining two-thirds?

The Chancellor who presided in the Circuit

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Court was pleased *to adjudge and decree, that by the terms of the marriage settlement, the power of appointment granted to the intended wife, was reserved to the testator, and that the will operated as a revocation and a declaration of uses; that the three younger children took the remaining two-thirds of the estate under the residuary clause of the will —and ordered partition accordingly; and the questions before stated have been revived here on an appeal from that decree.

The widow, Mary Hunter, appeals from so much of this decree as determines that the will is an execution of a power under the deed, and moves the Court of Appeals to reverse the same, or so modify it as to decide that she is entitled to an absolute estate in the two-thirds referred to, in default of any appointment during coverture; or at least, that she still has a right to appoint the same to such uses as she may choose, upon the grounds following:—

1. The power reserved in the deed to the donor is only a power to control an appointment by the wife, and is dependent for its exercise upon the fact of her making an appointment.

2. The will is not an execution of any power reserved in the deed. It does not, and is not intended to revoke any part of the appointment or limitations in the deed; nor does it declare any new uses.

3. The deed and will can stand together—the deed operating on the property mentioned in it, and the will on other property of the testator.

Wilkins, for appellant.
Sims, contra.

Chancellor JOHNSON. [after making the foregoing statement of facts, and of the questions arising out of them.]

Whether trusts are created by deed or will, the rules of interpretation are, in general, the same in the Courts, both of law and Equity. Equity indeed follows the rules prescribed by the Courts of law in regard to the creation and limitation of legal estates.—2 Mad. Ch. 452, and the cases cited in the notes. If created by deed, the construction is determined by the rules of law prescribed for the interpretation of deeds, all of which are resolved into the universal rule, that whether by deed or will, the intention, to be ascertained according to the rules of law, must govern.

In the solution of the first proposition, we are, therefore, led to inquire, what was the intention of the testator in reserving to himself, in the deed, the power of "revoking any

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limitation or *appointment the said Mary may make, and of declaring the uses of the said two-third parts of the said remainder," &c. And upon recurring to the deed and examining its contents, it will be found that the whole estate, real and personal, is conveyed to the trustee, George Bruce, in trust for the testator during his life, and after his death, one-fourth part to the use of his illegitimate children in fee; one-third part of the remainder to his intended wife for life, remainder to the children of the marriage in fee; and the remaining two-thirds of the said remainder to the use of such person or persons as his said intended wife might appoint, and in default of such appointment, to the use of the said intended wife in fee. Here then is a final disposition of the testator's whole interest in the estate, and you look in vain through the deed for any reservation of power which authorizes him to revoke, change or alter any grant, condition or limitation which he himself has made in that deed. The power reserved is in terms, that of "revoking any limitation or appointment that the said Mary Hunter may make," and of declaring other uses, and could not therefore be exercised until the case provided for (an appointment by the intended wife) had been made.

The question may be simplified and better understood, by supposing that instead of a deed like this, there had been mutual cove-

nants between the parties—on the part of the testator, to grant the estate to the intended wife, and to such person or persons as she may appoint, and in default of such appointment, to the intended wife in fee; and on the part of the intended wife to permit the testator to revoke any appointment she might make, and which he disapproved, and to declare other uses. Can it be maintained, that the power of revocation existed independent of the previous exercise of the power of appointment? or that under the covenant to permit the testator to revoke the appointment, he might revoke his own deed? There is certainly no principle or rule of law to authorize such a perversion of the obvious intent: and yet the cases are identical.

Conceding, however, that the power of revoking the deed was reserved to the testator, independent of the exercise of the power of appointment by the wife, still I think it very clear that the will was not intended, and cannot operate as a revocation and declaration to other uses.

In the rules prescribed for the construction

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of wills, there are *none more familiar, than that the intention of the testator to be collected from the whole will must govern, and that if possible it must be so construed that the whole must stand together, and effect given to every provision in it. Now, that the testator did not intend, by his will, to revoke the marriage settlement, is conclusively shewn by his recital and positive re-affirmation of it in the will. "I do by these presents confirm a marriage deed or settlement, dated," &c., is the language of the will; and the rule is, that a paper writing recited or referred to in a will, is incorporated with, and constitutes a part of the will, as much so as if the testator had declared his will in the terms of the writing.—Habergham v. Vincent, 2 Ves. 228. But it is said that the subsequent provisions of the will are inconsistent with the deed, and therefore operates as a revocation of the deed and an appointment to uses, although there is no express declaration of an intention to revoke. Now, it is true that the intention to revoke need not be expressed in the will, but the intention must be so clear that no other reasonable intent can be imputed to the will; nor will it be permitted to operate as a revocation where the will can have its operation without it.—Bradish v. Gibbs, 3 John. Ch. Rep. 551; nor unless it is demonstrable that the testator had the power in his contemplation, and intended by his will to execute it.—Doe v. Roake, 2 Bing. 497; 9 Eng. Com. Law Rep. 496. And it remains to be seen, whether the inconsistencies between the deed and the will, are so irreconcilable that the will cannot operate consistently with the deed.

It is before noticed that the will contains an express re-affirmation of the deed, and following that, is the general residuary clause by which the testator disposes of the residue and remainder of his estate to his three younger children with cross remainders over. In this there is certainly nothing inconsistent with the deed. It operates on subsequently acquired property, if there is any, but if there is nothing on which it can operate, it does not revoke the provisions of the deed. Then follows the clause last above recited, by which the testator declares that "it is my wish that my wife, Mary, and my several children by her, remain on my plantation under the direction of my executors, until my crops be housed and a suitable and comfortable place be prepared for them on one of my upper plantations," &c.; and in the same clause goes on to direct that his negroes should be hired out, and his mills rented, (property of which he was confessedly seized

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and *possessed at the time of the execution of the deed,) and to make other dispositions, inconsistent with the distribution provided for in the deed, at the time of his death. It will be observed, however, that this clause begins with, "it is my wish," and although these terms are frequently held to import a direct devise or bequest, or to create a trust, (6 Cruise Dig. 144–204), and would generally so operate where the will contained nothing inconsistent with it; yet the rule is not so imperative as to compel us to do violence to the general intent in giving them that effect. In their general acceptation they import an inclination or disposition of the mind, not an act of the will; and it is, I think, very apparent that the testator intended them so to be understood here, at least so far as they appear to be inconsistent with the limitations of the deed. The preceding clauses, it will be recollected, contained a final disposition of all his estate, real and personal—the deed, of the property described in it, and the residuary clause, of every thing else that he possessed; and if this last clause is interpreted a direct bequest, it leads to that inconsistency and repugnancy which the rules of construction repudiate. If taken in their ordinary acceptation, they are merely advisory, and render the will thus far consistent—and this I take to be their true interpretation. This last clause, however, contains directions to the executors to allow the wife, during her natural life or widowhood, household and kitchen furniture, horses and other stock, so as to afford her and her children a reasonable and comfortable support, and is thus far consistent with the deed, and may well stand with it and supersede the preceding residuary clause.

On the third and last proposition, there is, if possible, still less doubt. On the death of the testator, two-thirds of the remainder of the estate is limited by the terms of the deed, to such person or persons as the wife, Mary, should by deed or will limit and appoint, and in default of such appointment, to the wife,

her heirs, executors, administrators and assigns forever. No appointment has been made, and the question is, what estate does she take?

The general rule is, that when a greater and a less estate concentre in the same person, the lesser merges in the greater; or, according to the Master of the Rolls, in Phillips v. Bridges, 2 P. W. 126, where a legal and equitable estate unite in the same person, there is nothing on which the equitable can act; or in better phrase, it no longer exists. So in the case of Wagstaff v. Wag-

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*staff, 2 P. W. 259, where the Lord Chancellor supposes the case of a trust for the use of J. S., his heirs and assigns, or to such person or persons as he shall appoint; on which he observes, that the last words (such person or persons as he shall appoint) are no more than is implied before, et expressio eorum quæ tacite insunt nihil operatur: and if the terms of this limitation in the deed are transposed, which may be done without in the least impairing the intent, we have the precise case. Upon the death of the testator, Mary, the wife, therefore took an absolute estate in the remaining two-thirds of the estate described in the deed—Sugden on Powers, 58.

By the terms of the deed one-fourth part of the real and personal estate is limited to the testator's illegitimate children, taking into due estimate such real and personal estate by him given to them or any of them. The power of selling, disposing of, changing or exchanging, of all or any part of the estate, is also reserved to the testator, provided, however, that the proceeds thereof should be subject to the same uses, limitations and conditions as in the original deed. It is probable, too, that the testator acquired property subsequently to the execution of the deed, or had other property at the time on which the residuary clause of the will would operate; and before the partition prayed for can be awarded, it will be necessary to ascertain in what amount the illegitimate children were respectively advanced by the testator: what property contained in the deed, if any, had been sold, disposed of, exchanged or re-exchanged; and whether the proceeds had been re-invested, and in what; and whether the testator was, at the time of his death, seized and possessed of any, and what other real and personal estate.

It is therefore Ordered and decreed, that the decree of the Circuit Court be and the same is hereby set aside and reversed, and that the case be referred back to the Commissioner to ascertain—1. In what the testator's illegitimate children, Laney Andrews, Solon Andrews, Satyra Andrews and Cambyses Andrews, had been advanced by him in his life time, and its value: 2. Whether the testator, in his life time, sold or otherwise disposed of the whole or any part of the property described in the said deed, and whether the proceeds have been re-invested, and in what; or whether any thing, and what, has been substituted in its place: 3. Whether the tes-

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tator was, at the time of his death, *seized and possessed of any other real or personal estate than that described in the deed and not specifically disposed of by the will, and in what it consisted. On the coming in of this report, a writ of partition will be ordered for the partition of the real and personal estate, as well that described in the deed, as any other of which the testator may have died seized and possessed, not specifically disposed of by the will, according to the principles of this decree.

Chancellor JOHNSTON and Justices O'NEALL, GANTT, EARLE and BUTLER concurred.

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2 Hill, Eq. 492

JOSEPH MASSEY, Administrator of George Massey, Deceased, v. JOSEPH D. MASSEY, Administrator of Benjamin Massey, Deceased,

JOHN B. COOK and CHARLOTTE, His Wife, HENRY G. MASSEY, JOHN B. MASSEY, and WILLIAM MASSEY, His Guardian, JAMES H. GILMORE and HARRIET C., His Wife, and B. S. MASSEY, her Guardian and BENJAMIN MASSEY, Guardian of MARY E. MASSEY, (now Mrs. Haigood.)

(Columbia. Dec., 1836.)

[*Executors and Administrators* ⇐496.]

Executors and administrators are not entitled to 2½ per cent. in addition to 10 per cent. for making interest. By the Act of '89, they are not allowed 10 per cent. for letting out to interest and receiving in again, nor 10 per cent. for making interest; but 2½ for letting out and 2½ for taking in, until the commissions reach 10 per centum, which is the maximum.

[Ed. Note.—Cited in Briggs v. Holcombe, 3 Rich. Eq. 17; Bobo v. Poole, 12 Rich. Eq. 227.

For other cases, see Executors and Administrators, Cent. Dig. § 2115; Dec. Dig. ⇐496.]

[*Limitation of Actions* ⇐12.]

On a bill by an administrator against a distributee and her guardian to have money refunded which was paid by mistake to the guardian more than four years before the filing of the bill, but paid over by him to the ward within that time, it was held, that the ward might protect herself by the statute of limitations, although not pleaded by the guardian; especially as the guardian had paid over all the funds received before notice of the mistake, which discharged him from liability.

[Ed. Note.—Cited in Buchan v. James, Speers, Eq. 375, 382; Long v. Cason, 4 Rich. Eq. 68; Brewster & Dickson v. Gillison, 10 Rich. Eq. 439; State ex rel. Van Wyck v. Norris, 15 S. C. 260.

For other cases, see Limitation of Actions, Cent. Dig. § 43; Dec. Dig. ⇐12.]

[*Guardian and Ward* ⇐119.]

Guardian not liable for money paid to him by mistake, after he had paid it over to his ward without notice.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 419; Dec. Dig. ⇐119.]

[*Executors and Administrators* ⇐104.]

An adm'r who is charged with interest on annual balances, shall not be charged with interest on the interest he has made and returned: the party charging must elect between the methods of stating the accounts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 423–432; Dec. Dig. ⇐104.]

George Massey died intestate, and the plaintiff, Joseph Massey, administered on his estate. The intestate, George Massey, left a widow and seven children. By his first wife he left the following children: Joseph D. Massey, Charlotte Massey (now Mrs. Cook,) Henry G. Massey and Benjamin Massey; and by his last wife, the following: John B. Massey, (and William Massey is now his guardian,) Harriet C. Massey, (now Mrs. Gilmore, and Benjamin S. Massey was her guardian,) and Mary C. Massey, now Mrs. Haigood (Benjamin Massey was her guardian). In 1819, about a year after George Massey's death, his son Benjamin died unmarried and intestate. Joseph Massey, the plaintiff, having sold the property of his intestate and collected the debts, and having also made regular annual returns of his accounts, in 1827 procured an order from the Ordinary, for partition of the estate amongst the distributees; and by the instructions of the Ordinary, and contrary to his own impressions, after paying the widow the one-third of the estate, he paid over the remainder, including the share of the deceased child, Benjamin, to the six surviving children, in equal shares.

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*In 1832, Joseph D. Massey, a brother of the whole blood to the deceased, Benjamin, administered on his estate, cited the plaintiff before the Ordinary, and obtained a decree against him for $1316 3, the share of Benjamin, being the one-seventh of two-thirds of his father's estate: one-half of which the plaintiff had properly paid to the brothers and sister of the whole blood, and the other half improperly to the brothers and sisters of the half blood. Joseph D. Massey, as the administrator of Benjamin, brought his action at law against the plaintiff on the administration bond, and obtained judgment, predicated on the said decree, for the full amount thereof.

The bill was filed in June 1833, to enjoin the judgment at law, to obtain credit thereon for the amounts already paid by the plaintiff to the brothers and sister of the whole blood of the said Benjamin, and which they were legally entitled to; and to require the brothers and sisters of the half blood, and their respective guardians, to refund the sums paid them on the mistaken distribution of the estate of Benjamin.

James H. Gilmore and wife pleaded the statute of limitations. The payment was made by the plaintiff to B. S. Massey, Mrs. Gilmore's guardian, in 1827; and in 1831 he paid over the funds and settled in full for his guardianship, without having notice of the plaintiff's claim. The guardian pleaded this in discharge of his liability.

The cause came to a hearing before Chancellor De Saussure, at York, June 1834.

His Honor overruled the plea of the statute of limitations, and ordered, "That it be referred to the Commissioner to examine and report what proportion was overpaid to each of the younger children, (those of the half blood,) and how much was underpaid to the elder children, (those of the whole blood,) of the estate of Benjamin Massey. It is further ordered, that the injunction previously granted by the Commissioner, be continued till the coming in of the report and the decision thereon."

In pursuance of this decree, the Commissioner held a reference and stated the accounts.

On the reference, the plaintiff's annual returns were in evidence, in which he made regular returns of the interest made and received by him. In his report, the Commissioner charged the plaintiff with interest on the annual balances, including interest on the

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*interest returned. The principal sale bill fell due on the 28th January, 1818; the Commissioner adhering to the rule that moneys received should not bear interest against the administrator in the current year, charged no interest on it until the first of January succeeding.

The cause came on again before Chancellor Johnston, in June 1835, on the report, and exceptions by both parties.

Of the several exceptions, it is only necessary to notice the following:—

By the plaintiff.

1. That the plaintiff, having in his returns returned and accounted for the whole of the Interest made and received by him, and no attempts having been made to falsify them, and no negligence imputed, he should not be charged with interest beyond that returned.

2. That the report charges the plaintiff with interest on the interest returned, although the defendants admit, that according to their mode of charging, they are not entitled to the interest itself thus returned; and consequently cannot be allowed interest thereon.

4. That the plaintiff should not be charged with interest on the annual balances, as he had charged himself with all the interest he made and received.

7. That commissions are not allowed to plaintiff in the report, at 2½ per cent. on the interest made, in addition to 10 per cent. for making interest.

By the defendants—

2. That the Commissioner, in his report, did not charge the plaintiff with interest on $9133, (the sale bill,) from 28th January, 1819, because, in making up the accounts previously, he had commenced the annual charges on the 1st January.

So much only of the decree as relates to these exceptions is presented.

Johnston, Chancellor. This case comes up on a report of the Commissioner, and exceptions thereto.

The first exception of the plaintiff is, I think, founded in misconception. The interest referred to in the plaintiff's returns, is extra interest made by renewing notes. But charging himself with this, does not exempt him from ordinary interest. The exception is overruled.

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*I have in vain endeavored to find out the practical application of the plaintiff's second exception: as I cannot, I must overrule it.

The plaintiff's fourth exception is overruled for the reasons stated in relation to the first.

The plaintiff's seventh exception insists that he is entitled to 2½ per cent. in addition to 10 per cent. allowed administrators for interest. Taveau v. Ball (1 M'Cord Eq. Rep. 462) seems to support this construction of the act. But it appears to me to be so plain an invasion of the act, that I will give the Supreme Court another opportunity to consider the question. By the act it is provided,(a) not that an executor shall receive 10 per cent. for letting out to interest and receiving in again, nor 10 per cent. for interest he shall make for the estate; but that he shall receive 2½ for letting out and 2½ for taking in, until the commissions reach 10 per cent. on the interest made, which is expressly declared to be the maximum. In all cases of short loans, 10 per cent. on the interest made will fall short of 5 per cent. for letting out and taking in the capital; and therefore, as the limit is 10 per cent. on the interest, the operation of the act is, in all such cases, the same as if 10 per cent. had been expressly given on the interest, instead of allowing commissions to that limit on the capital. The case would be very different, however, on a loan for twenty years secured by bond: then, only 5 per cent. on the capital would be the commission—falling far short of 10 per cent. on the interest. The exception to the report on this point, is overruled.

The defendants' second exception is overruled. Harper v. Ardis, 2 Hill, 560, is against it, and governs me, although I dissent from it.

The plaintiff appealed from the decision of Chancellor Johnston, in overruling the exceptions on his part.

The defendants Gilmore and wife appealed from the decree of Chancellor De Saussure, overruling their plea of the statute of li-

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*mitations; and all the defendants appealed from the decree of Chancellor Johnston overruling their second exception. And the defendant B. S. Massey, the guardian of Mrs. Gilmore, appealed and now moved that the bill as to him be dismissed, on the ground that his plea was sustained.

Rogers & Hill, for the plaintiff.

Mills & Witherspoon, for the defendants.

Chancellor JOHNSTON delivered the opinion of the Court.

This Court is of opinion, that Jas. H. Gilmore and wife are entitled to the benefit of their plea of the act of limitations. The money now sought to be recovered from them, was paid over to Mrs. Gilmore's guardian in 1827; and the bill to recover it back, was not filed until 1833. The relation between the administrator and the guardian, was terminated by the payment of the money. Indeed, with respect to the excess over the ward's share, that relation never existed. It is a simple case of money paid by mistake, and action brought after the lapse of four years to recover it back.

It is argued, that inasmuch as the guardian to whom the plaintiff paid the money does not plead the act, and therefore the plaintiff can recover it from him, who in his turn can go over to his ward for indemnity—that from these circumstances it follows, that the ward cannot protect herself by the statute.

If the plea is a good defence for the guardian, which he collusively neglects to make,

(a) The 29th Sect. of the Act of 1789 (P. L. 495) is as follows: "All and every executor or administrator shall for his, her or their care, trouble and attendance in the execution of their several duties, take, receive or retain in his, her, or their hands, a sum not exceeding the sum of 5os. for every £100 which he, she or they shall receive, and the sum of 5os. for every £100 which he, she, or they shall pay away, in credits, debts, legacies or otherwise, during the course of their or either of their managements or administrations, and so in proportion for any sum or sums less than £100. Provided, that no executor or administrator shall for his, her or their trouble in letting out any monies upon interest, and again receiving the same, be entitled to take or retain any sum exceeding 20s. for every £10 for all sums arising by monies let out to interest, and in like proportion for a larger or lesser sum; nor shall any executors or administrators who may be creditors of any testator or intestate, or to whom any sum of money or other estate may be bequeathed, be entitled to any commissions for paying or retaining to themselves any such debts or legacies."

the ward is not bound. So it was decided, in Peyton v. Peyton, Charleston MS. cases, where a creditor having called the administrator and distributees before the Court, it was held that although the administrator would not plead the act, the distributees might do it for him, and thus protect their interests.

But there is another answer. Although the guardian has not pleaded the statute of limitations, he has pleaded and proved a full administration, (by settlement with his ward,) of all that came to his hands, and this before notice of any mistake. This discharges him. And as, by the argument to which I have alluded, the ward's liability to the administrator is made to depend on the previous liability of the guardian, it follows that there can be no recovery here against the ward.

The bill must therefore be dismissed as to Gilmore and wife; but without costs.

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*The bill must also be dismissed as to Mrs. Gilmore's guardian; he having sustained his plea of having paid over the assets before notice from the plaintiff.

With respect to the accounts, I am directed to say that the Court is, except in one or two particulars, satisfied with the circuit decision on the exceptions.

It is their opinion that if the defendants charge the administrator of George Massey according to the ordinary rule, with interest on the annual balances, he should not be charged with interest on the interest returned by him. The defendants must elect between the two methods of stating the accounts. If they choose to charge the interest returned, that will dispose of the exception relating to the sale bill. If they choose to charge by the ordinary rule, the question whether the interest on the sale bill shall be charged as contended for, will arise. That question is now pending before the Court in another case: and had better be left open in this until decided in that, or until the report comes in again. It may be, that the defendants' election may render it unnecessary to decide it in this case.

Let the circuit decrees be modified according to the foregoing opinion; and the case remanded to the Circuit Court.

Chancellors DE SAUSSURE, JOHNSON and HARPER, and Justices O'NEALL, RICHARDSON, EVANS and BUTLER concurred.

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*☞An Act of the Legislature was passed on the 21st day of December, 1836, entitled "An Act to organize the Courts of this State," which, after prescribing the times and places of holding the Courts of Law and Equity, provides amongst other things as follows:

Sec. 5. That all appeals from the Courts of Law shall be heard and determined in a Court of Appeals, consisting of the Law Judges—and that all appeals in Equity shall be heard and determined in a Court of Appeals, consisting of the Chancellors: That the said Courts shall meet at the same time, and be held as follows: That is to say: at Charleston, on the first Monday in February; and at Columbia, on the first Monday in May, and fourth Monday in November.

Sec. 6. That in all questions of Law, as distinguished from Equity, the Court of Chancery shall follow the decision of the Court of Law.

Sec. 7. That upon all constitutional questions arising out of the Constitution of this State, or of the United States, an appeal shall lie to the whole of the Judges assembled to hear such appeals: That an appeal shall also lie to the whole of the Judges upon all questions upon which either of the Courts of Appeal shall be divided, or when any two of the Judges of the Court shall require that a cause be further heard by all the Judges.

Sec. 8. That the Judges of Law and Equity, when assembled as aforesaid in one chamber, shall form a Court for the correction of all errors in Law or Equity, in the cases that may be heard before them: and that it shall be the duty of the Judges to make all proper rules and regulations for the practice of the said Court of Errors, and for the mode of bringing causes before them.

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT CHARLESTON, IN FEBRUARY TERM, 1837.

CHANCELLORS PRESENT.

HON. HENRY W. DE SAUSSURE, President.
" DAVID JOHNSON,
" WM. HARPER,
" J. JOHNSTON.

2 Hill, Eq. *499

*J. B. THOMPSON. Administrator de bonis non of Hance M'Culloch, v. JAMES T. BUCKNER.

(Charleston. Feb. Term, 1837.)

[*Executors and Administrators* ⟸120, 460.]

Bill by administrator de bonis non against defendant to account as former administrator, his administration having been revoked. There were but two distribntees, of whom defendant's wife was one; he had paid the debts, and obtained an assignment from the other distributee. *Held*, that the validity of the deed of assignment could not be impeached by the plaintiff: If obtained by fraud, none but the distributee or his representatives could impeach it; and it was a fraud on his creditors, they only could complain. And for the same reason the will of the distributee disposing of his interest in the estate, was rejected.

[Ed. Note.—Cited in Petigru v. Ferguson, 6 Rich. Eq. 385; Lay v. Lay, 10 S. C. 219.

For other cases, see Executors and Administrators, Cent. Dig. §§ 485, 1984; Dec. Dig. ⟸ 120, 460.]

[*Divorce* ⟸271.]

And a decree in favor of defendant's wife for alimony settling her portion of her father's estate to her separate use, is irrelevant and inadmissible. The administrator de bonis non cannot call defendant to account for her benefit. She might enforce her own decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 744; Dec. Dig. ⟸271.]

[*Executors and Administrators* ⟸120, 473, 474.]

Nor can the administrator de bonis non in such case sustain the bill on account of judgements remaining of record unsatisfied; especially where from lapse of time they may be presumed to be satisfied, and where the judgment creditors are not parties claiming payment. To require defendant to account on that ground, they should come in and swear that their judgments are unsatisfied, and it should appear that the defendant had notice of their demands within the year: after that, without notice, he would not be liable as administrator, and the creditors would be left to their remedy against the distribntees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 488, 2045; Dec. Dig. ⟸120, 473, 474.]

[*Executors and Administrators* ⟸20.]

Administration ought in no case to be granted, but to kindred or creditors, or on their application; and where there are neither, the Ordinary is only authorized to grant administration ad colligenda bona.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 96; Dec. Dig. ⟸ 20.]

Heard at Coosawhatchie, February Term, 1836, before Chancellor Harper, who delivered the following decree:

On the 2d of August, 1816, administration was granted to the defendant, James T. Buckner, of the estate of Hance M'Culloch, then lately deceased, whose estate was appraised at more than $12,000. He continued in the administration until the—of July, 1821, when his administration was revoked on the application of his sureties. In 1830, administration de bonis non of Hance M'Culloch's estate, was committed to David C. Campbell, who renounced in the same year; and in December 1833, administration de bonis non was committed to the plaintiff. The bill is

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for an ac*count of the estate of Hance M'Culloch, in the hands of the defendant.

Defendant, by his answer, admits the facts stated with regard to the grant of the several administrations, and the revocation of his own. He states, however, that he paid

off all the debts of the intestate, and accounted before the Ordinary. He states that Hance M'Culloch left only two children, or distributees, to wit: a son named Thomas B. M'Culloch, and a daughter named Elizabeth, who was the defendant's wife; that on the 4th March, 1816, the said Thomas B. M'Culloch, by deed, assigned to the defendant all his interest in his father's estate. Defendant claims that having paid off all the debts, and being himself entitled to the whole estate, in right of his wife, and under Thomas B. M'Culloch, deceased, he is not liable to account. If the case made by the answer were sustained, there could be no doubt that he would be entitled to a decree. The Court would not do such a thing as to compel a defendant to account for an estate which he would be forthwith entitled to receive back.

The execution of the deed of Thomas B. M'Culloch, was admitted, but evidence was offered to shew it to be fraudulent. This testimony was objected to on the part of defendant, and the objection sustained by the Court. The transaction was a final administration of the estate, so far as Thomas B. M'Culloch was concerned. If it was a fraud on his creditors, the deed might still be good, as between the parties, and none but his creditors could impeach it. If it were obtained by a fraud practised on Thomas B. M'Culloch himself, none but himself, or his legal representative, could call it in question. He is understood to be dead; but suppose he were living and did not think proper to impugn it, could the administrator de bonis non avoid it on his behalf without his concurrence? It can make no difference that he is dead; his legal representative stands in his stead, and is alone competent to litigate the validity of the deed. For the same reason, the will of Thomas B. M'Culloch, which was said to dispose of this property, was rejected when offered. The executor of that will, if an executor were appointed, or if not, an administrator cum testamento annexo, is the only proper person to sue. Evidence was also offered of proceedings on a bill in Equity by the wife of the defendant against him for alimony, and a decree that her portion of

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her fa*ther's estate, should be settled on her, to her separate use. This also was objected to, and the objection sustained. The object of the present suit was stated to be for her benefit, and that she might be satisfied with her decree. But this is plainly unnecessary and contrary to principle. If any other distributee had obtained a decree here, could the administrator de bonis non call the former administrator to account for the benefit of that distributee? What difference does it make that the distributee was the administrator's wife? If the decree was that defendant should settle the estate on her, it is implied that he shall account first. What forbids her to enforce that decree? Or if there be any defect in the directions of the decree, they may be supplied by proceedings to have it carried into effect. Then evidence was offered to shew debts existing against the estate of Hance M'Culloch, on account of which, the administrator de bonis non is supposed to sue. This consisted of certificates from the clerk's office of Colleton and Beaufort districts, of judgments against Hance M'Culloch himself, and against the defendant as his administrator, standing apparently unsatisfied on the record. It was objected that these ought to be regarded as satisfied from lapse of time, and so I should think. The latest judgement against Hance M'Culloch, was near twenty-two years before the filing of the bill, and the latest against the defendant as administrator, near nineteen years, and these are circumstances to corroborate the presumption. There are various reasons why the bill could not be sustained on the score of the judgments, but a conclusive one is, that the judgment creditors are not before the Court, nor claiming anything upon them. If they were, they would be required to make affidavits that their judgments were unsatisfied before they would be received. The plaintiff is a trustee on their behalf. In the case of Stoney v. Shultz, decided by the Court of Appeals at its last sitting at Columbia, the assignee of an insolvent debtor, when creditors had been advertised for, objected to the distribution of the fund among the creditors who were before the Court, on the ground of such judgments standing apparently unsatisfied on the record. The Court held, that though a trustee for all creditors, it was not his duty to go in search of creditors, and that they could take notice of no creditors, but those who had presented their demands duly verified by affidavit. By parity of reason, if the estate were in the hands of the plaintiff, and distributees were suing him, he could not claim

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to *retain a fund to meet those judgments; he could not do so at any time after the expiration of the year and day. Creditors who had not within that time rendered their demands, would be left to their remedies of pursuing the estate in the hands of the distributees. Shall he be permitted to recover against defendant, that he may hold the fund, upon a surmise that these claims may be one day brought forward and established?

It is ordered and decreed, that the bill be dismissed with costs.

The plaintiff appealed on the following grounds:—

1. Because the administrator of Hance M'Culloch did not finish and complete his duty as such—inasmuch as he did not pay the debts and cause distribution to be made, but held the estate unadministered until the administration was revoked, and thereby be-

came liable to account to the administrator de bonis non.

2. Because the decree of the Court of Equity prevented the attaching of the marital rights, and until a final account, the possession by the administrator of M'Culloch, was not sufficient to transfer his wife's share.

3. Because the mere allegation of a conveyance from the other distributee, was not a sufficient accounting for his share.

4. Because the Chancellor, instead of dismissing the bill, should, on his own principles, have retained the bill and directed that the legal representative of Thomas B. M'Culloch and the judgment creditors of Hance M'Culloch, be made parties.

5. Because there was no proof of any account before the Ordinary; on the contrary, his accounts shew a large inventory and only some partial payments, and no final account was proved or pretended.

N. B. The decree is mistaken in the statement that the execution of the deed of Thomas B. M'Culloch was admitted. It was admitted that such a deed has been set up and alleged, and evidence was to be introduced to shew it void.

Hunt, for the appellant.
Bailey, contra.

Chancellor HARPER delivered the opinion of the Court.

The mistake which is supposed to have occurred with respect to the admission of the fact, of the execution of Thomas B. M'Culloch's deed, if it be a mistake, is one which cannot be corrected now. My notes of the evidence were sent with the decree, and

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*are not now in my possession. The notes were before me, however, when the decree was drawn, and I am satisfied that I must have so taken it down, and so understood it at the time. It is singular that evidence should have been offered to shew the deed to be fraudulent before its execution was established.

With respect to the debts of the estate of Hance M'Culloch, which are said to remain unpaid, I may remark, in addition to what is said in the decree, that the existence of such debts is not alleged by the bill, and consequently the defendant could not have been prepared to disprove them. If, after the expiration of the year, during which he had received no notice of the debts, the administrator had paid over the estate to the distributees, he might plead that he had fully administered, as against creditors, or an administrator de bonis non. Creditors might perhaps pursue the estate in the hands of the distributees; but an administrator de bonis non, would be required to prove, not only that debts existed, but that the administrator had notice of them within the year, before he could require an account. In this case, that has been done which, according to the view I have taken, is equivalent to a full administration. If the creditors themselves might pursue the estate in the hands of the defendant or his wife, yet the administrator de bonis non, even if he has established the existence of the debts, has certainly not shewn that the defendant had notice of them within the year.

I think that Ordinaries ought in no case to grant administration, unless to the kindred or creditors, or upon the application of the kindred or creditors. The statutes 31, E. 3, c. 11 and 21, H. 8. c. 5. only provides for the granting of administration to the kindred, &c. according to their propinquity. See Toll. Ex. 82, 83. Administration is also committed to creditors; but when there are neither kindred nor creditors, the Ordinary is only authorized to grant administration ad colligenda bona—for the sole purpose of collecting and preserving the goods. When kindred applies, the Ordinary must have evidence that they are kindred, entitled to the administration. And when creditors apply, they ought to verify the existence of their demands, not only by the production of their evidence of debt, but by their own oaths. In this case, it is plain the administration was not granted on the application of creditors. It is probable that it was granted on the application of the defendant's wife. But as to her, as I have

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said, even if she were other*wise entitled to it, the estate has been fully administered by the decree in her favor.

If the decree in favor of the wife is to have no validity or effect whatever, then it cannot stand in the way of the husband's marital rights attaching. If it is to have any validity or effect—if it be an authoritative determination of her right to the estate derived from her father, then it is certain that it may be enforced and carried into execution, by a proper proceeding on her part. Directions may be supplied, if they are deficient, and an account had, if an account be needed. But to decree an account and payment of the estate to the present plaintiff, would be, in effect, to decree to him that which has already been decreed to her.

With respect to the suggestion in relation to making additional parties, it may be observed, that if the plaintiff had any rights, to the decision of which those parties were necessary, such a course would be proper. But he has no rights, nor any standing in Court, and if such an order were made, it would not be to amend the bill, but to make a new case, to which he would be an improper and unnecessary party.

The decree is affirmed.

JOHNSTON, Chancellor. I do not concur.

2 Hill, Eq. 504

WILLIAM E. PERRYCLEAR v. M. JACOBS and JAMES SLOWMAN.

(Charleston. Feb. Term, 1837.)

[*Husband and Wife* ⇐29.]

Before marriage J. S. executed a deed to the plaintiff as trustee, by which he settled on his intended wife, a legacy due to her. The deed was recorded in the mesne conveyance office, but not in that of secretary of State. Suit had been brought before marriage for the legacy, and after marriage a decree obtained in the wife's favor and the funds received by the solicitor employed to prosecute the suit, who, at the instance of the husband, and without the concurrence of the trustee, accepted an order in favor of a creditor of the husband. On a bill by the trustee to declare the creditor's claim invalid, and to have the settlement enforced; the Court decreed the trust fund recovered on the legacy to be paid over to the trustee.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⇐29.]

[*Assignments* ⇐90.]

The order was an assignment of the husband's interest, but he had none, having previously parted with it by the settlement, which, though void, for want of recording as to creditors who could reach the fund without the aid of Equity, was good between the parties.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 156; Dec. Dig. ⇐90.]

[*Husband and Wife* ⇐35.]

As the creditor could only reach the wife's choses in action in Equity, the Court will, on his application to obtain the fund, make a settlement on the wife, or one being already made by the husband, enforce that.

[Ed. Note.—Cited in Peyton v. Enecks, 3 Rich. Eq. 400, note.

For other cases, see Husband and Wife, Cent. Dig. § 209; Dec. Dig. ⇐35.]

[*Husband and Wife* ⇐11.]

The husband and solicitor could not by their act change the rights of the parties; and the acceptance of the order was a nullity.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 53; Dec. Dig. ⇐11.]

[*Husband and Wife* ⇐12.]

The wife has the right to a settlement out of her separate property, whether the application be by the husband or his assignees to obtain the possession, and an assignee for valuable consideration is subject to the same equity as the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 59; Dec. Dig. ⇐12.]

[*Husband and Wife* ⇐13.]

Creditors of the husband have no interest in the wife's expectancy not reduced into possession, and if they trust him on the faith of it, it is at their peril.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 22, 26, 37, 68–70; Dec. Dig. ⇐13.]

[*Husband and Wife* ⇐12.]

As the Court may compel the husband, on his application for his wife's estate to make a settlement, so he may of his own accord make one, and that either of a part or the whole of her choses; and his creditors could not object.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 58–67, 396; Dec. Dig. ⇐ 12.]

[*Assignments* ⇐34; *Husband and Wife* ⇐ 12.]

In Equity the husband may make an assignment of his wife's choses for her separate use by parol; and although a deed of settlement not recorded is void as a marriage settlement, it would operate as an assignment of his interest, and put the property out of the reach of his creditors.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 67; Dec. Dig. ⇐34; Husband and Wife, Cent. Dig. § 61; Dec. Dig. ⇐12.]

[*Husband and Wife* ⇐10.]

The recovery being for the wife's separate use, the marital rights did not attach.

[Ed. Note.—Cited in Peyton v. Enecks, 3 Rich. Eq. 401, note.

For other cases, see Husband and Wife, Cent. Dig. §§ 23, 34, 35, 38–46, 396, 398; Dec. Dig. ⇐10.]

[*Husband and Wife* ⇐29.]

[Cited in Trustees v. Bryson, 34 S. C. 412, 13 S. E. 619, to the point that a deed of marriage settlement, though not recorded as required by law, is valid between the parties, and an assignment of the property by the husband to his creditor in payment of the debt passes only the interest of the husband, if any, in the property, and does not affect the right of the wife, though the creditor might by legal process have subjected the property to his debt.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 167; Dec. Dig. ⇐29.]

Heard at Coosawhatchie, January Term, 1835, before Chancellor De Saussure, who delivered the following decree:—

The bill states, that previous to the marriage of James Slowman with Sarah Oswald, a deed of settlement was executed, by which a certain claim, which she had as one of the legatees of George Stevens, was conveyed to plaintiff, as trustee, for certain uses therein set forth. That the deed of settlement was recorded in the office of the Register of mesne conveyance in Beaufort District, but omitted to be recorded, from ignorance of the law, in the office of the Secretary of State. That no portion of the legacy came into the hands of the plaintiff, but he was informed recently by the solicitor employed before the marriage to recover the legacy from the estate of Stevens, that by a decree of this Court, a

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certain *sum of money was due plaintiff, as trustee of Mrs. Slowman. The solicitor also informed him, that he had accepted an order of James Slowman, in favor of Myer Jacobs, made after the marriage, and that he must retain that amount in his hands; and that other creditors of James Slowman would seek to make the legacy to Mrs. Slowman, when reduced to possession, liable for the debts of said Slowman. The plaintiff states, that as the legacy has never been in the possession of said Slowman, it may be considered as impounded in this Court, being in the hands of the solicitor, who recovered the same for Mrs. Slowman, from the estate of Stevens; and that the assignment of the husband, ought not to prevail against the equity

of the wife, more especially as the husband had previously executed the deed, by which the right to the legacy was conveyed to plaintiff, as trustee for Mrs. Slowman. That plaintiff had refused to acknowledge the right of the said Myer Jacobs, to be paid out of the fund now in the hands of plaintiff's solicitor in the suit under which the legacy was recovered. That as the marriage deed was recorded in the office of the district in which all the parties resided, and had been drawn up by the gentleman at the bar, then and now the attorney, solicitor and agent of the said Myer Jacobs, as well as of the said Sarah Slowman, this ought to be considered as notice of the existence of the deed of settlement. The bill, therefore, prays that the claim of Myer Jacobs may be declared invalid, and that James Slowman may be ordered to make a sufficient settlement of his wife's property.

The answer of James Slowman, admits the execution of the marriage settlement, and that he subsequently drew the order on the solicitor, who had recovered the legacy for Mrs. Slowman, in favor of Myer Jacobs, as before stated. That he did not mean thereby to defraud his wife and children, or to defeat their rights under the deed, but that having been informed that the deed was void, for want of being fully recorded according to law, he thought himself at liberty to draw the order he did, on the fund in favor of one of his creditors. That he is willing to do justice to his creditors as far as in his power, and also to his family, as the Court may order and direct.

The answer of Myer Jacobs insists upon his rights under the order drawn by James Slowman on the solicitor, who recovered the legacy in question, which was accepted by him.

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The answer *denies any notice of the deed of settlement, and insists that the same not being duly recorded, is void as to creditors.

The facts appear to be, as stated in the proceedings, and upon them the question arises, whether the order of the husband, in favor of Myer Jacobs, to pay a debt of his own, on the solicitor who had recovered the legacy to Mrs. Slowman and held the fund in his hands, and which order the solicitor has accepted, is such an assignment of the wife's equity, as will transfer to the said creditor a right to be paid out of the fund, to the prejudice of the wife and children. The uses and trusts expressed in the marriage settlement were, that the trustee should permit the said Sarah Oswald, and her assigns, to receive and take the rents, wages, profits and emoluments, and increase of the said legacy, to her sole and separate use and benefit, during her natural life, free from the control, debts or engagements of her intended husband, James Slowman, and her receipt to be a sufficient discharge to said trustee; and upon her death in the life time of the said James Slowman, then the trustee should assign and transfer the said legacy or bequest, and the proceeds from it, to and among the children of the said Sarah Slowman.

The question, as above stated, is whether under the circumstances of the case, the order drawn by James Slowman, the husband of said Sarah, the legatee, on the solicitor who recovered the legacy from the estate of Stevens, is such an assignment of his interests in the legacy bequeathed to his wife, as vested an interest in the assignee, to the prejudice and rights of the wife and children, under the deed of marriage settlement? This order was an informal mode of assigning any interests which the husband might have in the legacy, but as there is no particular mode prescribed by law, for transferring such an interest, I am of opinion that it may be considered well enough to carry whatever interest the husband had in the legacy, to the extent of the order. The question then arises, what interest had the husband in the said legacy? If there had been no marriage settlement, the husband would have had such an interest therein, as to have been able to assign the same, and if the assignee could have obtained the interest assigned, without coming to this Court for its aid in procuring the fund, he would be able to hold it. But if he were obliged to come to this Court for its aid, that would not be furnished without a proper provision for the wife out of the fund. In

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this case, *however, there was a marriage settlement, duly executed before the marriage, by which the husband had joined in conveying to a trustee, this legacy then unrecovered, to the sole and separate use of the wife, free from his control of debts, and after her death to her lawful children. By that instrument the husband parted with all the rights and interests which he might have acquired by the marriage, and of course the right of transferring or assigning any in the legacy in question, to his creditors. It is, however, argued, that the marriage settlement, not having been recorded according to the provisions of the statute, the same is void, and that the creditors of the husband have a right to avail themselves of the defect, and obtain payment of the debts due to them out of the fund. There is no doubt, that the non-recording the instrument according to law, avoided the same as to creditors, and they are at liberty to enforce their legal processes as far as the same could be used. But a power to enforce their legal remedies would not enable them to touch a legacy, or money, in the hands of an attorney or solicitor; an execution could not be levied on it. Then it can be reached only by application to this Court, on the equitable rights of the parties. Now, if we examine these, it appears that the husband had parted with all the interests he

might acquire to the legacy in question, by executing a marriage settlement to a trustee for the benefit of his wife and children. That instrument was void as to creditors for want of due recording; but it was valid as between the parties. The husband was bound by it, and however his creditors might lay hold of the fund, if they could get at it by legal processes, the husband could do no act to affect it. He was not at liberty to assign it to his creditors or any body else, and they could not, by the order of the husband, who had parted with all his rights to the trustee, acquire any power over this equity. If the solicitor, who had been employed to recover the legacy for the trustee of Mrs. Slowman, had not accepted the order of the husband, to be paid out of the fund in his hands, the creditor, Mr. Myer Jacobs, must have come here to obtain the effect of his order, and his equity would have been resisted by the equity of the wife, which existed independent of the settlement. But the acceptance of the order by the solicitor, has in some degree changed the situation of the parties, and obliged the trustee to come here for protection. The question arises, was the solicitor at liberty to do so? For

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the pur*pose of recovering the legacy, he was the agent of the trustee for the benefit of the cestuique use, and when recovered, he had no authority over the fund. It was at the disposal of the trustee, and should have been paid over to him who was the real employer. He had no authority to change the situation of the parties by any act of his, or his own position as the solicitor of the trust estate, for that of a stakeholder. It was for the Court to decide what effects flowed from the non-recording the marriage settlement. The act of acceptance by the solicitor, was, therefore, a nullity, done no doubt with good intentions, and to promote, as he thought, the purposes of justice. But he transcended his powers, for it is understood he had no authority from the trustee to accept orders or make payments to the husband's creditors, out of the trust fund in question. The acceptance, then, being put out of the way, the plaintiff is entitled to a decree, directing that the fund be paid over to the trustee. Should the creditor, however, be disposed to persevere in his claim, he may still, perhaps, file his bill, and seek his redress against the trustee and the trust fund.

It is Ordered, that the trust fund recovered on the legacy, be paid over to the trustee.

Defendant, Jacobs, appealed on the following grounds:

1. Because Slowman's order on his solicitor, in favor of Jacobs, for four hundred and eighty-five dollars, was a legal and valid assignment of so much of his wife's legacy, and being for valuable consideration, gave the assignee a claim paramount to the rights of the trustee under the unrecorded deed of marriage settlement.

2. Because the assignee is a bona fide and fair creditor, as well as a purchaser for valuable consideration, without notice, and is, by the principles of equity, as well as by the positive enactments of the legislature, entitled to payment from the property covered by the marriage settlements.

3. Because, if the defendant, Jacobs, can procure redress, as the Chancellor intimates in his decree, "by filing a bill against the trustee, and the trust fund," the decree in this case, should have been in his favor, inasmuch as all the parties to be affected by such a decree, as well as the fund itself, were in Court.

4. Because there is nothing in the shewing of the plaintiff, to give jurisdiction of his case to a Court of Equity, as against the defendant, Jacobs.

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*5. Because the decree is in other respects contrary to the principles of Equity, as is settled by decided cases, and contrary to the uncontradicted facts in the defendant's (Jacobs') answer, and ought to be reversed.

Treville, for appellant.
A. M. Smith, contra.

Chancellor HARPER delivered the opinion of the Court.

The right of the wife to a settlement out of her separate property, which is subject to the jurisdiction of this Court, is too well settled to be questioned. As is said by Chancellor Kent, in Kenney v. Udal, 5 John. Ch. Rep. 464, "the wife's equity attaches upon her personal property, when it is subject to the jurisdiction of this Court and is the object of the suit, into whatsoever hands it may have come, or in whatever manner it may have been transferred. The same rule applies, whether the application be by the husband, or his representatives or assignees, to obtain possession of the property, or whether it be by the wife or her trustee, or by any other person partaking of that character, praying for a provision out of that property." An assignee, even for a valuable consideration, stands in the same situation with the husband, and is subject to the same equity, when he comes to seek for the wife's property. Creditors of the husband have no interest whatever in the wife's expectancy, not yet reduced into possession, and if they think proper to credit him on the faith of it, it is at their peril. The case of Elibank v. Montolieu, 5 Ves. 737, is one in which the bill of the wife was sustained against the husband and the administrator of an estate of which she was entitled to a distributive share, and who was also a creditor of the husband, and claimed to retain

the fund for the satisfaction of his debt. But the Court, not questioning but that he might retain as against any right of the husband, held that he was in no better situation than the husband, and decreed a settlement. In Carr v. Taylor, 10 Ves. 574, a bill was sustained by the wife against an administrator and the assignees of a bankrupt husband. If the husband obtains actual possession of the property, it is out of the reach of the Court; but while it is within the control of the Court, it will enforce the right of the wife.

But what the husband may be compelled

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to do by the Court, *he may certainly do of his own accord. He may make a settlement of his wife's expectancy upon her, and creditors cannot impeach it. The Court, in directing settlement, generally, orders a reference to ascertain the proper settlement. But if the husband should assent, it would, as of course, order a settlement of the whole property, and creditors could not be heard to object to it. He may assign his wife's legacy in the hands of the executor to a trustee for the wife's separate use; and certainly, I suppose such a trustee might maintain a bill against the executor, for the benefit of the wife. But in Equity, an assignment may be made on sufficient consideration, by parol merely. There can be no doubt but that the equity of the wife is a sufficient consideration; and I do not see how such an assignment of the wife's legacy could be questioned. Notwithstanding the decision of the Court, in the case of Price v. White, Carolina Law Jour. 297, [Bailey Eq. 244,] where a written settlement was actually executed, I do not perceive how any question could arise as to the necessity of recording such parol assignment. If the executor should pay over to such a trustee, it would still be the wife's chose in action; which neither the husband nor creditors could touch without the aid of this Court or some Court of concurrent jurisdiction, and still subject to the wife's equity, if they should attempt to reach it. And no prejudice could arise to creditors, by misleading them to credit the husband, on the appearance of property in his possession, if the trustee retained the money or any other property in his possession, and paid over the rents and profits to the wife. If he should permit chattels to go into the hands of the husband, this might, perhaps, be construed a surrender of the trust, and the marital rights attach upon them, so as to render them liable to creditors.

In this case, we are to regard the defendant, Slowman, as having assigned the legacy to the plaintiff. If the solicitor received the money merely as the agent of Slowman, then I think it is the same thing as if Slowman himself had recovered it, and he must be regarded as having reduced it into possession. But if, in consequence of an understanding between Slowman, his wife, and the plaintiff, he was directed to receive it, and pay it over to plaintiff for the separate use of the wife, this was, in effect, an assignment to plaintiff, and the solicitor's receipt of the money was plaintiff's receipt. To the plaintiff alone was the solicitor responsible for it, and Slowman's subsequent assignment of

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a part of *the same fund to the defendant, Jacobs, was a mere nullity; and this, entirely independent of any effect to be given to the marriage settlement. The husband has never had possession of the money, and whether in the hands of the solicitor or the plaintiff, is still the wife's chose in action.

The Chancellor states that the solicitor received the money as the agent of plaintiff. But it is supposed in argument, that this may have been a mistaken impression. But all the circumstances of the case indicate that he did not act merely as the agent of the husband. He was the solicitor of the wife in the suit for recovering the legacy before the marriage, and when, after the marriage, the husband became a party to the suit, he continued the solicitor of husband and wife. As soon as he received the money, he advised the plaintiff of it, and as it was agreed at the hearing, paid over the principal part of the fund. How is it possible to account for this, but by such an understanding as I have supposed? The deed itself, however void it may be as a marriage settlement, and though we give it no greater effect than if it had been a mere verbal agreement in consideration of marriage, yet furnishes plenary evidence of the understanding and agreement of the parties, to assign the legacy to plaintiff. It shews that the solicitor received it for the plaintiff, and that he is the proper person to maintain the suit for it. It is possible that the money might have been recovered of the solicitor by a different proceeding. But the plaintiff is entitled to have the rights of his cestuique trust declared, as against the husband and his assignee, Jacobs. He comes here properly, to give effect to the assignment.

The Chancellor's decree is therefore affirmed.

Chancellors DE SAUSSURE and JOHNSON, concurred.

Chancellor JOHNSTON, dubitante.

2 Hill, Eq. 511

ELIZABETH GRAY, Administratrix of John H. Jenkins, and Others, v. CHARLES GIVENS, and Others.

(Charleston. Feb. Term, 1837.)

[*Tenancy in Common* ⇐15.]

In no case, unless aided by other circumstances, will an ouster of a joint tenant be presumed from lapse of time, under a period of twenty years.

[Ed. Note.—Cited in Godfrey v. Schmidt, Cheves, Eq. 60; McGee v. Hall, 26 S. C. 185, 186, 1 S. E. 711; Powers v. Smith, 80 S. C. 114, 61 S. E. 222.

For other cases, see Tenancy in Common, Cent. Dig. § 43; Dec. Dig. ⇐15.]

[*Descent and Distribution* ⇐65.]

Husband decreed to elect to hold his deceased wife's lands as tenant by the curtesy, or to take under the statute of distributions.

[Ed. Note.—Cited in Withers v. Jenkins, 14 S. C. 608; Gaffney v. Peeler, 21 S. C. 68.

For other cases, see Descent and Distribution, Cent. Dig. § 195; Dec. Dig. ⇐65.]

[*Tenancy in Common* ⇐14.]

In analogy to the statute of limitations, the time which the party to be affected was under a disability, is to be deducted from the lapse of time which is to raise a presumption of title against him.

[Ed. Note.—Cited in Lamb v. Crosland, 4 Rich. 542; Godfrey v. Schmidt, Cheves, Eq. 60; McQueen v. Fletcher, 4 Rich. Eq. 161; Massey v. Adams, 3 S. C. 265; Shubrick v. Adams, 20 S. C. 52; Langston v. Shands, 23 S. C. 154.

For other cases, see Tenancy in Common, Cent. Dig. § 34; Dec. Dig. ⇐14.]

[*Tenancy in Common* ⇐14.]

[Mere exclusive possession by one tenant in common for less than 20 years after his cotenant is of ability to sue will not bar such cotenant.]

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 33; Dec. Dig. ⇐14.]

[*Tenancy in Common* ⇐15.]

[Cited in McGee v. Hall, 26 S. C. 186, 1 S. E. 711, to the point that a tenant in common in possession of land does not hold adversely to his co-tenant till such tenant has notice that he claims adversely to him.]

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 49; Dec. Dig. ⇐15.]

Heard at Beaufort, February Term, 1836, before Chancellor Harper, who delivered the following decree:

The only object of the bill which it is necessary to consider, is to obtain partition of a tract of land of which Joseph John Jen-

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*kins, deceased, is admitted to have been seized at the time of his death. The bill also claimed a number of slaves, and this seemed the more material part of it. But this claim was abandoned, being manifestly unfounded, and, as it seemed to me, in some degree vexatious. Defendants had purchased the interests claimed by the plaintiffs in the slaves, for what appeared to be an adequate and full consideration, and received a release; though this was charged by the bill, to have been obtained fraudulently and for a grossly inadequate consideration. The bill was dismissed by consent as respects the plaintiff Joseph Jenkins, so that there only remain the plaintiffs, Elizabeth Gray, formerly the wife of John H. Jenkins, and Benjamin P. Jenkins, her son, by the said John H. Jenkins, and the only child of that marriage.

The said Joseph John Jenkins died in the year 1804, leaving his wife Martha Jenkins, afterwards the wife of the defendant, Charles Givens, entitled to one third of the tract of land in question, under the statute of distributions, and three children, Joseph, Jas. and John H. Jenkins, (the latter the husband and father of the plaintiffs,) each entitled to one-third of two-thirds. James is since dead, intestate and without issue. Mrs. Martha Jenkins went into possession of the land, and continued in possession till her marriage with the defendant, Charles Givens, and she and her husband remained in possession, having the exclusive use and enjoyment until her death in 1832. Defendant Givens, has remained in possession ever since. Plaintiffs claim in the right of John H. Jenkins, the share to which he was entitled by inheritance from his father; one-third of the share of James Jenkins; and if the land be subject to partition, the infant plaintiff is entitled to one-third of two-thirds of his grand-mother's interest, she having left a husband and two other children.

Plaintiffs pray that defendant, Givens, may elect either to hold his deceased wife's share of the land for life, as tenant by the curtesy, or that partition may be made of it, according to the act of distributions. Defendant relies on the length of his possession to maintain his title to the land. It is agreed that John H. Jenkins, plaintiff's intestate, came of age on the 3d February, 1818, and that from that time to the filing of the bill, (Sept. 1834,) more than sixteen years had elapsed, during which defendant was in exclusive possession. There is no doubt but that the possession of one tenant in common is the possession of the other, and

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that his pos*session will not be adverse, so as to admit the operation of the statute of limitations, without an ouster of the co-tenant. But it is not necessary that there should be an actual turning out to constitute an ouster. Whatever is sufficient to give the co-tenant notice, that the party in possession claims exclusively for himself and in his own right, will, I think, be a sufficient ouster. And if there were circumstances to shew that plaintiff's intestate had such notice, I should think defendant's title matured by the statute. But there are no circumstances beyond the naked fact of possession. No doubt an ouster may be presumed, from the mere fact

of a very long exclusive possession, as in the case of Fisher v. Prosser, Cowp. 217. Where one tenant in common had been in possession exclusively, receiving the rents and profits for about forty years, (double the time required for the English statute to run,) Lord Mansfield instructed the jury, that from the length of possession they might presume an ouster. It may be, that if this case were before a jury, it might be within their discretion to find an ouster. But, I cannot venture to exercise an arbitrary discretion. If I could, I should incline to exercise it in favor of the defendant. I must adopt some rule, and what shall it be? Twelve, sixteen, or eighteen years. I can think of no other than that bar which is made to quiet almost every other claim and give efficacy to long possession—the lapse of twenty years. As is said in Riddlehoover v. Kinard, 1 Hill Eq. Rep. 378, "The lapse of twenty years is sufficient to raise the presumption of a grant from the State, of the satisfaction of a bond, mortgage, or judgement; of the grant of a franchise, or the payment of a legacy, or almost any thing else that is necessary to quiet the title to property." See also Hutchison v. Noland, 1 Hill, 222. But in no case, unless aided by circumstances, have such presumptions been made on a possession of less than twenty years. I must, therefore, declare the plaintiffs entitled to partition of the land in question, but upon all the circumstances of the case, I think they must pay the costs.

It is therefore ordered and decreed, that a writ of partition issue, to divide the land in question; and that the commissioners allot to the plaintiffs, Mrs. Elizabeth Gray and Benjamin P. Jenkins, such portion of the said land as their intestate, John H. Jenkins, was entitled to by descent from his father, Joseph J. Jenkins, and his brother James Jenkins; that the defendant, Charles Givens,

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*elect to hold as tenant by the curtesy, such portion of the said land as his deceased wife was entitled to, or that the same be divided in pursuance of the statute of distributions; and that if he shall elect to take under the statute, the commissioners allot to the plaintiff, Benj. P. Jenkins, one-third of two-thirds of the said portion of land. Plaintiffs to pay costs.

The defendant appealed on the grounds:

1. Because the Chancellor decides that near seventeen years peaceable possession by the defendant, Charles Givens, of the tract of land, did not, under the circumstances, give him a sufficient title.

2. The decree is, in other respects, contrary to equity and the evidence.

A. M. Smith, for appellant.

Treville, contra.

Chancellor HARPER delivered the opinion of the Court.

The Court is of opinion that the decree in this case must be affirmed. There is no difference of opinion as to the length of time which is necessary to raise the presumption of an ouster by one tenant in common of his co-tenant. It is urged that the possession of the defendant, during the minority of John H. Jenkins, ought to be taken into account in computing the lapse of time, or that it is a circumstance to strengthen the presumption arising from the sixteen years possession, after he came of age. I think it has not before been questioned, but that the time during which the party to be affected has been under a disability, must be deducted in computing the lapse of time, in analogy to the statute of limitations. Such was the case of Riddlehoover v. Kinard, 1 Hill's Eq. Rep. 376, relied upon on the part of defendants. The rights of the parties, who were infants when possession was taken of the property, were saved by the decree. Such was the case of Henry v. Stewart and Means, 2 Hill, 328. The decisions have been numerous and the practice habitual, and I am not aware of any doctrine or decision to the contrary. If it were otherwise, the consequence might follow which was suggested by the plaintiff's counsel. If the possession were taken in the very early infancy of the other party, the title might be matured before his arriving at

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age, and before *the statute of limitations had begun to run. So in the case of successive minorities. The evils complained of, or apprehended from this source, in keeping titles indefinitely suspended, would be effectually remedied by such a construction. But this time might as well be taken directly into account, as to serve for strengthening the presumption arising from a subsequent possession of less than twenty years. The decree is affirmed.

Chancellors De SAUSSURE, JOHNSON and JOHNSTON concurred.

2 Hill, Eq. 515

ELIAS HORRY and REV. PAUL TRAPIER, Trustees of Mary A. and James F. Heyward, v. Dr. JOS. GLOVER, Mrs. E. GLOVER and JOHN FRAZER, Executors of J. Heyward Glover, Deceased, and Others.

(Charleston. Feb. Term, 1837.)

[*Remainders* ⇐17.]

A remainderman may sustain a bill in Equity against the tenant for life for the specific delivery of slaves.

[Ed. Note.—Cited in Young v. Burton, McMul. Eq. 256, 267; Bryan v. Robert, 1 Strob. Eq. 341; Sims v. Shelton, 2 Strob. Eq. 224.

For other cases, see Remainders, Cent. Dig. § 12; Dec. Dig. ⇐17.]

[*Evidence* ⇐288.]

On a question as to identity of slaves, it is admissible to prove that the slaves in question were called certain names, and said by other negroes to belong to a certain gang.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1147; Dec. Dig. ⇐288.]

[*Life Estates* ⇐5, 15; *Trusts* ⇐305.]

The tenant for life of slaves as a trustee for the remainder man is bound to account, and the burthen of proof to show the increase or diminution is thrown on him; and in default of accounting, he shall be charged with the value of such number as the original stock may reasonably be supposed to have increased; subject, however, to evidence of peculiar circumstances, accident or mortality.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 11, 34; Dec. Dig. ⇐5, 15; Trusts, Cent. Dig. § 426; Dec. Dig. ⇐305.]

[*Life Estates* ⇐5; *Wills* ⇐614.]

A specific bequest of property strictly consumable in the use, such as corn, wine, etc. gives the absolute property; but of a flock or herd which is capable of increase, the tenant for life taking the increase is bound to keep up the number of the original stock.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 11; Dec. Dig. ⇐5; Wills, Cent. Dig. §§ 1396, 1397; Dec. Dig. ⇐614.]

[*Equity* ⇐401.]

The estate of tenant for life having been divided before administration, reference ordered to ascertain if sufficient property came into the hands of her son, so as to make his estate chargeable for the stock, etc.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 869–873; Dec. Dig. ⇐401.]

[*Life Estates* ⇐5, 23.]

Limitations of the trusts of personalty are the creatures of Equity; and it is by regarding the tenant for life as a trustee for the remainder man that Equity takes jurisdiction to compel the execution of the trust by delivery to the remainder man. And not only the personal representative of the tenant for life, but every volunteer and purchaser with notice, are bound by the trust.

[Ed. Note.—Cited in Gregg v. Harllee, Dud. Eq. 50; Hill v. Hill, Id., 84; Donald v. McCord, Rice, Eq. 338; Young v. Burton, McMul. Eq. 256, 267; Reese v. Holmes, 5 Rich. Eq. 575.]

For other cases, see Life Estates, Cent. Dig. §§ 12, 21, 44; Dec. Dig. ⇐5, 23.]

[*Equity* ⇐17.]

Where one states that his slaves have come into possession of another who refuses to deliver them, he states a sufficient ground for Equity jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 41; Dec. Dig. ⇐17.]

[*Specific Performance* ⇐69.]

But if it should appear that he contracted for slaves generally, with no view to their qualities, or to any individuals, but as mere merchandize, the remedy is at law.

[Ed. Note.—Cited in Bryan v. Robert, 1 Strob. Eq. 342.

For other cases, see Specific Performance, Cent. Dig. § 201; Dec. Dig. ⇐69.]

[*Equity* ⇐383.]

When an issue will be ordered.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 787; Dec. Dig. ⇐383.]

[*Witnesses* ⇐94, 106.]

The interest to disqualify a witness must be present and certain, and not uncertain and contingent: And, therefore, where a tenant for life of slaves loaned them to her son, and on her death her estate, excluding these slaves, was divided between her son and daughter, on a bill by the remainder men against the adm'rs of the son for specific delivery of the slaves, the husband of the daughter is a competent witness for the plaintiffs, to prove the identity of the slaves; altho' if the plaintiffs should fail to identify the slaves, and the defendants, to prove that the stock had perished the estate of the tenant for life might be made liable for the value, and the witness required to contribute.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 255, 418; Dec. Dig. ⇐94, 106.]

[*Evidence* ⇐317.]

On the question as to the identity of slaves, where the original stock are all dead, hearsay coming from negroes, that those claimed are descendants, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1187; Dec. Dig. ⇐317.]

[*Life Estates* ⇐23; *Trusts* ⇐234.]

The general rule is, that if a trustee wrongfully refuses to deliver on demand, he is liable if the property afterwards perishes: and therefore, defendant, claiming as a volunteer undertenant for life, was held liable to remainder men for slaves, who died since the filing of the bill to compel delivery.

[Ed. Note.—Cited in Fraser v. McClenaghan, 2 Strob. Eq. 228.

For other cases, see Life Estates, Cent. Dig. § 44; Dec. Dig. ⇐23; Trusts, Cent. Dig. § 340; Dec. Dig. ⇐234.]

[*Specific Performance* ⇐114.]

[In a bill for the specific delivery of slaves, it is not necessary to allege any peculiar value in the slaves which cannot be compensated in damages.]

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 356; Dec. Dig. ⇐114.]

Colleton District, May Term, 1836.

The following decree presents a full statement of the case:

Harper, Chancellor. Daniel Heyward, by his will, dated in 1778, gave to his brother Thomas, in trust for his (testator's) wife, for life, his plantation, known by the name of Springfield, together with all the negroes, plantation utensils, stock of cattle, hogs and sheep; also, twenty head of cows and calves, from his plantation called White Hall. All the residue of his estate he gives to his brother, Thomas Heyward. The testator died soon after, and his widow, Mrs. Margaret Heyward, went into possession of the property devised in trust for her. Mrs. Hey-

ward, in the year ———, married Wilson Glover. The bill charges that, during the coverture, she was in possession of all that estate she derived from her first husband, Daniel Heyward's will, as her own and separate estate, and enjoyed the same free from the let, control, or interference of the said Wilson Glover, and continued in like manner, in possession after his death, (she having survived him,) until her own death in 1832.

Thomas Heyward, the residuary devisee of Daniel Heyward, by his will, gave his whole estate, real and personal, to his wife, Mrs. Eliza Heyward, and she by deed executed in

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1832, release *to the plaintiffs, Elias Horry and Paul Trapier, all the reversionary interest which Thomas Heyward took in the personal estate of Daniel Heyward after the life estate of Mrs. Glover, in trust for the plaintiffs, Mary A. and James F. Heyward.

The bill charges, that the slaves who constituted part of Mrs. Glover's life estate, were by her, in her life time put into possession, by way of loan, of her son, John Heyward Glover, now also deceased, and at his death came into the possession of his executors. The object of the bill is to obtain the delivery of the slaves who were given by Daniel Heyward to his wife, afterwards Mrs. Glover, for life, or their descendants, and to have an account of their hire from the death of Mrs. Glover; also to have an account of the cattle, &c. The executors of John Heyward Glover, the surviving executors of Wilson Glover, and the administrator of Mrs. Glover, are made parties to the bill.

The first question made, was whether the bill would lie, as the plaintiffs have adequate remedy at law, by an action of trover or detinue. Independently of considering the tenant for life as a trustee, bound to account, and therefore, amenable to this Court, it has been determined by the Court of Appeals, in the case of Sarter v. Gordon, [ante 121,] decided at Columbia, that as a general rule, a bill may be maintained for the specific delivery of slaves. Some exceptions are stated, but this case does not come within the exceptions, but within the express reason of the rule. Entertaining jurisdiction for this purpose, the Court will do complete justice between the parties, in relation to the whole property and the matters of account.

Then it becomes merely a matter of evidence to identify the slaves who are subject to the disposition of the will.

By the inventory and appraisement of the estate of Daniel Heyward, made in 1783, it appears that there were then on the Springfield plantation, twenty-two slaves, who are named. It is not surmised that any of the original stock are now in existence, but those now claimed, are claimed as the descendants of the former.

The testimony chiefly relied on by the plaintiffs, is, that of the witness, John Ferrabee. This witness thinks he heard John Heyward Glover say, the Heywards had some claim on negroes after his mother's death. Witness "thought they were the negroes that he said belonged to his mother. He said, one woman at Wrightfield, named Fanny, belonged to his mother. Fanny is

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*now alive, and has, he believes, fourteen children and grand children.—Nancy and her children, Solomon, Venus, Phillis, and November—one of these mentioned, died last fall, aged about four years—Sam, Robert, June, Stephen, Adam, June, Affie, Sylvia. Sally died last week, she was about four years old. Witness says he recognizes some of the negroes of H. Glover's estate, by the name of Springfield gang; has heard the negroes call them so, and no one else. Fanny and her children and grand children are a portion of them; also, Charley, Sampson, Joe, Tom, Harriet, Monday, Tirah, Rachael, Mary Ann, Accabee, Hannah, Toney, Polly and children."

An objection was taken to the last part of the witness' testimony—that the negroes called these the Springfield gang—as being hearsay from slaves. But it does not strike me in that point of view. The effect of the testimony does not depend on the credit to be given to the slaves whose declaration are testified to. The fact that the slaves did call them so, depends on the credit of the witness who was examined. Then the inference is drawn from that fact, that it cannot be conceived why the slaves should have called them so, if they were not so in fact. It is as if the witness, attempting to identify them by their names, had testified that the slaves called one Fanny, or another Toney. This could not be called hearsay. Another portion of the testimony of the witness, with respect to what his brother told him, I consider inadmissible.

This testimony is, I think, entitled to its weight, but it is very strongly corroborated by other circumstances. On the part of the defendants there is opposed to it the testimony of the witness, Richard Y. Carey, (who was examined, however, on the part of the plaintiffs.) The testimony of this witness was given in a very confused and precipitate manner, and I may not have taken it down with perfect accuracy. The amount of it was, that he was in the service of John Heyward Glover, managing his plantation, from 1810 to 1821; that there were a certain number of slaves, (eight altogether,) known as the Springfield gang, who were first removed from Springfield, to a place called the Old Store, and thence to Mr. Glover's plantation of Wrightfield; these were mostly superannuated and are dead, without children. In this last particular he is corroborated by Ferrabee. But thus far his testimony is not

inconsistent with that of Ferrabee. There may have been other Springfield negroes

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besides those brought from the Old *Store to Wrightfield, unknown to the witness. Indeed, he says Col. Glover did not pretend to point out all the negroes that were to go to Judge Heyward's family after his mother's death. But he adds that in 1813, he, with the assent of Col. Glover, gave to James Heyward a list of those slaves, then amounting to eight. In this there seems to be some contradiction. With respect to Fanny, the witness is more explicit. He states that she was not one of the Springfield negroes. He knew her at about the age of nineteen, when she was brought from Wilson Glover's Swamp plantation. This I suppose to be his reason, for not thinking her one of the Springfield negroes, in addition to his never having heard her so called. This seems to be in some degree contradictory of Ferrabee, but it is not absolutely inconsistent. She may have been sent from Springfield to the Swamp, and thence to Wrightfield. If there were more direct contradiction, however, I think the circumstances give the preponderance to Ferrabee's testimony. First, the intrinsic improbability of such a gang of twenty-four slaves, pretty well apportioned as respects men and women, becoming extinct during a lapse of fifty-three years; and defendants indicate no other slaves as being descendants of the stock in question.

Mr. Nathaniel Heyward, who was examined as a witness, stated that he never heard of the Springfield gang of negroes having died, or of any extraordinary decrease; and from his opportunities of knowing, this could hardly have occurred without his having heard of it.

The testimony of Mrs. Hamilton, was, that about the time referred to by Carey, (25 years ago, which must have been about 1810, or 1811,) Mrs. Glover, passing by the Springfield plantation, spoke of the gang of slaves as then existing on it.

But more satisfactory than these is the testimony of Mr. John Huger. He states, that a short time before the death of Heyward Glover, he saw a list of the negroes, in the hand writing of Heyward Glover, which was sent by him to his mother, with an offer to deliver them up. These negroes the witness heard Wilson and Mrs. Glover speak of, as connected with the will of Daniel Heyward. Mrs. Glover offered them to the witness for her life, but he declined receiving them. According to the list, they then amounted to 25 or 30. He believes the negroes are now at Wrightfield. Mr. Huger identifies no particular negroes, but the

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*number stated by him agrees very well with the number now claimed. It was agreed, however, at the hearing, that the estates of Wilson Glover and Mrs. Glover, have been divided between their children, Heyward Glover and Mrs. Huger (wife of John Huger); and on that division the negroes at Wrightfield, (by which, I understand the negroes now in question,) were not divided or brought into account. Now, connect this with the testimony of Mr. Huger, and can I possibly avoid making the inference that they were reserved from division on the knowledge of the parties, that Mrs. Glover's interest in them had terminated with her life, and that they were not subject to division? Nor is this inference weakened by the testimony on the part of the defendants, to shew that there had been an unusual mortality among the Springfield negroes. A paper was produced, in the hand writing of Wilson Glover, purporting to be an account of the slaves in 1783, and having the word "dead" written opposite to many of their names. I do not understand this to purport that they were then dead. The paper is an account of slaves then removed from the Springfield plantation. I conclude the memorandum "dead," to have been made afterwards; perhaps at various times, as the deaths occurred. If so, it affords no evidence that the gang did not increase. No doubt all the original stock are dead now. The births of two children are noted in 1783. This seems to have been done at the time of making the list, and I suppose they were then born, but the paper does not purport to give any account of births afterwards. But, if all so marked were dead at that time, it may very well be that the residue have increased to the number now claimed. Nor do I attach any importance to the testimony of the witness, Broughton, that heard Mrs. Judge Heyward say she believed they were all dead, or of Mrs. Jane Glover, that she heard of the negroes having been removed to Pedee, and of great mortality among them there. It is plain that there must have been some unusual mortality among them, or their numbers would have been much greater than they are. Within the same time many stocks of slaves have doubled or trebled their numbers, while the number now claimed is about the same as that of the original stock.

I think, on the evidence, the plaintiffs' claim must be sustained. But I think there is much force in the argument of counsel, that the tenant for life was trustee for the

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remainderman, and the bur*den is on her legal representative to account. For many purposes the tenant for life is regarded as trustee. He is bound to make an inventory of the property, that the remainderman may be able to identify it; and by parity of reason, it seems to me that in the particular case of slaves, where the increase goes to the remainderman, he is bound to keep an account of the increase. Certainly the defendants have not shewn the stock of slaves in question to be extinct. Then, in default of

accounting, how shall the estate of the tenant for life be charged? I can conceive of no other method than this, to charge it with the value of such a number of slaves as the original stock may reasonably be supposed to have increased to—subject to be sure, to evidence of any peculiar circumstances, accident or mortality, which may have prevented increase. It seems to me that it would be to the disadvantage of defendants to be charged in this manner. Plaintiffs, however, claim no more than the negroes specified, and to those I think they are entitled.

Plaintiffs also claim the value of one or two of the slaves, who died after the termination of the life estate, and before the hearing. In the case of ———, decided by the Court of Appeals at Columbia, at its last sitting, it was held, that in an action of trover, where one of the slaves had died in possession of defendant, the measure of damage was the hire up to the death, or the interest on the value from the time of the conversion; but the jury were not bound to give the value of the slave when living, unless there were reasons to believe the death, in some manner, a consequence of the defendant's act. Upon further examination, I have some reason to doubt, whether that case was sufficiently considered. But as it is, I must be governed by it, and this claim must fail.

Plaintiffs are also entitled to hire of the slaves from the 1st of January, 1833, until they shall be delivered.

Evidence was offered of the value of the hire, to save the necessity of a reference; in which course I understood both parties to acquiesce. There were shown to be fifteen working hands, and the average value of hire for the years in question was fixed at $60 per annum, making $900 per annum.

Plaintiffs are also entitled to the value of the stock of cattle, hogs and sheep. By the inventory of 1783, it appears that there were then on the Springfield plantation, 183 head of cattle, 30 hogs, and 61 sheep. The value of the cattle was agreed to be $5 per head;

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*but there was no evidence to that of the hogs and sheep. The ground was taken that a bequest for life of this sort of property, which was said to be consumable in the use, gives the entire property. But this is contrary to the well settled rule. A specific bequest of property, strictly consumable in the use, such as corn, wine, &c. gives the absolute property. But of a flock or herd, which is capable of increase, the tenant for life, taking the increase, is bound to keep up the number of the original stock. The principle is explained by Judge Nott, in the case of Devlin v. Patterson, referred to and recognized in Robertson v. Collier, 1 Hill, Ch. R. 370. Such is the rule of the civil law, from which ours is taken.—1 Domat B. 1, Tit. 11, Sec. 3. The case of Randall v. Russell, 3 Meriv, 190, which was relied on, was one in which the stock of cattle, &c. was held to have been given absolutely by the terms of the will.

Another question arises, what estate is to be charged with these? There is no shewing that the cattle went into the possession of John Heyward Glover. I cannot charge the estate of Wilson Glover with them, contrary to plaintiff's own allegation, that Mrs. Glover retained her whole property as a separate estate. The estate of Mrs. Glover is certainly liable, but her administrator answers, that he has received no effects of his intestate, and has been informed that she died possessed of no effects beside some articles in her personal use of little value. It is true that it was agreed that the estates of Mrs. Glover and Wilson Glover, were divided between Heyward Glover and Mrs. Huger, but there was no evidence as to what her estate was. I may conjecture that there was an estate of Mrs. Glover divided between her children before administration. If Heyward Glover did, in this way, receive enough of his mother's estate for the purpose, it might be followed in the hands of his representatives, and rendered liable for a moiety of the demand. But there was no proof of this, and I cannot decree upon conjecture. The plaintiffs may have a reference upon this matter if they think proper.

It is Ordered and decreed that the defendant, Mrs. Eliza Glover, executrix of John Heyward Glover, deceased, deliver to the plaintiffs the slaves before enumerated, which are now in her possession, and pay for the hire of slaves, at the rate of nine hundred dollars per annum from the 1st

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day of January, 1833, until the *said slaves shall be delivered, with interest on the hire of each year from the end of the year.

The defendants appeal on the grounds:

1. That the plaintiffs had plain and adequate remedy at law, and, therefore, Equity ought not to entertain jurisdiction of the case.

2. The defendants had nothing of which to make discovery in any manner relating to the case made by the bill, so that Equity could not, on the ground of discovery, entertain jurisdiction.

3. That Mr. John Huger was directly interested in the event of the suit, and therefore his evidence is inadmissible.

4. That hearsay evidence has been admitted in the case on points in which it was inadmissible, and ought to have been excluded.

5. That hearsay from negroes has been admitted, and ought to have been excluded.

6. That on the facts legally proved, and the law applicable to those facts, the decree ought to have been for the defendants.

Plaintiffs insist that, as the decree is opened by the appeal, the defendants should account for the negroes that died since the commencement of this action.

And, that the estate of Wilson Glover,

should be charged with the cattle, as it appeared on the evidence that he disposed of them—and that they were not the separate estate of Mrs. Glover.

Petigru & Losesne, for the plaintiffs.
King, for defendants.

Chancellor HARPER delivered the opinion of the Court.

The two first grounds of appeal by defendants, may be disposed of together. On both the grounds taken in the decree, the jurisdiction of the Court must be supported. It is admitted that during the life time of the tenant for life of personal chattels, he is regarded as a trustee for the remainderman. But the trust is supposed to terminate with his life. But this is contrary to the main purpose, for which he is made a trustee. It is hardly necessary to say, that at common law, there could be no limitation of personal chattels to one for life, with remainder to another, and that a gift for a day or an hour,

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vested the whole in the first taker. *Executory devises and the limitations of the trusts of personalty, by which alone such dispositions can be rendered effectual, are exclusively the creatures of Equity. It was by regarding the tenant for life as a trustee, that Equity took jurisdiction, for the purpose of compelling his personal representative to execute the trust, by delivering the property to the person entitled in remainder. The cases cited in argument are amply sufficient to establish this. Then not only the personal representative of the tenant for life, but every volunteer and every purchaser with notice, on a well known principle, are bound by the trust. If, then, as the decree establishes, (and we think correctly,) John Heyward Glover was a volunteer under his mother, he and his personal representative are equally bound to the execution of the trust. And if it were shewn that courts of law recognize the division of personal estate between tenant for life and remainder man, this would not oust the Court of Equity of its ancient and accustomed jurisdiction.—See the reasoning of the Court in King v. Baldwin, 17 Johns. Rep. 384.

We think, too, that the nature of the property sought by the bill, forms a ground of jurisdiction. It is for the specific delivery of slaves. We do not feel at all disposed to depart from the principles of the decision in Sarter v. Gordon, [ante 121,] quoted in the decree, to the reasoning of which I refer. It is admitted that in some particular instances, such as are referred to in that case, where there are circumstances to give a peculiar value to the slave, with respect to the person who seeks to recover him, and to shew that damages would be an inadequate compensation, there may be a ground of jurisdiction. But it is urged, that such circumstances ought to be stated and proved, before the case is taken from the ordinary tribunals of the country, to which it properly belongs.

But if it were necessary to state such circumstances, I think they are sufficiently stated in the present case. The slaves in question were a gift to the cestuique trust of plaintiff, by a friend and relation, and were received by her from the gift of another. If the Court gives that consideration to the just and honorable feeling which causes a man to set a peculiar value on an heirloom, derived to him from his ancestors, and to regard the damages which a jury, estimating its money value, would give, as no compensation for its loss, is there less ground for its

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interposition *to give him slaves—sentient and intelligent beings—derived to him from a friend or ancestor, whom he may be supposed to love or venerate? Are not family slaves, who are often, and I think I may say generally, attached dependants, of as much value to the feelings of the owner as a piece of family plate or a family picture? As was said by the Chancellor, in Fells v. Read: "It would be great injustice if an individual cannot have his property, without being liable to the estimate of people who have not his feelings upon it." It was urged, that an effectual remedy was given by the late act regulating the action of trover. But that act only provides, that security shall be given for the forthcoming of the slaves to answer the damages which may be recovered. If the defendant will pay the damages the title of the slaves is vested in him. But it is on the ground of the inadequacy of damages as a compensation, that the Court interferes.

I am of opinion, however, in pursuance of the views, in Sarter v. Gordon, that when a man states that his slave has come into the possession of another, who refuses to deliver him, or that he has contracted for the purchase of specific slaves and the vendor refuses to perform his contract, he states a sufficient ground of Equity jurisdiction. Any other construction would render the law uncertain and impracticable. It is admitted that in some cases a bill may properly lie for a specific delivery—as where the slave has been born and brought up in the owner's family, or has for a long time belonged to it, so that a peculiar attachment may be supposed to have been formed for his peculiar qualities, which render him of more value to the owner than to any one else; or where a contract has been made for a slave on account of such peculiar qualities, and the object of the contract could not be obtained without a specific delivery; or, suppose a mother to be converted by a stranger, having an infant child in the possession of the master, or a husband or wife to be so converted, leaving the other in the master's possession. But how are these circumstances to be ascertained by evidence? By what rule will you fix

the length of time that a slave shall have belonged to his owner, so that he may be supposed to have formed a particular attachment for him? Will you go into evidence of the slave's character and qualities, to determine whether they are such as give him a peculiar value to the feelings of his owner, or to have formed a probable inducement to

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the purchaser in making a contract for *him? Suppose him to be one of a family of slaves still in the owner's possession, and who are rendered of less value by his loss, (which is often the case,) will you fix the degree of relationship—such as that of a parent or child, husband or wife—which would authorize the Court to interfere? Such a construction would tend greatly to litigation, and afford room for great looseness of discretion. I can think of no safe or practicable rule but that already expressed—that if a man's slave has come into the possession of another who refuses to deliver him, or if he has contracted for specific slaves, he has a right to a specific delivery. But if the contrary appears—that he contracted for slaves generally, with no view to any particular individuals, or if they were contracted for as merchandize, to sell again, the remedy is at law.

I agree with the appellant's counsel, that when there is a complicated question of title—when there is much conflicting testimony, or more especially when the credit due to testimony is to be weighed, a jury is the proper tribunal for the trial of those questions. And if the suggestion had been made below, I might perhaps have directed an issue. But it was not demanded below, and at the present stage of the case, when so great delay would be occasioned to the parties, and having no serious reason to doubt the correctness of the conclusion to which I have arrived, I think we are not authorized to direct it now.

The next ground relates to the admissibility of the testimony of John Huger. The rule is, that to disqualify a witness, "the interest must be a present, certain interest, and not uncertain or contingent. So it was held that a steward was competent to prove that a fine was payable on the death of the lord, although the establishment of the affirmative might render a readmission necessary and entitle him to a fee."—2 Stark. Ev. 745. The record must certainly be evidence to fix or rebut his liability in a future action. As observed in Cotchet v. Dixon, 4 M'Cord, 314, "it is not enough that he has an interest in the subject matter in litigation—it must be an interest in the event of the particular cause." What is the cause at issue? The bill states that the defendant Mrs. Glover, is in possession of certain slaves, which are claimed as being descended from those bequeathed by the will of Daniel Heyward, which the plaintiffs state they are

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prepared to identify *by proof. The defendant requires the proof to be made, and urges in defence that the stock of slaves bequeathed by Daniel Heyward has perished. The testimony of the witness would seem rather to be against his interest in this cause. It is not disputed but that these slaves once belonged to Mrs. Glover. If they are still part of her estate, undivided, he has a claim in right of his wife to a moiety of them, which would be defeated by the recovery of the plaintiffs. If they were divided as part of her estate, and fell to the share of John Heyward Glover, his representative would have a claim against the witness for contribution. In this cause then, he has no interest. But it was thrown out in argument, and the Court intimated that there might be just ground for the opinion, that another case might be made in which he would have an interest. If the plaintiffs should fail to identify the slaves, and if the defendant failed to prove that the stock had perished, then the estate of Mrs. Glover might be made liable for the estimated value of such a stock of slaves, she having been trustee for the remainderman, and the witness and John Heyward Glover, having divided her estate, it might be pursued in their hands, if the plaintiffs should fail to recover in this case. This is similar in principle to the cases of Briggs v. Crick, 5 Esq. N. P. C. 99; Duncan v. Bell, 2 Nott and M'Cord, 153; Lightner ads. Martin, 2 M'Cord, 214, and Johnson v. Harth, 2 Bailey, 183. In an action for the breach of warranty of soundness of a horse or slave, the defendant's vendor may be a witness for him, though a verdict in favor of the defendant would obviate the chance of the witness' being made liable in a future action. It may be said, as in Johnson v. Harth, it is true, that if the plaintiffs recover against the present defendant, he will have no right of action against the witness, because he will have sustained no damage, and therefore, it may be said that the judgment will be of benefit to the witness by obviating the chance of his being made liable in a future action. But this is not the sort of interest that will disqualify a witness; nor is it in this sense, the law says the verdict must be evidence for or against him. It is not like the case of an action for the breach of warranty of title, in which a verdict against the defendant would of itself be the foundation of an action against his vendor.

If the present bill should be dismissed, that would be no evidence for or against the witness, in a future action to be brought against him. But if the present plaintiff should succeed, it is thought the decree would be evidence in the event of such an

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ac*tion as has been surmised. If the plaintiff succeeds, he will have no right of action

against any one in respect of his present claim, because the claim will be satisfied. The decree may be evidence, not as a judgment, but as a fact to make out the proof of his having received satisfaction. If he had received satisfaction by agreement with the defendant, this would have been equally a bar. If two persons were suspected of a trespass, or proved to have committed it, it might as well be said that one was an incompetent witness for the plaintiff in a suit against the other, because if he should recover satisfaction of the defendant, this would be a bar to an action against any one else.

The third and fourth grounds form in effect but one. In addition to what is said in the decree, I may observe that even hearsay evidence may be admitted on a question of pedigree, and this is in reality a question of pedigree. The original stock of slaves are admitted to be all dead, and the question is, whether these now claimed are their descendants? And it comes within the qualification expressed in Whitelocke v. Baker, 13 Ves. 514, in relation to the reception of evidence of tradition. It must be from persons having such a connexion with the parties, that it is natural and likely from their domestic habits, that they are speaking the truth.

I shall make a few remarks on the last general ground. Admitting the testimony of Mr. Huger, there can be no doubt of the credit due to it. Then it is certain that at the death of Mrs. Glover, there were in the possession of John Heyward Glover, and at the plantation of Wrightfield, twenty-five or thirty slaves to which the plaintiffs are entitled. It is objected that plaintiffs have not sufficiently identified them. As is said in the decree, no others are indicated as being those left by Mrs. Glover. If, as was suggested, Heyward Glover obtained the slaves now claimed by purchase from his mother, or from any other person, or in any other manner, certainly it is to be supposed that it was in the defendant's power to show this. The particular slaves claimed were named in the bill, and the defendant put upon her defense. Failing to do so, can she complain that all presumptions should be against her, and that effect should be given to slight testimony for the purpose of identifying the slaves. Without these circumstances, I admit the testimony of Ferrabee would be very slight. I cannot doubt but that justice, though not perhaps full justice, has been done by the decree.

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*In considering the plaintiffs grounds of appeal,—with respect to the claim for slaves who died since the filing of this bill, the Court is of opinion, that the decision referred to by the decree in relation to the measure of damage in an action of trover, must be confined to the particular case. Certainly the general rule is as contended for on the part of plaintiffs, and supported by the authorities referred to, that if a bailee or pawnee, who are trustees, wrongfully refuses to deliver the deposite or pledge when it is demanded, he thenceforth keeps it at his own risk, and is liable for the value, if it afterwards perishes. See Story on Bailm. 93, 231, and the authorities there referred to. The principle seems to apply to the present case; the tenant for life, or volunteers under her, being regarded as trustees. The value of these slaves must therefore be a subject of reference.—With respect to the second ground, I do not perceive the evidence to charge the estate of Wilson Glover with the cattle. The memorandum said to be in his hand writing, of their being removed from Springfield, does furnish evidence of their being taken possession of by him for his own use. The same memorandum includes the slaves removed at the same time, which it is agreed remained her separate estate. The maker of the memorandum states himself to have taken charge of all the property specified. There is no other evidence whatever, to charge Wilson Glover's estate in opposition to the allegation of the bill. A reference is ordered with respect to the slaves, who died since the filing of the bill, but in every other respect the decree is affirmed.

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2 Hill, Eq. 528

BONA v. DAVANT.

(Charleston. Feb. Term, 1837.)

[*Equity* ⇐=394.]

The Commissioner is only entitled to commissions allowed by the fee bill for investing and loaning out money under the order of Court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 857; Dec. Dig. ⇐=394.]

In this case, by order of the Court, the Commissioner in Equity for Beaufort, was directed to receive the funds arising from the sales for partition, and to invest them in stock, or loan them out on proper securities—the interest to be paid annually, and when received, to be invested or loaned out in like manner. The Commissioner reported under this order the amount of principal received by him and invested, on which he charged 2½ per cent; and also the amount of interest received, on which he charged 10

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per *cent. Held, that the Commissioner was not entitled to the commissions claimed for extra services, but must be restricted to the amount allowed by law in his character of Commissioner.

2 Hill, Eq. 529

MARGARET LESTER, Administratrix of Bannister Lester, Deceased, v. HUGH FRAZER, Administrator of Benjamin P. Frazer, Deceased.

(Charleston. Feb. Term, 1837.)

[*Infants* ⟸31.]

Where a female infant before marriage entered into a settlement by which she conveyed her real estate to the uses of the marriage and the issue thereof, and died during infancy leaving a son who lived eleven years after attaining full age, without calling the settlement in question, and died leaving issue; on a bill by the creditors of the son to charge the real estate derived from the mother with the payment of his debts, on the ground that the settlement was void, being made by the mother while an infant: *Held*, that at most the settlement could only be regarded as voidable, and no election having been made to avoid it, the creditors had no right to interfere, and the bill was dismissed.

[Ed. Note.—Cited in McMorris v. Webb, 17 S. C. 562, 43 Am. Rep. 629; Ihley v. Padgett, 27 S. C. 302, 3 S. E. 468.

For other cases, see Infants, Cent. Dig. § 53; Dec. Dig. ⟸31.]

[*Infants* ⟸26.]

The question, whether a female infant is bound by marriage articles by which her own real estate is settled to the use of the marriage discussed, and the English cases considered.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 27–34; Dec. Dig. ⟸26.]

[*Infants* ⟸26.]

In England, while it has been held that an infant wife who had accepted a jointure was barred of dower under the stat. Henry 8, it seems to be settled she is not bound by a settlement before marriage disposing of her own real estate.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 27–34; Dec. Dig. ⟸26.]

[*Common Law* ⟸11.]

Regarding the point settled in England, it becomes a question how far we are bound by it, considering the difference in our circumstances, habits and institutions.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. §§ 9, 12; Dec. Dig. ⟸11.]

[*Infants* ⟸31.]

What contracts of an infant are void, or voidable only.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 41, 46, 50–63; Dec. Dig. ⟸31.]

[*Infants* ⟸47, 58.]

Whatever may be the rule as to executory contracts, it is clear that the executed contract of an infant is voidable only, and only the infant or his legal representatives can avoid it.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 99, 150; Dec. Dig. ⟸47, 58.]

Georgetown, February Term, 1836.

The following Circuit decree presents the case:

De Saussure, Chancellor. The first question which arises in this case, is whether the real estate of the late Mrs. Frazer, the wife of the Rev. Hugh Frazer, included in her marriage settlement, made in 1790, when she was a minor, passed and goes under that instrument, and according to his provisions; or descended to her son, the late B. P. Frazer, her only child, and was subject to his debts. It appears that she died when still a minor, and her son died in 1829, leaving alive two children. The doctrine on which this case depends has been much discussed, and a good deal of difference of opinion has prevailed in the Courts. In Drury and Drury, 2 Eden, 39—after seven days argument of the ablest counsel in England, it was decided in 1761, by the Lord Chancellor, Northington, among other things, that the statute Hen. 8, extends to adult women only, and that notwithstanding a jointure on an infant, she may waive the jointure, and elect to take her dower—also that a woman being an infant, cannot by any contract previous to her marriage, bar herself of a distributive share of her husband's personalty, in case of his dying intestate. The Lord Chancellor, in his elaborate argument, stated (page 50) the question to be, whether sitting in a Court of Equity he could bind an infant to a specific performance of an agreement, and bar her from claiming her dower at law, and her share of the personal estate; and he came to the conclusion that he could not; for he could not be satisfied that the statute enabled infant girls to agree to settlements to bind themselves, and to bar them of their legal provisions—dower. On an appeal to

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the House of Lords, it was di*rected, after argument by very able counsel, that the opinion of the Judges should be taken on the following question: Whether a woman married under the age of twenty-one years, having before such marriage a jointure made to her in bar of dower, is thereby bound and barred of dower, within the statute, 27 Hen. 8, ch. 10? (which statute is of force in this State.) There were seven Judges present who delivered their opinions seriatim—of these, three were of opinion that she would not be bound and barred, which was in affirmance of the Lord Chancellor's decree. Four of the Judges were of opinion that she would be barred, which was against the decree. Lord Hardwicke, sitting in his capacity of a member of the House of Lords, (having long resigned his office as Chancellor,) concurred fully with the majority of the Judges, in the opinion that an infant, having a proper jointure made, is bound and barred by it. Lord Mansfield, sitting as a member of the House of Lords, and of the Court, concurred in this opinion, and the decree was reversed. Mr. Eden, the Reporter, and grandson of Lord Northington, in a valuable note at the end of the case, (page 65,) states that great doubts were afterwards entertained of the propriety of the decision of the House of Lords; and that Lord Thurlow is said to have expressed himself strongly in favor of Lord Northington's opinion. But this did not extend to the real estate of the

infant.—See 18 Ves. 275. Mr. Eden then goes on to state, that the result of subsequent authorities is, that an infant cannot be bound by any article entered into during her minority, as to her own real estate; which nothing but her own act, after the period of majority, can fetter or affect. But that she may be barred of her own right of dower by a competent and certain provision by way of a jointure; and her interest in money may be bound by agreement on marriage, which is for her benefit—and Mr. Eden cites the decided cases on which these conclusions are founded. Mr. Atherly, in his treatise on Marriage Settlements, page 28–9, was of opinion that the weight of authorities was, that a female infant has a right to bind her real estate by marriage settlement. But Chancellor Kent, (2d vol. Com. p. 244,) considers the doctrine settled by Lord Eldon's decisions in Milnor and Harewood, 18 Ves. 259; and on examining that case, he says, (p. 275,) that even Lord Thurlow was of opinion that a female infant could not be barred of her own real estate.—1 Bro. C. C. 106, 115. By this statement, it appears then

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to be settled by the English autho*rities, that though an infant may be barred of her dower in her husband's land by a proper jointure, and of her interest in her personal estate by an agreement on marriage, she cannot be bound as to her own real estate. Consequently, the settlement of the real estate of Miss Porter, by her marriage settlement, did not bind her, and she dying whilst an infant, never was bound. Yet, though I take this to be the settled law, I may be permitted to add, that by the practice of this State, it has been usual to include the real estate of infants in marriage settlements. I am not aware that these have ever been questioned, or their binding efficacy on the female infant, ever decided on. It may be worth considering whether it would be proper to disturb that practice, or bring its validity into question; until, however, a decision be made by the highest authority, I feel bound to adhere to the doctrine as settled by the decided cases.

I must, therefore, consider the real estate of the late Mrs. Frazer, (wife of Rev. Hugh Frazer,) as not bound by the marriage settlement made in her minority; she having died a minor, and consequently the same never having been legally confirmed by her. Her real estate, therefore, descended on her death, according to law, one-third to her husband and two-thirds to her infant son, B. P. Frazer. Having come to the conclusion that the real estate of Mrs. Frazer descended at her death according to law, by which her son became entitled to two-thirds thereof, on his death, his share descended to his children, subject however to his debts.

It is to subject the lands descended to B. P. Frazer, deceased, to the payment of his debts, that this bill is filed, and his infant children made parties to the amended bill. The demand of the plaintiff, is founded on a note of hand, alleged to have been signed by the said B. P. Frazer in his life time, and made payable to the late B. Lester, whose administratrix seeks payment thereof from the estate of the said B. P. Frazer. The Rev. Hugh Frazer, who administered on the estate of his son, B. P. Frazer, and who is entitled to one-third of the estate of his late wife, in his answer to the plaintiff's bill, admits that he has possessed himself, as administrator, of the personal estate of his late son, which, however, was inconsiderable, and that he is also possessed of the real estate of his late wife, called Clegg's Point, to which, by the present judgement of the Court, his son was entitled to two-third parts. With respect to the personal estate,

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Mr. Frazer, the defendant, *admits that he is accountable for the same to the creditors of his son, Benjamin, but that he has paid debts having legal priorities, to a much larger amount than the actual value of said personal estate; and that with regard to the real estate called Clegg's Point, the same was levied on, and sold by the sheriff of Georgetown district, some years ago, to wit, in the year 1824, and during the life time of his son, Benjamin, under judgements and executions against the said Benjamin, and that he became the purchaser thereof, at and for the sum of three thousand dollars, and has ever since held the said land, having paid the said sum, which has gone in part satisfaction of the numerous creditors of the said B. P. Frazer; many of whom had liens long before the claim of the plaintiff by note in 1830, was even in existence. Wherefore, even if the demand of the plaintiff had been established, which is denied, there remain no funds in the hands of the defendant, out of which such demand could be satisfied. Upon these allegations in the answer, it would be in the course of the Court, that a reference should be had before the Commissioner, who, (after the plaintiff had established her demand,) should examine the accounts of the administrator and report thereon. But, another question has been raised by the bill and answer, which requires to be discussed and decided.

It is alleged by the bill, that certain creditors of the said B. P. Frazer, having recovered judgments against him, levied upon a plantation on Waccamaw, commonly called Clegg's Point, as the property of the said Benjamin, and at the sale thereof, by the sheriff of Georgetown district, divers of the creditors, of the said Benjamin, were present, and ready and willing to bid for the said plantation as much money as would have amply paid all the judgements against

the said Benjamin P. Frazer, and left the personal estate free, to be applied to the payment of the other debts of the said Benjamin; at which time and place the said Hugh Frazer, undertook and promised to the said creditors, that if they would permit him to bid off the said plantation, for a sum much less than the actual value, which they would have otherwise bid, that he, the said Hugh Frazer, as agent and trustee of the creditors, would sell the said plantation for its full and actual value, and apply the proceeds to the payment of their debts; but that the said Hugh Frazer has received the rents and profits of the said plantation, and has not resold the same, or applied the proceeds

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of the plantation to *satisfy the said judgements and other creditors, and applied the remainder of the assets in his hands to pay the debt due to the deceased B. Lester; and the bill prayed relief thereon. The amended bill set forth more fully the grounds of the claim, and of the complaint against the said Hugh Frazer, and required a full answer to its allegations as to the estate which his son, the said Benjamin P. was entitled, and insisted upon a discovery thereof, and the application of the same to pay the debts of the creditors; more especially as he the said Hugh, had purchased in the lands at a very low rate and without competition, avowedly on the ground that he would pay the creditors of his said son, the full value of the said lands.

The answer of the Rev. Hugh Frazer, as administrator of B. P. Frazer, admitted that the personal estate came into his hands to a small amount, which had been applied to pay debts, or to be accounted for. That with respect to the real estate, which had originally belonged to his wife, the late Mrs. Frazer, even admitting that it descended to his son, B. P. Frazer, (which was questionable under the marriage settlement,) he, the defendant, had become the bona fide purchaser thereof; and that with respect to the alleged promises to the creditors, and the breach thereof, and fraud practised on them, the said Hugh Frazer denied the same, and insisted, that so far from the said allegations being true, he did not know that any person intended or wished to make a bid for the lands, and he deterred no person from being a purchaser. That he may have said at the sale, as he has often said since, that he would be glad to make an advantageous sale of Clegg's Point, in order that he might be enabled to pay his son's debts; but that this was uniformly a voluntary declaration, and that he believed the sum of three thousand dollars, (at which the place purchased was knocked off to him,) was just that amount more than the interest of his son therein. The defendant further answering stated, that though he was under no obligation to the creditors of his deceased son, he has constantly made efforts to make sale of the plantation at Clegg's Point, always intending to appropriate the proceeds thereof to the payment of his son's debts; and although he has not been able to do so, he has since the sale of the sheriff, and in anticipation of the sale of the premises which he hoped to make, paid and advanced to the creditors of his said son, fifteen thousand dollars, in addition to the three thousand dollars paid to the sheriff, selecting such as he deemed to be just.

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*The allegations and the answer involve a serious question—It is no less than a charge of misrepresentation, and an attempt to hold to his own use, at a very low price, a valuable estate, which is worth a very large sum of money, sufficient to pay the debts of his son; and which might have brought its full value if the creditors had not been lulled into a false confidence, by the assurances of the defendant, that he would, if allowed to purchase the land without competition at a low rate, make a re-sale at the full value, for the benefit of the creditors. The answer positively denies the allegations, especially as they relate to the tract called Clegg's Point. The answer of a defendant, especially when made by a man of high character, as in the present case, is entitled to great weight, and cannot be set aside, but by great and preponderating evidence. To rebut the answer, plaintiff produced at the hearing of the cause, a letter from the defendant to the sheriff, Mr. Huggins, dated 6th July, 1824, after he had made the purchase of the land at three thousand dollars, in which he states that he had been informed (by a letter) that the sheriff was directed to advertise and resell the Waccamaw lands, which orders he attributed to some misunderstanding among the parties, not knowing that his sole view in purchasing the land was to dispose of the same at some future day, at their intrinsic value, which would more than pay all demands against his son Benjamin; he adds that he had had a conversation with the attorneys and others, who were all willing to wait for payment. That the sale was gone through for form, for the only bid was made by a friend of his for three thousand dollars, which he promises to pay speedily. At the hearing of the case, Mr. Shaw was examined for the plaintiff, and testified that he was present at the sale of one of the plantations of the lands of B. P. Frazer, in the summer, (warm weather)—could not say which of the tracts of land—he was himself a judgment creditor of B. P. Frazer. He had various conversations with Mr. Hugh Frazer on the subject; Mr. Hugh Frazer said, his object in becoming the purchaser of his son's property was to bid it off for the benefit of the creditors of his son, and not with any view to benefit himself, and he wished the creditors not to interfere with his bidding. The

witness told Mr. H. Frazer that any bid would pay his demand, as he was among the earliest of the creditors, and therefore, had no interest in entering into any arrangements, and his means being small, he could

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not bear delay; Mr. Frazer *said there were persons who induced his son to make improper purchases, and if he had the control of his property, it would enable him to prevent such improper dealings. The witness attended the sale on the same day; Mr. Marvin was the only person who opposed Mr. Hugh Frazer, in bidding—at each bidding, Mr. H. Frazer told Mr. Marvin he stood in his own light, for that he (Mr. Frazer) was bidding for his benefit, and that of the other creditors of his son. This was repeated several times. Being cross-examined, Mr. Shaw testified that he was inclined to think this was at the sale of the Black River lands, which are distinct from Clegg's Point. He does not remember if Mr. Coggeshall was present, as Marvin's adviser. On being re-examined, Mr. Shaw testified that he did not remember whether the land was knocked off to Mr. Frazer; the general impression was, that the land did not sell for half its value. Witness considered Mr. Frazer's declarations as general, and as applying to all his son's property, and not to any particular land; and from Mr. Frazer's declarations, believed he was acting for the benefit of his creditors, and that his purchasing his son's property made it unnecessary for the creditors to bid or interfere; don't remember whether Clegg's Point was knocked off to Mr. Frazer. (The answer admitted it.)

The plaintiff's counsel produced the marriage settlement of Rev. Hugh Frazer, and Miss Porter, March 1796. She was then under age; her son, B. P. Frazer, was born in 1797; the mother died under age; B. P. Frazer died in 1829, leaving two children. The execution states a levy on plantation, without specifying; date May 15th, 1824. It would be a difficult thing to decide on this part of the case. The answer of the defendant, a respectable clergyman, is certainly at variance with the letter of 6th July, 1824, (above cited,) and with the evidence of Mr. Shaw, a respectable witness. Both the witnesses are entitled to credit; but there must be a failure of recollection on one side or the other, which is not to be wondered at, after a lapse of eleven or twelve years; yet the letter of Mr. Frazer seems to corroborate the recollections of Mr. Shaw. Under these circumstances, it would be a most painful duty to decide this case on that ground, and as I think, it may be properly decided on another, I willingly avoid doing so. Mr. Frazer states, that though he does not feel himself legally bound to make a re-sale of the lands, and especially of Clegg's Point, yet he was will-

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ing, and had offered, from a sense *of justice to his son's creditors, to sell the lands at their full value, if that could be obtained, and to apply the proceeds to the payment of the just debts of his son; and that in anticipation of such sales he had actually paid just debts of his son's, to the amount of $15,000 over and above the $3000, at which he had bid off the land. Now, if this be correctly stated, as we have reason to believe, then there is no ground to insist on the sale of the land; for the defendant has done, by anticipation, out of his own funds, all that could be required of him, if the case had been most fully proved against him; for it is not contended that the lands and the personal property together, exceed $18,000 in value. It is therefore Ordered and decreed, that it be referred to the Commissioner to receive proofs of the amounts paid by the Rev. Hugh Frazer, on his son's debts; and of the value of the real and personal estate of the said B. P. Frazer, which came into the hands of Mr. Hugh Frazer, and to report thereon; and also to report if any, and what amount is due to the plaintiff.

From this decree, the defendant appealed on the following grounds:

1. Because his Honor decided, "that the real estate of Mrs. Frazer was not bound by the marriage settlement, made in her minority, she having died a minor, and consequently, the same never having been legally confirmed by her; and that her real estate, therefore, descended on her death, according to law, one-third to her husband, and two-thirds to her son;" whereas, it is most respectfully submitted, that the settlement was valid, and did not require confirmation; or, in any event, the covenant of Mrs. Frazer could only be avoided by herself, or her legal representatives; and the settlement should be sustained in favor of the infant defendants, who were purchasers under it.

2. Because, if the settlement were void, and two-thirds of the Clegg's Point plantation vested in Benjamin P. Frazer, deceased, the allegation as to the contract, made at the sheriff's sale, was positively denied by the defendant's answer, which, it is most respectfully submitted, is perfectly reconcilable with the evidence adduced at the trial, and therefore, no reference was necessary as to the payments made by the defendant.

3. Because the defendant's answer having denied any assets of his intestate, and no proof to the contrary offered, the bill should have been dismissed.

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*4. Because the decree was made without any evidence of a debt due to the plaintiff, or assets in the hands of the defendant.

Dunkin, for the appellant.
Hunt, contra.

Chancellor JOHNSON delivered the opinion of the Court.

The leading questions propounded in this appeal, and those alone on which the Court think it necessary to express any opinion, are:—

1. Whether a female infant is bound by marriage articles, by which her own estate is settled to the use of the marriage?

2. If not, whether any other than herself, or her legal representatives, can avoid it?

They arise out of marriage articles entered into between the Rev. Hugh Frazer and Elizabeth Clegg Porter, in 1796, the said Elizabeth then being about sixteen years of age; whereby a plantation called Clegg's Point, of which she was then seized, is conveyed to trustees to the use, in the event which has happened, of the intended husband for life, remainder to all and singular the children of the marriage, and to "the lawful issue of any such children as may happen to be dead, equally and impartially to be divided between and among them," etc. The marriage contemplated was accordingly had and solemnized, and the only issue of the marriage was a son, Bejamin Porter Frazer. Elizabeth, the wife, died in 1797, being then under the age of twenty-one years. Benjamin, the son, died in 1829, being then upwards of thirty-two years of age, leaving two children, parties defendants in this suit. The Rev. Hugh Frazer, the husband, is still alive, and also a party defendant, the administrator of Benjamin, the son. The plaintiff claims as a creditor of Benjamin, the son, who died otherwise insolvent; and in support of the bill it is insisted that the marriage articles are void, Elizabeth the wife being an infant at the time of their execution; consequently on her death, two-thirds of Clegg's Point descended to the son Benjamin, and are assets for the payment of his debts. It may be proper also to premise that at the time of the marriage, the wife Elizabeth was, in addition to Clegg's Point, seized of other real estate, and possessed of a number of slaves, all of which was by the terms of the articles secured to the joint use of the husband and wife during their joint

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*lives, remainder to the survivor, and on the death of the survivor, remainder to the children &c. as before stated; and that nothing like fraud in obtaining the marriage articles has been charged or pretended. So that the questions propounded are unmixed questions of law.

The question whether a female infant is, or is not bound by a marriage settlement which disposes of her own real estate, is one of much interest, and about which there has been great diversity of opinion amongst the most learned lawyers and judges of the English Courts. It is one of the first impression here, and as it is not indispensable to the satisfactory determination of the case before us, I propose only to offer some general views of it, more with a view to call the attention of the profession to it, than to express any settled opinion of my own.

In Drury v. Drury, 2 Eden 39, the question was, whether an infant wife, who had been jointured, was, or was not barred of dower in the lands of her husband under the statute of 27 Hen. 8th; and on discussing that case, the Court went very fully into the general question, whether a female infant was, or was not bound by a marriage settlement disposing of her real estate? Lord Northington, who tried the cause, held that she was not bound, either by the statute, or by the rules of the common law, and that she might elect to take either the jointure or dower. He insists that the policy of the common law, which avoids the contracts of infants in other matters, extends also to marriage settlements of real estates by female infants. That as an incident to marriage, the law had endowed the wife in the lands of her husband, and conferred on the husband all the chattels of the wife, regarding each as an equivalent for the other; thus superseding the necessity of any contract between the husband and wife in relation to their estates. The judgment was however reversed, on an appeal to the House of Lords, with the concurrence of a majority of the judges, amongst whom were Lord Hardwicke, Lord Mansfield, and Wilmot, J. On that side of the question, it is maintained that although infants are not generally bound by their contracts, they are bound by such as are for their benefit, as for necessaries and the like. That a female infant over twelve years is capable of entering into the contract of marriage, into the consideration of which, the settlement of her real estates enters very largely, and without which the marriage might never have been

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had, and as the marriage is *indissoluble, the settlement ought to be binding. See 2 Eden 64–72. Wilmot's Notes 184. And in this opinion Mr. Atherly, in his treatise on Marriage Settlements, pp. 39, 40, after a full review of the authorities, concurs, regarding the direct question as not then entirely settled. It came up again incidentally in Durnford v. Lane, 1 Bro. C. C. 106, when Lord Thurlow expressed himself favorably towards the judgement of Lord Northington, in Drury v. Drury, and in Milner v. Harewood, 18 Ves. 275, which was tried in 1811. Without entering into the argument, or reviewing the cases, Lord Eldon concurred in that opinion, and that seems to be regarded as decisive of the question there. —2 Kent's Com. 199.

If the matter be regarded as definitely settled there, it becomes a question how far we are bound by it. The Act of 1712, while incorporating the body of the English common law into our jurisprudence, renders it obligatory no further than it is applicable to our own condition and circumstances; and in applying the rules, we must take care that they do not violate some other fixed rule growing

out of our own peculiar habits and institutions. It would be unsafe, therefore, implicitly to follow the English Courts, without enquiring whether, under the circumstances existing here, a different rule would not have obtained there.

Without adverting to the causes which must be obvious to every one who has considered the subject, it is well ascertained that our females marry at much earlier ages than even in England; indeed the instances in which females do not marry before the age of twenty-one years, may be accounted rare. The policy of throwing no difficulties in the way, or rather of encouraging them, is peculiarly applicable to the sparse population, and the great facilities of obtaining subsistence; and into whatever speculations the subject may lead, there can be no question that marriage settlements, especially amongst the richer classes, enters very largely into the contract of marriage, and that any restraints upon them would oppose an obstruction.

In England, whilst personalty is scarcely regarded at all, real estates are very highly estimated, and descend in the male line: the instances in which the wife brings with her real estate on marriage, are therefore rare; and it might well be thought that it was unnecessary to break in upon a general rule, to provide for the few cases which might

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arise, especially as the value of the real *estate of the wife might be regarded as more than an equivalent for any provision which the husband might be able to make for her. Here it is otherwise; real estates descend equally to the males and females, and the value of the slaves, which are regarded as chattels, and other personalty usually attached to a well settled plantation, may be safely estimated at double the value of the realty, and in most cases the portion of the wife consists partly of both. There is also another diversity. In England provision is usually made for the wife out of the fortune of the husband, in consideration of the portion which the wife brings. Here the object is generally to secure to the wife her own fortune, consisting of lands or negroes, or both. And if a female infant may bind herself by a settlement of her personalty, (and that she may is universally conceded,) to deny her the power of also disposing of her real estate, would be to frame a rule giving her the shadow, whilst the substance is taken from her. The slaves and the plantation are inseparable; one would be comparatively useless without the other, and the interest of the wife would seem to require, that she should be left to treat the matter without restraint. The watchfulness of parents, and the care of guardians and friends, would in general be a sufficient guard aginst rash and inconsiderate settlements on her part, and the Courts of justice would always relieve against positive fraud in obtaining them.

There is another consideration. Instances of female infants settling their real estates on their marriage, must have very frequently happened, and the question, whether they are bound by them, never has been before made. They have always been treated as valid, and the estates have passed under them. Public opinion appears to have settled down in favor of their validity, and to introduce a new order of things might disturb the repose of titles which have been acquired under them. The matter ought therefore to be well weighed before we venture upon it.

The remaining question is one of less difficulty. The question as to what contracts of an infant are absolutely void, or voidable only, is a very fit subject of a lecture or disputation, but I do not perceive that we should derive any advantage from treating of it so much at large here. It is already sufficiently ascertained that there is a class of contracts, (within which, I propose to shew that this case falls,) which are considered as voidable only, and that the election to avoid or abide

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by them, is a personal privilege, of *which no other than the infant, or those claiming as legal representatives, can avail themselves.

Bingham, in his Treatise on Infancy, p. 33, lays down the rule that all the acts of an infant, capable of being legally ratified, are voidable only, and that such only are absolutely void as are incapable of being legally ratified; and on this principle it was held in Zouch v. Parsons, 3 Bur. 1794, that the conveyance of an infant by lease and release, was voidable only. But Chancellor Kent has, I think, shown very clearly that the rule is not a certain test, and after reviewing the authorities, concludes with Chief Justice Eyre, in Kean and Boycott, 2 H. Black. 511, that when the contract of an infant was obviously to the prejudice of the infant, it is void—when for his benefit, as for necessaries and the like, it is good; and when uncertain as to the benefit or prejudice of the infant, it is voidable only at his election.—2 Kent. Com. 192-3.

These rules apply obviously to executory contracts, and I cannot well suppose that it ever yet entered into the head of any one, who considered the subject, that the executed contract of an infant, where he had done all that was necessary to invest another according to the forms of law, with the title and possession of his estate, was absolutely void. For example: An infant makes an advantageous bargain in the sale of his estate, or he gives it away, and executes formal conveyances, and the purchaser or donee enters under it; himself and his legal representatives are well satisfied to acquiesce in it—can it be that a stranger would be permitted to enter on the purchaser with impunity, on the ground that he derived his title from an infant? And yet this must be the effect, if

the conveyance of the infant is absolutely void.

Atherly, in his treatise on Marriage Settlements, p. 43, has, in a note, referred to Perkins as authority for a rule, which appears to me to point at the principle. It is, "That all gifts, grants or deeds, made by infants, which do not take effect by the delivery of the hand are void, but all gifts, grants or deeds, made by infants by matter in deed or writing, which do take effect by delivery of his hand, are voidable by himself, his heirs and those who heir his estate." That the infant, or his legal representatives alone, are competent to avoid a voidable contract, is not, I think, questioned any where. That doctrine is distinctly recognized by Lord Eldon in Milner v. Harewood, and in that all the authorities agree.

In England, lands pass only by livery of

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seisin, and it might *well be questioned whether the conveyance of an infant by deed, without livery was void, or voidable only; but here the delivery of the deed is substituted for the livery of seisin, and invests the purchaser with the title.

Here, Elizabeth Clegg Porter, then an infant, in contemplation of marriage with Hugh Frazer, conveyed her estate to trustees for certain uses. She died during her infancy, her husband surviving, and supposing the conveyance to be voidable only, she was never competent, nor did she make an election, whether to be bound by it or not. Her only issue, Benjamin, lived to the age of thirty-two, eleven years after he attained full age, without calling the settlement in question, or making his election. The descent is now cast on his infant children, who must of course elect to take under the settlement, as otherwise the estate would be assets to pay the debts of their father. The creditors of Benjamin, strangers to the blood of Elizabeth, very clearly have no right to interfere in the matter.

The plaintiff's bill must therefore be dismissed, so far as it seeks to charge the settled estate; each party to pay their own costs.

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2 Hill, Eq. 542

GEORGE W. BROWN and Wife v. JAMES LINDSAY, Administrator of John Atchison, and Others.

(Charleston. Feb. Term, 1837.)

[*Husband and Wife* ⟸125, 144.]

The husband having leased his wife's inheritance and died during the term, the adm'r. who also acted under a power of attorney from the wife, received the rent from the tenant: *Held*, that the wife was entitled to the rent accruing after the husband's death.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 35, 453; Dec. Dig. ⟸125, 144.]

[*Husband and Wife* ⟸137.]

As regards lands owned by the wife in fee, the dominion of the husband continues no longer than marriage: after that, she may defeat an unexpired lease of the husband altogether by ousting the tenant, or claim the benefit of it.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 512–523, 939, 940; Dec. Dig. ⟸137.]

[*Husband and Wife* ⟸137.]

[A lease for years by a husband of his wife's land is, after his death, voidable only by the wife.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 516; Dec. Dig. ⟸137.]

Heard before Chancellor Johnson, Charleston, May Term, 1836.

The material facts of this case are as follows:

John Atchison and his wife, being each seized in fee, in equal undivided shares of the livery stable and lots in Church and Chalmers streets, Charleston; Atchison, in May 1830, leased the whole of the premises to Edward Francis, for five years, at two thousand dollars a year.

In April 1833, Atchison died intestate, leaving his wife and three infant children by a former marriage. James Lindsay administered on his estate. Atchison's widow married Geo. W. Brown.

The lease to Francis expired in May 1835; and Francis paid the rent due, to the administrator of Atchison, his lessor; no rent being ever demanded of him (Francis) by the

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widow or her second *husband; nor did either of them ever enter, or interfere with the lease, after the death of Atchison; unless that be inferred from their giving Atchison's administrator a general power of attorney to receive monies due them.

Brown and wife having filed their bill against the administrator and children of Atchison, for a settlement of his estate, it was referred to the Commissioner to take the accounts, and ascertain the nett distributive shares of the widow and children, in the estate.

The Commissioner reported, that Mrs. Brown was entitled to two-thirds of the rent, which accrued after Atchison's death—to wit, to half of the whole rent on account of her ownership of one moiety of the premises, and third of the other half, as widow and distributee of Atchison. To this report the children of Atchison excepted:

"1. Because John Atchison, the husband of Mrs. Sarah Atchison, (now Mrs. Brown,) was authorized, by law, to lease his own moiety and also his wife's moiety of the premises, to Edward Francis; and that the entire accruing rent, for the whole term, was distributable as assets of his estate.

"2. Because the lease to Francis was the property of John Atchison's estate, which might perhaps have been defeated by entry

by his widow, on his death; but that the right of Mrs. Atchison, was no more than a right of entry, and not a right to the rent reserved by the lease. And the wife not having entered, or done any act to defeat the lease, she made her election to take one-third of the rent under it, as a distributee of her husband's estate."

Johnson, Chancellor. The question is, whether Mrs. Brown is entitled to a moiety of the rents accruing after the death of the intestate, or whether they are assets in the hands of his administrator.

There is no question that the wife's inheritance in land abides in her, notwithstanding her coverture, and survives to her on the death of the husband. The husband may, however, during his life, use, alien or charge, the lands of the wife; but, on his death, these and all other incumbrances, fall off and drop with his estate and interest therein. (Bac. Ab. title Leases and Terms for years, C. 1.)

It seems, however, that it has been a controverted question, whether a lease, made by the husband, of the wife's lands, for a longer

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*term than his own life, the wife surviving, became absolutely void on his death, or was only voidable at the election of the wife.

Bacon, in the chapter before referred to, lays it down, that it is good for the whole term, unless the wife, by some act after the husband's death, shews her dissent thereto; for if she accepts rent, which became due after his death, the lease is thereby rendered absolute and unavoidable. The reason given is, that by reason of the marriage, the wife loses altogether the power of contracting or disposing of her own possessions; and, having subjected herself to the will and power of the husband, the power of contracting about, and disposing of, her possession, devolves upon him; because no one else has the right, or power, to meddle therewith; and without such power, they would be obliged to keep them in their own hands and occupation,—which might, finally, prejudice both. The abuse of this power, is guarded against, by permitting the wife, after his death, to affirm or disaffirm, his lease, as she may find most subservient to her own interests.

So, in Cruise's Digest, vol. 4, p. 64, it is said that such leases by the husband are not void, but voidable, at the election of the wife. And Chancellor Kent, (2 Kent's Com. 112,) on the authority of Mr. Preston, (Essay on Abs. of Titles, vol. 1, p. 334, 435-6,) remarks, that from the authorities, when closely examined, it seems, that, according to the common law, the husband has the power of transferring the whole estate of the wife; and the estate will be in the alience of the husband, subject to the entry of the wife, or her heirs, after the death of the husband, which entry is necessary to re-vest the estate. But Sergeant Williams, in a note to Waller v. Hill, (2 Saund. 180, note 81,) whilst he questions whether, as a general rule, this doctrine is tenable, takes a distinction which is very plausible, if not entirely sound, and is certainly more consonant to the analogies of the law, and has, by that means, attempted to reconcile the cases. Estates for life being freehold estates, could only commence in livery of seisin, and can only be avoided by entry. But not so in leases for term of years, where livery of seisin was unnecessary. And, therefore, he concludes that leases for life are only voidable, and leases for term of years absolutely void.

Roper, in his treatise on property arising from the relation of husband and wife, (vol. 1, page 93,) seems to take for granted, that notwithstanding some cases to the contrary, a lease by the husband alone, of the lands of the wife, for a term of years, is absolutely void as to the wife surviving.

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*But this question is wholly irrelevant to the matter now in issue.

The argument of the defendants is, that the lease was voidable only; and that the wife could avoid it only by entry, or, according to the laws of this State, by suit at law against the lessee. Conceding this to be correct, it does not follow that she is not entitled to the rents. All the authorities agree that where the lease is voidable only, any act of the wife, confirmatory of the lease, such as bringing an action of waste, or receiving the rents, after the death of the husband, is evidence of the election of the wife to confirm the lease. It follows, therefore, that she may receive the rents. A contrary rule would directly infringe the fundamental principle, that a husband cannot alien the inheritance of the wife, to her prejudice and against her consent, so as to bind her after his death. If his representative, and not the wife, is entitled to the mesne profits, until she sue, (no other entry is known here,) she would be deprived of the rents, ad interim.

I concur, therefore, in the view taken by the Commissioner; and it is ordered and decreed, that his report be confirmed, and made the judgment of the Court.

The infant children of Atchison appealed from this decision, on the grounds stated in their exceptions taken to the Commissioner's report.

H. A. De Saussure & Crafts, for appellants.
Petigru & Lesesne, contra.

Chancellor JOHNSTON delivered the opinion of the Court.

The only point made by the appeal, relates to the rent which accrued on the widow's half of the lot, after the death of the husband.

The more convenient method will be to consider this moiety as if it were a distinct parcel of land, owned entirely by the wife.

The case, then, is: a husband grants a term out of his wife's fee, and dies pending the lease, having received the rent up to his death. The tenant is permitted to hold to the end of the term, and pays the residue of the rent to the husband's administrator: who, at the same time, holds a general power from the widow to receive monies due to her.

The question is, whether the administrator

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can hold the residue *of rent, thus received by him, as assets of the husband, or whether it belongs to the wife.

The dominion which a husband acquires over his wife's property, results entirely from the contract between them. If they have made an express contract, lawful in its terms, that will govern. If, as was the case here, there was no express contract between them, the law raises an implied one, according to the character of the wife's property.—7 Ves. 183; 9 Ves. 177. The implication as to her chattels real is, that the husband may forfeit or dispose of them during her life. If he does not, they go absolutely to whichever of the two happens to survive the other. I mention this to relieve the case, at once, from the authority of Preston. He has been quoted to shew, that in the case at bar, the administrator of Atchison is entitled to the rents. But his authority is a case of the wife's leasehold estate, and decides nothing here, where the estate of the wife is a fee.

The implication of law, as regards lands owned by the wife in fee, is, that she has granted the husband dominion over them during the continuance of the marriage. When the marriage ceases, his control ceases with it; the wife is re-invested with all her original rights, and is not bound by any contract made by him beyond the authority she by marriage conferred on him.

If the husband die, pending a lease granted by him out of the wife's fee, the rights incident to her fee, immediately vest in her; and she may select what mode she pleases for asserting them.

She may proceed against the lessee. He is but the assignee of the husband. And the husband having acted under a limited power, the wife may avoid his act, so far as it exceeded his authority.

In proceeding against the lessee, she may defeat the lease altogether, for the unexpired part of the term; or she may claim the benefit of it. In the latter case, while she avoids it as to the husband, she affirms it as to the tenant; and it becomes, as it were, a new lease executed between the tenant and herself.

If she treats the tenant as a trespasser, she defeats the lease altogether; and so far from entitling herself to the rent reserved by it, as was argued, destroys the rent by denying the tenure. The occupant, considered as a trespasser and not as a tenant, is liable if he detains possession, not for rent, but for damages.

If she receives rent from him, or sues him for rent as a tenant, she, so far as he is concerned, affirms the lease; but affirms it as her own.

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*It has been argued, that the wife cannot claim the rent, as against the husband's executor, unless she deprives the lessee of the term. The argument seems to be, that so long as the tenant is permitted to enjoy the lease, it stands as the contract of the husband who made it, and his executor is entitled to the benefit of it. But the cases quoted by the appellants themselves, shew that this position cannot be maintained. They say that the wife's receipt of rent, so far from defeating the lease, as to the tenant, confirms him in his term; and yet they say that the wife is entitled to the rent she has received.

The affirmation of the contract as to the tenant, is no affirmation of it as to the husband, but merely substitutes the wife in his place, as a party to it. If, instead of substituting her, it is a confirmation as to the husband, and perpetuates his contract for the benefit of his executor, then the wife is accountable to him for the rents she has received. The consequence would seem to be, that she is to be held bound by the contract to confirm, and at the same time deprived of the consideration of that contract. If the executor should not see fit to look to the wife for what she has received, or she should waste it, he might still insist, that inasmuch as the wife's confirmation perpetuated the husband's contract for the husband's benefit, the very payment which served to confirm the lease, was no discharge to the tenant; and that he still remained liable to the executor: a consequence equally absurd and unjust.

In this case, Mr. Lindsay, when he received the rent, was not only Atchison's administrator, but also the attorney for the widow. The act of receiving may be referred to either character. If we refer it to his character of attorney, it is as if the widow had, herself, demanded and received the rents from the tenant. In that case she would, as we have seen, be entitled to them, as between herself and the administrator.

We have stated what rights the wife may exert as against the tenant. If she ousts him, she disaffirms the contract, both as against lessor and tenant. In that case the tenant may look to the lessor's estate for damages on the covenant. If she claims rent from the tenant, she confirms as to him, but disaffirms as to the husband. In that case the contract between the husband and tenant is dissolved, but without laying a foundation for damages on either hand.

But the widow, here, did not oust the tenant; and it is contended that Mr. Lindsay received the rent as Atchison's administrator,

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*and not as her agent. Let us see what, on principle, must be the consequence.

The wife, in the case we have just supposed, has permitted the lease to stand as between the lessor and tenant; and the tenant has, I presume rightfully, paid the rent to his landlord's representative. I suppose the wife has lost her right as against the tenant. He was not to take notice of a claim never interposed, and being in under the husband, and never disturbed, he could neither aver against his landlord's title, nor resist payment.

But I apprehend the wife has a good right to disaffirm the contract against either party to it. She may do this as against the husband, although she forbore to do it against his tenant.

It must be borne in mind, that the husband acted under a power coupled with an interest, which he derived from her. For any act beyond his interest, he must be regarded as her agent. His representative is not entitled to hold against his principal what he has received, by exceeding his authority, and beyond his interest.

The motion is refused.

Chancellors JOHNSON and HARPER concurred.

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2 Hill, Eq. 548

WM. A. CALDWELL, Administrator of George Chur, v. ROBERT GILES, Assignee.

(Charleston. Feb. Term, 1837.)

[*Equity* ⇐430, 441.]

A decree obtained by fraud may be set aside on an original bill for that purpose; but on a bill to obtain satisfaction of a former decree, the defendant in his answer cannot avail himself of this so as to resist performance.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1043, 1059; Dec. Dig. ⇐430, 441.]

Heard before Chancellor Harper, Charleston, January Term, 1836.

The decree of the Chancellor states the question made in this case as follows:

"The plaintiff's bill is to obtain satisfaction of a decree, for the payment of $1,488.73, and interest, formerly obtained in this Court, by his intestate, the said George Chur, against the defendant, Robert Giles, assignee of Thomas W. Giles. There is no question of the fact of such decree having been obtained, or that it remains unsatisfied. But the defendant, by his answer, states many circumstances to show that the original demand on which the decree was obtained, was unjust

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and fraudulent. These were *evidently the same matters which were urged in defence in the former cause, and cannot be taken into consideration now.

"Among the rest, however, it is stated that the decree itself was obtained by fraud, by the said George Chur's inducing the said Thomas W. Giles, who was sworn as a witness in the cause, to swear untruly in support of his demand; and that for this purpose, he used various artifices, and promised to share with him the amount to be recovered. There is no question, but that if a decree be obtained by fraud, it may be set aside on an original bill for that purpose. The only question is, whether the defendant can avail himself of this by his answer, so as to resist the performance of the decree. I am of opinion that he cannot."

The Court accordingly refused to hear the defendant on that point, and ruled that the plaintiff was entitled to a decree. And the defendant appeals on the following ground:—

That the Court ought not to give relief, by giving active efficacy to a decree, which the defendant alleges was obtained by fraud, until it has heard the evidence; and if the evidence supports the defence, the Court should refuse to revive the decree on the ground, that the Court will not lend its aid to make a fraud successful.

Hunt, for appellant.

Peronneau, Mazyck & Finley, contra.

HARPER, Chancellor. The Court concur with the Chancellor, that the matters put in issue by the answer, are precisely the same as those recorded in the original proceeding, and cannot therefore avail the defendant, by the way of answer to this bill. If it can in any event avail the defendant, it can only be on a bill to set aside the decree for the fraud complained of, and that course of proceeding is the only one recognized by the precedents. Motion dismissed, and the decree of the Circuit Court is affirmed.

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2 Hill, Eq. 549

COOPER v. Administrators of REID.

(Charleston. Feb. Term, 1837.)

[*Partnership* ⇐253.]

A surviving partner winding up and settling the affairs of the firm, is not entitled to commissions unless stipulated for by contract. The Act of 1745, (P. L. 202–3) relates only to trustees who have the management of the estates of "infants or minors."

[Ed. Note.—Cited in Cothran v. Knox, 13 S. C. 496, 511.

For other cases, see Partnership, Cent. Dig. § 550; Dec. Dig. ⇐253.]

2 Hill, Eq. *550

*JOHN H. WILSON and Wife v. MARIA FREER, and Others.

(Charleston. Feb. Term, 1837.)

[*Wills* ⟸524, 634, 849.]

Testator by his will devised his plantation to his son Charles in fee, but if he should die under age and without issue, then to be kept for the use and maintenance of his wife and unmarried daughters, and on marriage to be sold and equally divided between his wife and surviving daughters. Charles died under age, and without issue leaving four sisters, the mother having died before; one sister died shortly after unmarried, two afterwards married and died leaving issue, and the last died lately, unmarried: *Held*, that the devise to Charles was a fee simple defeasible on his death under age and without issue; that the limitation over to the wife and daughters was contingent, and must fail, because at the event on which it was limited over there was none answering the description to take; and that, on the death of Charles, the fee reverted to testator's right heirs, and those answering the description of heirs at that time take.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1122, 1497, 2166; Dec. Dig. ⟸524, 634, 849.]

Heard before Chancellor De Saussure, Charleston, January Term, 1837, who pronounced the following decree:

William Stanyarne, the testator, died on the 5th May, 1783, leaving alive his wife Anna, and the following children:—his son Charles, and his daughters Elizabeth, Mary, Frances, and Anna. The widow of the testator died in 1783, or 1784. The son Charles, also died soon after, under age and without issue; then the daughter Frances died unmarried. Elizabeth married John Wilson, survived her husband, and died in 1804, leaving issue John, William, and Sarah Wilson.

Mary married Charles Freer, survived her husband and died in 1811, leaving issue, Frances, Maria, Charles, and John Freer. The sons, John and Charles, are dead leaving wills, which have been proved, and the executors have qualified.

The testator's last daughter, Anna, died in the year 1836, unmarried. She devised her estate to Maria A. Freer.

By his last will and testament, duly executed, William Stanyarne devised his plantation on John's Island, to his son Charles, his heirs and assigns forever: Provided, that if his son Charles should die, before he attained the age of 21 years, without issue of his body lawfully begotten, then in that case, the plantation so devised to him, should be kept for the use, profit and maintenance of his (testator's) wife, Anna Stanyarne, and all his surviving children or child for the use, profit, and maintenance of all his unmarried children, until the day of marriage. Then and after, the said plantation should be sold by his executor and executors, and the money arising therefrom should be equally divided between his wife and surviving daughters or daughter, share and share alike, to them and their heirs forever.

The first devisee of the land, Charles, having survived his father, the estate vested in him, but he dying afterwards under age, and without lawful issue of his body, the devise to him failed and the estate was divested.

The estate continued to be held and enjoyed by the surviving children, who died successively in the order above stated.

The daughter Anna, who survived all the rest, having died in 1836, unmarried, the question which now arises is, whether any

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*and what persons are entitled to the plantation in question, under the will of the testator or otherwise.

It is certainly an obscure will, and it is not easy to form an opinion entirely satisfactory to the mind. The description of those who are to take under the devise, does not seem to apply to any of the parties in the events which have occurred.

Then it is a case of intestacy; and as such, the estate is descendible to those who were the heirs at law, or is distributable under the statute of 1791. On the death of Charles Stanyarne, the first devisee, unmarried and without issue, the devise to him failing, the fee descended to the heirs at law, to await the contingencies provided for by the will. These not having occurred, the question recurs, who are those heirs? Charles, the first devisee, died after his mother and sister Frances, and before the enactment of the statute of February, 1791, which abolished the rights of primogeniture.

The estate then descended to his sisters, Mary, Elizabeth, and Anna, subject to be defeated if the contingencies had occurred. (For Anna, the survivor never married.) The plantation or proceeds of the sale must be divided into three equal parts, and paid over to the respective heirs, or devisees of the said Elizabeth, Mary and Anna; and it is so Ordered and decreed.

The cases cited by the counsel on each side were embarrassing, as they seemed to present similar circumstances; but on examination, they are not found to be identical. Indeed, few cases under wills, and depending on contingencies, are ever found to be precisely alike; and the variation of a single fact, or feature in the case, often changes the right and the decision.

From this decree, an appeal was taken on the ground:

That according to the true construction of the will of William Stanyarne, the fee in the plantation descended, on the death of Anna Stanyarne, unmarried, to those who were then next of kin to the testator, to wit: the children of Mary Freer, deceased, and of Elizabeth Wilson, deceased.

Dunkin, for appellant.

Petigru, contra.

Chancellor JOHNSON delivered the opinion of the Court.

When the will of the testator, is properly analyzed, it will be found to contain the following dispositions of the John's Island

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*plantation:—1st, To his son Charles in fee, but if he should die under 21, and without issue; then, 2dly, To be kept for the use, profit and maintenance of the testator's wife, and unmarried children, until the day of their marriage; and then, 3dly, To be sold, and the proceeds divided equally between his wife and his surviving daughters.

Charles died under 21, and without issue, leaving four sisters, Elizabeth, Mary, Frances and Anna, surviving him, (his mother having died before;) Frances died afterwards, unmarried, intestate, and without issue; Elizabeth and Mary have died since, both leaving issue; and last of all, Anna died unmarried in 1836.

It seems to be conceded on all hands, that the daughter, Anna, was entitled to the use and profits of the plantation, up to the time of her death, being the only child remaining unmarried, and that the limitation over to the wife and surviving daughters of the testator, must fail, because at the event (the death of Anna) on which it was limited over, there was no one in being, falling within the description of those entitled to take. The devise to Charles, having failed, also the fee necessarily reverts to the right heirs of the testator; and the question is, whether those coming within that description at the death of Charles, or the death of Anna, are entitled to take.

The devise to Charles, is in terms a fee simple, defeasible in the event of his dying under twenty-one, and without issue, and on his death under twenty-one and without issue, the fee necessarily reverted to the right heirs of the testator, unless it vested in the wife and daughters, under the devise over. That it did not, I think is very clear. In Monkhouse v. Holme, 1 Bro. C. C. 298, Lord Ellenborough says, that when the time is not annexed to the form, but to the substance of the gift, the interest is contingent, and the true question always is, whether the event on which the estate is limited over, is in the nature of a condition, without which the testator would not have them to take: and there is, perhaps, no case, which would better illustrate the rule. The devise over here, is to the wife and surviving daughters after the marriage of all his daughters, the survivorship being the event without which, it is apparent the testator intended they should not take. Their interest in the fee, was therefore merely contingent. The fee, as before remarked, vested in the right heirs of the testator, on the death of Charles; and the event on which it was limited over, not having occurred, it still abides in them.

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Consequently, none can take, but those who answered the description of heirs at that time. All the sisters were then living and were entitled to the inheritance in common. On the death of Frances, without issue, and intestate, afterwards her interest vested of course, in her surviving sisters. The children of Elizabeth Wilson, their heirs, or devisees, are therefore entitled to one-third of the estate; the children of Mary, their heirs, or devisees, if any of them be dead, are entitled to one other, third part; and Maria A. Freer, to the remaining third, under the devise from Anna. Such, I understand, is the import of the Circuit decree. The appeal is, therefore dismissed.

Chancellors HARPER and JOHNSTON, concurred.

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2 Hill, Eq. 553

WM. SEABROOK v. ROSE and Others.

(Charleston. Feb. Term, 1837.)

[*Attachment* ⇐180; *Shipping* ⇐21.]

Bill by joint owners of a steam boat against another joint owner and his attaching creditors, the joint owner, defendant, having been the agent of the company, and being a balance due from him to the company, on which plaintiffs claimed a lien on his shares: *Held*, that the plaintiffs as creditors in possession, were entitled to the lien in preference to the attaching creditors.

[Ed. Note.—Cited in H. J. Baker & Bro. v. Doe, 88 S. C. 79, 70 S. E. 431, 434, 34 L. R. A. (N. S.) 510.

For other cases, see Attachment, Cent. Dig. § 550; Dec. Dig. ⇐180; Shipping, Cent. Dig. § 73; Dec. Dig. ⇐21.]

[*Shipping* ⇐17½.]

The question considered whether owning a ship employed in trade, by several in distinct shares, constitutes a partnership. Chancellor De Saussure's opinion, that this is a partnership, and carries with it all its legal incidents.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 72; Dec. Dig. ⇐17½.]

Heard before Chancellor De Saussure, Charleston, January Term, 1836, who delivered the following decree:

The bill was filed by Wm. Seabrook, and others, joint owners of the steamboat or steamer "William Seabrook," to have an account from M'Kenzie, also a joint owner of two shares in said steamer, who acted as the agent of the company at Augusta, and was indebted to the concern for a balance alleged to be due by him to them. The bill states the case fully, with which a copy of the agreement of the parties was filed. By this instrument, each of the subscribers agreed to pay one thousand dollars per share, for as many shares as he took, for the purpose of building and fitting up a steam packet for the conveyance of passengers and freight. And it was agreed, "that no share should be

transferred, or assigned, without notice being first given to a majority of the shockholders of the owner's intention to transfer."

The bill was taken pro confesso as to M'Kenzie, who was one of the joint owners, and also agent of the company at Augusta, and who it is allowed, is indebted to the company for monies received in the course of the agency. He is insolvent. The creditors of M'Kenzie, and of M'Kenzie & Co., (which in-

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cludes Merriman,) *issued attachments against the property of M'Kenzie as an absent debtor.

The answers of Messrs. Rose and Bonnell, the attaching creditors, insist upon their rights to a priority under the attachments. They deny that the plaintiffs have a right to retain the amount of the shares of M'Kenzie in the steam boat "Wm. Seabrook," either under the general doctrine of partner, or, as creditors in possession. On the face of the instrument, the contracting parties are to be joint-owners of the steamer, "The William Seabrook," according to their respective shares.

The only feature in the agreement which might vary the contract, is the clause, that no transfer or assignment should be made without notice being first given to a majority of the stockholders, of the owner's intention to transfer. This does not appear to me, to be such an agreement as would amount to what is called a limited co-partnership, (even if such were allowed by our laws,) restraining the exercise of any powers which joint owners have over their shares. It is a mere agreement to give notice of an intended assignment. If the part owner should make such transfer without notice, he may be responsible to the other owners, for breach of the contract, but the assignment would be good as to third persons. The case then stands on the general ground of a joint ownership. There is however, no proof of any assignment, and the creditors of Mr. M'Kenzie are not claiming under an assignment but under attachments against an absent debtor, owner of certain shares in the steamer Seabrook.

The plaintiffs insist that they are entitled to a lien on the shares owned by M'Kenzie, for the alleged balance due by him to them, as agent of the joint owners.

1. On the general principles of co-partnership.

2. As creditors in possession.

The first may be called a vexed question. The decisions by judges of the highest character have differed. In Doddington v. Hallet, 1 Ves. 497, the part owners of a ship, filed their bill against the representative of a deceased partner, on the ground, that they had a specific lien upon what should be due to the deceased partner for his share. Lord Hardwicke, upon great deliberation decided that they had such a lien, on the ground that a ship may be the subject of partnership as well as any thing else.

Mr. Belt, in his supplement to the cases

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in Vesey, Sen., p. 497, *states that the decision, by Lord Hardwicke, in Doddington v. Hallet, that "part owners in a ship are partners, and liable in solido, for all goods furnished and repairs," has been overruled on great consideration by Lord Eldon, in the case Ex parte Young, 2 Vesey & Beames, p. 242. And on examining that case, it appears that Mr. Belt is correct in so stating it.

The case Ex parte Young, is indeed precisely the case we are now considering. The petitioners were part owners of a ship with other persons, two of whom became bankrupt. The bankrupts were also managing owners, and in that character were indebted to the petitioners, and the other owners of the ship, £287, on balance of accounts, for the freight and earnings of the ship, after taking credit for the outfit amounting to £2234, which sum the bankrupts had not paid, and the other owners were obliged to pay it. The petition prayed the application of the proceeds of the share of the bankrupts in the ship, freight, &c., towards satisfaction of the sums due to the petitioners and the other owners.

After an argument by the ablest counsel, Lord Eldon stated that the difficulty in the case arose from the decision of Doddington and Hallet, by Lord Chancellor Hardwicke, which was directly in point. Lord Eldon at first, said he doubted, though there was great difficulty in the case, and the inclination of his mind was against the doctrine of Lord Hardwicke, which he knew was his most deliberate opinion, after great consideration; and there was no decree in Equity contradicting that. Afterwards, in a few days, Lord Eldon said, that after great consideration, he must decide against the case of Doddington v. Hallet.

It is exceedingly embarrassing to a judge, administering the justice of the country, to find such able and learned Chancellors differing in opinion so widely, and indeed so directly opposite.—With much hesitation, I should feel myself, however, under such circumstances, at liberty to follow that opinion, which, in my judgment, was most consistent with sound principles; and it does appear to me, that the judgment of Lord Hardwicke is the most so, on the point in question—for I concur with him in opinion, "That a ship may be the subject of partnership as well as any thing else, the hire and earnings thereof being proper subject for trade; and letting a ship to freight, as much a trade as any other; then it appears plainly to be a partnership among them, and the ship itself to be part of the subject thereof."

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*The definition of a partnership seems to include a joint interest in this species of property, as well as any other kind. Mr.

Carey in his Treatise, (in the Law Library,) states that a partnership may be generally defined to be "a voluntary association of two or more individuals for the purpose of lawful trade, in which each person is to receive and bear his proportional ratio of profit and loss." The interest of each partner in the partnership, is his share in the surplus after a settlement of the co-partnership accounts: and that interest alone is liable to the separate creditors of each partner—20 Johns. Rep. 611. It does not appear to me, I confess, that there is any solid reason why ships should not be, as Lord Hardwicke stated, a subject of co-partnership. To make that species of property, and the interests of different persons in it an exception to the rule, and out of the reach of the rules and principles applicable to other kinds of personal property (and in some cases even of real property,) held in co-partnership, seems to me only to multiply distinctions and exceptions in the broad system of principles, and to increase difficulties and litigation.

I am relieved in some measure from my difficulties in this conflict of authorities and principles, by the American decision. In Nicoll v. Mumford, 4 Johns. Chan. Rep. 522, it was held by the Chancellor, professedly on the later English authorities, that ship owners were tenants in common, and were not to be considered as partners, not liable for each other in solido, nor entitled in the settlement of accounts, on the principle of partnership; the doctrine of Lord Hardwicke, in Doddington v. Hallet, being considered as overruled by the modern decisions, and by the universal understanding of the commercial world. But, when (as Chancellor Kent states in his admirable Commentaries, 3 vol. p. 40,) the case of Nicoll v. Mumford, came to be examined in the Courts of Errors, in New York, (20 Johns. Rep. 611,) the doctrine of Lord Hardwicke was considered by the majority of the judges to be the better doctrine, and they decided accordingly, and reversed the decree of the Chancellor. The case of Lamb v. Durant, in 12 Mass. Rep. 54, was decided on the ground, that vessels as well as other property might be held in strict partnership, with all the control in each partner incident to commercial co-partnerships.

Even lands may be made the subject of co-partnership, and subject to the rules applicable to those connexions.—(See 3 Kent's Com. 38, in which he cites various decisions

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which establish that. *See 11 Mass. Rep. 469, and 2 Munford, 387; and Winslow v. Chiffelle, State Rep. in Equity, 25, (1824,) which decided that in case of a mill held in co-partnership, that it was subject to be applied like other partnership property. And even Lord Tenterden, (see Abbott on Shipping 81,) gives to the ownership of vessels, one of the essential attributes of a partnership. Chancellor Kent, (3 v. 38,) considers those decisions as an entire subversion of the equity doctrine now prevalent in England. This is undoubtedly true; and I am content to be supported by Lord Hardwicke and the American Courts.

The result is, that I am of opinion, the plaintiffs are entitled to the relief which they seek by their bill, on this ground; and I am inclined to think also on the ground of creditors in possession, as against the attaching creditors. It is therefore Ordered and decreed, that it be referred to the Commissioner or Master to examine the accounts between the parties, and to report whether any sum, and how much, is due by M'Kenzie, as agent, or otherwise, to the copartnership—and that the two shares held by him in the steamer William Seabrook, be held liable for such amount, and the costs of the suit.

Defendants appealed on the following grounds:

1. That by the decree, an account is ordered to be taken between A. M'Kenzie, and the owners of the William Seabrook, as partners. Whereas in point of fact there was no agreement of partnership.

2. That the decree declares the attaching creditors of M'Kenzie, to be entitled to no more than the residuum that may be coming to him as a partner in the stock held by the owners of the William Seabrook, after the payment of all such sums as he may be indebted in to the company. Whereas, seeing that M'Kenzie is a tenant in common with Seabrook, of two shares in the steamboat, and that Rose has got a lien on those shares by his attachment, it follows necessarily, as a legal conclusion, that Rose is entitled to the money for which those shares may be sold, and that if any account is to be taken, it should be confined to the earnings and disbursements of the boat, since the attachment.

Petigru, for appellant.
King, contra.

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Chancellor JOHNSTON delivered the opinion of the Court.

The Court does not feel prepared to give an opinion on the first point discussed by the Chancellor who tried this cause. The question is not, really, as it has often been conceived to be, whether a ship may be the subject of partnership; for no doubt any species of property whatever, may be held in partnership. But the question is, whether a ship, owned in distinct shares and employed in trade, is, as between the owners, partnership property, or liable to be so regarded by creditors, beyond certain specified limits. On this point the Court gives no opinion, because it is entirely satisfied that the plaintiffs

are entitled, as creditors in possession, to the decree they have obtained.

The motion is dismissed.

Chancellors JOHNSON and HARPER concurred.

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2 Hill, Eq. 558

BANK OF THE UNITED STATES, BANK OF THE STATE OF SOUTH CAROLINA, and the STATE BANK v. CHARLES T. BROWN, and His Wife, Mrs. S. E. BROWN, and Their Children, and —— STEVENS, Trustee, and Others.

(Charleston, Feb. Term, 1837.)

[*Evidence* ⇐419.]

Husband being indebted, by deed expressed to be in consideration of love and affection, settled a plantation and slaves on his wife. He was then negotiating a sale of a large real and personal estate acquired by his wife, which was afterwards made: and this deed was the inducement of the wife to renounce her inheritance on the sale of her real estate: on a bill by the creditors of the husband to set aside the settlement as voluntary and fraudulent, and to subject the property to his debts: *Held*, that parol evidence was admissible to show that the true consideration of the deed was the wife's renunciation of her inheritance, and that such consideration was sufficient to support the deed against the creditors.

[Ed. Note.—Cited in Ryan v. Bull, 3 Strob. Eq. 92; Featherston v. Dagnell, 29 S. C. 47, 48, 6 S. E. 897; Trustees v. Bryson, 34 S. C. 413, 414, 13 S. E. 619; Ferguson v. Harrison, 41 S. C. 345, 19 S. E. 619.

For other cases, see Evidence, Cent. Dig. § 1917; Dec. Dig. ⇐419.]

[*Evidence* ⇐419.]

A deed without any consideration at its execution may be supported by parol proof of a subsequent valuable consideration.

[Ed. Note.—Cited in Young v. Young, 27 S. C. 204, 3 S. E. 202.

For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. ⇐419.]

[*Husband and Wife* ⇐29, 30.]

The registry acts requiring marriage settlements to be recorded, etc., apply only to settlements founded on the consideration of marriage and entered into before marriage, or afterwards in pursuance of articles before, and to voluntary conveyances by the husband to the wife. A settlement by the husband after marriage in consideration of his wife's renunciation of inheritance in her real estate, need not be recorded as a marriage settlement.

[Ed. Note.—Cited in Sibley & Morrison v. Tutt, McMul. Eq. 324, 328; Laborde v. Penn, Id., 449; Napier, Rapelye & Bennett v. Wightman, Speers, Eq. 358; LePrince v. Guillemot, 1 Rich. Eq. 213; Raines v. Woodward, 4 Rich. Eq. 404; Cloud v. Calhoun, 10 Rich. Eq. 374; Gregory v. Rhoden, 24 S. C. 93; Trustees v. Bryson, 34 S. C. 415, 13 S. E. 619.

For other cases, see Husband and Wife, Cent. Dig. §§ 167, 176; Dec. Dig. ⇐29, 30.]

[*Fraudulent Conveyances* ⇐95.]

And the same reasons apply to and will sustain a deed of a house and lot purchased by funds derived from the estate of the wife's father, no provision having previously been made for her; and to another deed by the husband settling other slaves on her, expressed to be in consideration of her renunciation of inheritance.

[Ed. Note.—Cited in Laborde v. Penn, McMul. Eq. 450.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 263; Dec. Dig. ⇐95.]

[*Fraudulent Conveyances* ⇐95; *Husband and Wife* ⇐30.]

The husband may not make an unreasonable settlement on his wife to defraud his creditors—a settlement of less than one half the value of the fortune he acquired by his wife is not an unreasonable provision.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 286; Dec. Dig. ⇐95; Husband and Wife, Cent. Dig. § 175; Dec. Dig. ⇐30.]

[*Fraudulent Conveyances* ⇐74.]

[A transfer in fraud of creditors may be ratified by the subsequent payment of a valuable consideration.]

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 190; Dec. Dig. ⇐74.]

Heard at Charleston, May Term, 1835—before Chancellor De Saussure, who delivered the following decree:

The bill is filed in this case by the bank creditors of Mr. Charles T. Brown, to set aside certain deeds and conveyances stated in the bill as void against creditors, being post nuptial settlements made or obtained by a husband who was indebted at the time; and also, not duly recorded.

The first deed which I shall notice, is among the last in date, but most easily disposed of—that of the 10th November, 1829, by which Charles Brown, conveyed to J. A. Keith and P. T. Keith, a plantation at Goose Creek, and forty-one negroes, in consideration of natural love and affection. The deed was recorded on 7th December, 1829, in the office of the Secretary of State, on 15th December, 1829, in Charleston, office of mesne conveyance; and on 21st December, 1829, at Georgetown. There were debts subsisting against Mr. Charles T. Brown, at that time. The

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deed *was purely voluntary, and this part of the case was properly abandoned by the counsel, and the property must be subjected to the claims of the creditors.

The next is the deed of the 1st June, 1824, by which Mr. Benjamin Elliott, the Commissioner in Equity, conveyed a house and lot in Charleston, at the corner of George and Anson streets, in consideration of $11,000, to S. N. Stevens, in trust, for Mrs. S. A. Brown, during her life to her sole and separate use, remainder to her children by C. T. Brown, and their heirs. This deed was recorded in the office of mesne conveyance, on 16th July, 1824. If this be a valid deed, it will protect the property in question, from the claims of plaintiffs. That depends upon whether it is to be considered a marriage settlement. For if it is, it cannot be sustained, for it was not recorded according to the

statutes requiring and regulating the record of marriage settlements. The deed was not made by the husband. The property never was vested in him. It was bought and paid for by the money of Mrs. Brown in the hands of the administrator of the estate, who gave it according to his testimony, expressly to pay for the house and lot, and to take the conveyance to a trustee for the wife and children. The administrator was not bound to pay the money to the husband without a settlement, and if, instead of requiring a settlement, he laid the money out in land for the lady and her children, it would have been good and not subject to the claims of the husband, or his creditors. This was done by the Court in Price and White, Carolina Law Jour. 297, [Bailey Eq. 244.]. It appears to me therefore, that this deed must be sustained, and the property held for Mrs. Brown and her children, not subject to the debts of the husband.

The next deed is that of the 19th January, 1825, executed by Charles T. Brown to trustees, by which, in consideration of love and affection, he conveyed to them Sandy Island plantation and forty negroes, in trust, for his wife for life, to her sole and separate use, remainder to her children by Mr. Brown, and their heirs.

It was contended for the defendants, that this was not a marriage settlement: and it was important to insist on that, because, if it should be considered a marriage settlement, it was not recorded according to law; for it was recorded in the office of mesne conveyance at Georgetown alone. An attempt was made to supply this defect by proceedings in Court, which were stated. The deed however, acquired no additional strength by these proceedings, and must be decided upon its own merits.

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*It appears to me, to come clearly within the statutes, and cannot be sustained. It preceded the renunciation of her inheritance by Mrs. Brown, to her own large real estate, and cannot, I think, be made to come within the idea of a purchase, even with the aid given to the case by the evidence, and by the powerful argument of counsel.

I would willingly protect this lady and her children if I could, as she carried so large an estate in marriage to her husband. But the laws, for wise reasons, prescribe the course which should be pursued to make family arrangements, and to secure their legal authenticity without prejudice to third persons and creditors. If these regulations are neglected, and injury results to the family, it is the fault of those who ought to have interposed and acted more cautiously. The conveyance was in consideration of love and affection, and Mr. Brown was then largely indebted, and no proof that the money of the estate was applied to pay for the property.

I am of opinion that this property must, according to the decided cases, be subjected to the demands of the creditors. The decision in Prescot and Hubbell, not reported, went very far, and is with difficulty, reconciled to other decisions, and does not conclude this case.

The next deed is of the date of 7th February, 1826, by which Robert Heriot, the Commissioner in Equity, conveys to J. A. Keith, and J. T. Keith, twenty-nine negroes, for the consideration of $10,077, in trust, for the use of Mrs. Brown and her children. This deed recites, that Mrs. Brown had renounced her inheritance in her real estate, and her husband got the benefit of it: That these negroes were bought with the funds of her father's estate, and she was entitled to this provision, as a purchaser. This is a difficult part of the case. If we consider the deed as a marriage settlement, then not being recorded, according to the statute of 1823, it would be void. It appears to me however, to have been a purchase, in consideration of the wife's renunciation of her inheritance in real estate of large value. The property in question, never was vested in Mr. Brown, but passed directly from Mr. Heriot, the grantor, to the trustees, for Mrs. Brown; and the presumption, that it was paid for out of the estate of Mrs. Brown, founded on the state of things, and on the want of private funds by Mr. Brown, and on the evidence, satisfies my mind. It appears to me therefore, though doubtfully, that this deed is valid as a purchase, and must be sustained against the claims of creditors.

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*It is therefore Ordered and decreed, that so much of the bill of complaint as seeks to set aside the conveyance of the 1st June, 1824, for the house and lot in Charleston, and to subject the same to the claims and liens of creditors of Charles T. Brown; and so much of the bill as seeks to set aside the conveyance of the 7th February, 1826, for twenty-nine slaves, and to subject the same to said creditors, be dismissed.

It is further Ordered and decreed, that the property and estates comprehended in the deeds of the 19th January, 1825, to wit, Sandy Island and forty slaves; and in the deed of 10th of November, 1829, to wit, the Goose Creek plantation, and forty-one slaves, be, and are hereby subjected to the creditors of said Charles T. Brown, according to their legal liens; and that the same be sold to satisfy the said debts, at the next sale day, or at such times and places, and on such terms, as the Court may direct, under any arrangement made between the parties. Costs to be paid by defendants.

From so much of this decree as subjects Sandy Island and negroes to the creditors of Brown, the defendants, trustees for the wife and children, appeal and hope the same may be reversed, for the following, among other reasons:

1. That the said deed is not, in any sense of the term, a marriage settlement, but a purchase by the husband of the wife's inheritance.

2. That it was competent for the defendants to prove a consideration for the said deed, beyond the consideration stated in the deed itself; and that the evidence is sufficient to establish that the said deed was the consideration for Mrs. Brown's release of her inheritance. That the consideration thus received by Mrs. Brown was reasonable, and no injury was done to the creditors of Mr. Brown, as they have had the benefit of the large fortune which Mr. Brown acquired by marriage.

The plaintiffs likewise appeal from that part of the decree which dismisses so much of their bill as seeks to set aside the settlement of a house and lot of land in Charleston, contained in the deed of 1st June, 1824; and the settlement of twenty-nine slaves, contained in the deed of 7th February, 1826, and to subject the said land and negroes to the plaintiffs' demand; and they move that such part of said decree may be reversed, and

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the said *land and negroes be ordered to be sold for the payment of the debts to plaintiffs, on the following grounds:

1. That the said land and slaves were purchased with the funds of defendant, Charles T. Brown, and the settlements were therefore, without any valuable or sufficient consideration to support the same; and having been made after his indebtedness to the plaintiffs had commenced, are fraudulent and void.

2. That the settlements embodied in the said deeds are also void, for not being duly recorded in the offices of the Secretary of State and register of mesne conveyances, conformably to the provisions of the Acts of the General Assembly, in such case made and provided.

3. That the decree, in the particulars above mentioned, is in other respects contrary to law and equity, and good conscience.

Eggleston & Frost, for defendants.
De Saussure & Bailey, for plaintiffs.

Chancellor JOHNSON delivered the opinion of the Court.

The grounds of the defendants' appeal grow out of a deed executed by the defendant, Brown, on the 19th of January, 1825, by which he conveyed to trustees, for the use of his wife, a plantation on Sandy Island, and forty slaves. The consideration expressed is natural love and affection, but the proof is very abundant that Brown was, at the time, negotiating the sale of a large real and personal estate, which he afterwards sold for $120,000, and which he had acquired by the wife; and that the deed above mentioned, was the inducement to Mrs. Brown to join in the conveyance of the land to Col. Hunt, and renounce her inheritance, and that this was the true consideration.

As a mere voluntary conveyance for the use of the wife, the deed would necessarily be void as to the creditors of Brown; and regarded as a marriage settlement, it was equally void, not having been recorded in the office of secretary of State; the questions then arise:

1. Whether parol evidence was admissible, to shew that Mrs. Brown's renunciation of her inheritance entered into the consideration of the deed, and whether that is a sufficient consideration to support the deed against creditors.

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*2. If the consideration be valuable, whether the deed ought to have been recorded in the office of the Secretary of State, as a marriage settlement.

The general rule is, that parol evidence is inadmissible, to add to, or vary the terms of a deed, or to shew any circumstances inconsistent with it; and if the converse of the rule be true, it follows, that any thing may be admitted which is consistent with it. On this principle, parol evidence has been admitted to supply a consideration, where none has been expressed in the deed, and to show a particular consideration where that expressed was general, as for "divers good causes and considerations."—1 Phil. 481–2–3. And I cannot perceive why, if there are two considerations existing at the time of the execution of the deed, one only of which is expressed, parol should not be admitted to show the other and better. So far from tending to contradict the deed, its object is to support it, and must necessarily be consistent with it—the addition of a circumstance necessary to give it effect—And it strikes me, that this is the more reasonable where it is a third party, a stranger, who seeks to avoid the deed on account of the want of consideration. The case does not rest, however, entirely on this question, and it is not necessary to decide it. The true consideration of the renunciation of Mrs. Brown's inheritance in her real estate, was subsequent to the execution of the deed of 19th January, 1825, and I take it as well settled, that a deed void for want of consideration, may be supported by parol proof of a subsequent valuable consideration. In this, there is clearly nothing inconsistent with the deed, but the proof of a substantive independent fact, arising subsequently to its execution. This point is expressly relied on in M'Dowall and Black v. Gist, decided not long since in Columbia, and to which I refer for the argument. Atherly, in his treatise on Marriage Settlements, page 159, in speaking of the consideration necessary to support settlements after marriage, says that giving up an interest in the settler's estate, will be a sufficient consideration, although it is not expressly relinquished in consideration of the settlements, and al-

though not relinquished by the same deed, or another at the same time; for if it is done about the same time, so that it be reasonably presumed to be part of the same transaction, it would be presumed so, and looked upon as the consideration which produced the settlement.

Now, had the settlement preceded the re-

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linquishment of Mrs. *Brown's inheritance, independent of the parol proof, these deeds furnish very strong intrinsic evidence of the true consideration. There is another principle on which this deed may be supported. The plaintiffs come here to be relieved against an advantage which the defendants possessed at law, on the ground that the consideration being love and affection only, the deed is void as to creditors. Now, the proof is very conclusive, that Mrs. Brown renounced her inheritance on the faith that a provision had been made for her by this deed. The witness, Smith, says expressly, that she would not have renounced but on that assurance; and if evidence of this fact is admissible, it is very clear that the right and justice of the cause is with her. In the Marquis of Townshend v. Stangroom, 6 Ves. 328, which was a bill for the specific performance of an agreement to lease a farm, Lord Eldon admitted parol evidence, to show that the written agreement was not according to the terms stipulated in the treaty; and he observes, that if parol evidence is to be excluded in Equity because it is at law, all the cases of hard bargains, unconscionable agreements, and agreements entered into by mistake or surprise, must be struck out: and he refers to a MS. note of Lord Hardwicke, in the case of Rich v. Jackson, in which his lordship says that he had often known parol evidence in cases where an attempt had been made to obtain by a decree of the Court a further security or more ample interest than the party was in, by the possession of the paper itself, to show that the demand was fraudulent and unfair—and in which relief had been refused on that ground. This is exactly that case. The plaintiffs come here to ask the Court to set aside the deed of the 19th January, 1825, that they may be let in as creditors of Brown. The effect must be to deprive Mrs. Brown of the equivalent for which she stipulated when she released her inheritance in a very ample estate, and reduce her to a state of comparative want. I think she is protected by the principle.

In Prescott v. Hubbell, not reported, decided in this Court in 1827, it was held that a conveyance by the husband to the use of the wife, in consideration of her renouncing her dower in lands which he had sold, was sufficient to support the conveyance against the creditors of the husband. So in M'Meekin v. Edmonds, 1 Hill Eq. 288, [26 Am. Dec. 203,] where the land of the husband was sold by the sheriff under execution, and the purchas-

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er, a stranger, conveyed to trustees *for the use of the wife, the husband having paid the principal part of the purchase money, it was held that the conveyance was good against the creditors of the husband; and it follows, that the renunciation of the wife's inheritance in her own lands, and of which no power can deprive her but with her own consent, must be equally valid.—Our registry act requires "all marriage settlements" should be recorded in the office of the Secretary of State, within a limited time after they are executed, and declares that they shall be void, unless they are so recorded. But there is some diversity of opinion as to what constitutes a marriage settlement, within the meaning of the act.—Prima facie, the terms obviously import a settlement founded on the consideration of marriage; and could not, therefore, directly apply to settlements entered into after the marriage, unless made in pursuance of articles previously entered into; but in Price v. White, (Car. Law Journal, 297, [Bailey Eq. 211,]) it was held that a voluntary settlement made by the husband after marriage, to the use of his wife, was within the mischiefs contemplated by the statute, and was void unless so recorded. That, I then and still think, was going quite far enough,—extending the construction of the statute to its utmost limits. It never could have been intended to apply to all conveyances for the use of a married woman. If a parent thinks proper to convey or devise an estate to the separate use of his married daughters, with what propriety is that denominated a marriage settlement? Marriage does not enter into the consideration; and did the legislature in framing the act, contemplate this state of things, and intend to provide for it under the term "marriage settlement?" I think not—they might, and would have employed more appropriate terms. So, if a stranger convey to the use of a married woman, or if she invest her pin-money, or her other separate funds in lands, and procure them to be conveyed to trustees to her separate use, what could be more foreign than the terms "marriage settlement," applied to these transaction? But the cases of Prescott v. Hubbell, and M'Meekin v. Edmonds, are direct authorities on the point. They are not marriage settlements within the meaning of the act;—and in what do these cases differ from the case where the wife acquires an estate in exchange for her inheritance, whether she obtains it from her husband or a stranger?

I conclude, therefore, that no settlement or conveyance falls within the purview of the

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act, except such as are founded on the *consideration of marriage, and entered into before the marriage, or afterwards in pursuance of previous articles, or voluntary conveyances by the husband to the use of the wife, after the marriage.

The grounds of appeal, on the part of the plaintiffs, are entirely covered by the foregoing observations. William S. Smith, the administrator of George Smith, the father of Mrs. Brown, advanced to Brown $11,000, to purchase a house in town, to be conveyed to the use of Mrs. Brown; and he did, accordingly, so invest it. No provision having been before made on Mrs. Brown, the administrator was right in insisting on these terms. The conveyance of Robert Heriot to Keith, of twenty-nine negroes to the use of Mrs. Brown, is expressed to be in consideration of the renunciation of her inheritance: and on the principles laid down, the consideration in both cases are valid against creditors; nor was it necessary to record the deed in the office of the Secretary of State.

In the discussion of the case, some remarks were made by the counsel, as to the magnitude of the provision made by those deeds for Mrs. Brown; and clearly the law would not justify the husband in attempting to defraud his creditors by using the interests of the wife, as a cover for making an unreasonable settlement on her. But it will be remembered that Mrs. Brown was otherwise wholly unprovided for—that on the death of her father, intestate, an estate, consisting of lands estimated at $60,000, which when sold with a part of the negroes only brought the large sum of $120,000, descended to her, and that the highest conjectural estimate of the value of the property secured to her, does not exceed $45,000. No direct question has been made on the subject. It is therefore unnecessary to enter into a minute calculation of the reasonableness of the provision; and I confess, that under the circumstances, I should not be disposed to look into it with too much exactness.—With proper diligence the creditors might have saved themselves out of the large estate which Brown has dissipated.

It is therefore Ordered and decreed, that so much of the decree of the Circuit Court as subjects the lands and negroes described in the deed, from the defendant Brown, to John A. and P. T. Keith, of the 19th January, 1825, with the payment of Brown's debts, be, and the same is hereby set aside and reversed. In other respects it is affirmed.

Chancellors HARPER and JOHNSTON concurred.

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*SOPHIA C. MESSERVEY and Others v. J. A. BARELLI and SOPHIA MESSERVEY.

(Charleston. Feb. Term, 1837.)

[*Marshaling Assets and Securities* ⟸2; *Mortgages* ⟸154.]

Plaintiffs and their mother being jointly entitled to an estate the latter administered, and proceedings in Equity for partition were had in which the mother was appointed guardian of her infant children, and a sale was ordered for one-third cash, and credit for the balance with bond and mortgage to secure the purchases. At the sale the mother purchased the principal part of the estate, both real and personal, and gave bond and mortgage for the real, but paid no money, and afterwards had the bond and mortgage assigned to herself as guardian—gave her receipt to the Commissioner as such, for the shares of her children, and took titles. Defendant knowing the terms of the sale (having acted as agent of the mother in the management of the estate,) and that no money was in fact paid, obtained a mortgage on the real estate purchased by her, to secure a debt due by her individually: *Held*, that the mortgage of the defendant must be postponed until plaintiffs' claims are satisfied.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. § 1; Dec. Dig. ⟸2; Mortgages, Cent. Dig. § 346; Dec. Dig. ⟸154.]

[*Vendor and Purchaser* ⟸228.]

Where the Commissioner, under the order of the Court to deliver to the guardian the portions of her wards, whether in money or bonds, delivered up the guardian's bond given for purchases on sales for partition, this is not a discharge of the bond and a satisfaction of the mortgage to secure it; and defendant, with a knowledge of the facts taking a mortgage from the guardian of the property purchased take subject to the equities of the wards.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495–501; Dec. Dig. ⟸228.]

[*Partition* ⟸109.]

The Act of 1791 prescribing in partition gives a lien on the land for the purchase money, whether the sale be for cash or on credit. And the fact that the guardian and Commissioner interchanged receipts, will not in Equity be regarded as a payment, so as to extinguish this security.

[Ed. Note.—Cited in Daniels v. Moses, 12 S. C. 141.

For other cases, see Partition, Cent. Dig. §§ 375–397; Dec. Dig. ⟸109.]

[*Partition* ⟸105, 106.]

The Commissioner having in his report on the sales in partition stated that he had paid over her share to a distributee who was of full age, and the report confirmed, is not an adjudication which will conclude plaintiff as to the fact of payment—that was not referred to the Commissioner, and was not in issue. And the confirmation was not intended to establish the fact of payment, but to approve it if done.

[Ed. Note.—Cited in Cruger v. Daniel, McMul. Eq. 190.

For other cases, see Partition, Cent. Dig. §§ 352, 361; Dec. Dig. ⟸105, 106.]

[*Equity* ⟸330.]

Irregularities in form, cannot be taken advantage of after answering to the merits of the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 660–668; Dec. Dig. ⟸330.]

[*Equity* ⟸117.]

[A defendant, by answering without objection a bill filed by a distributee of an intestate on behalf of himself and other distributees, waives the objection for want of parties.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 289; Dec. Dig. ⟸117.]

[*Mortgages* ⟸268.]

[On partition of land belonging to a mother and her children, a part of whom were minors, it was decreed to be sold, one-third of the price

to be paid in cash, and the balance to be secured by bond and mortgage on the land. The mother bought the principal part of the land, and gave her bonds and mortgage, which were afterwards assigned to her as guardian: and she gave the commissioner a receipt for her children for their shares, and took title. *Held*, that a delivery by the commissioner of the bonds and mortgage to the mother as guardian was not a discharge of such securities.]

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 696; Dec. Dig. ⟸268.]

[*Partition* ⟸104.]

[The act of 1791, declaring that land sold under a proceeding for partition shall stand pledged for the purchase money, applies as well to a sale on the recommendation of a master as to one on the return of commissioners.]

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 351; Dec. Dig. ⟸104.]

Charleston, May Term, 1836.

The following Circuit decree, presents a full statement of the case:

Johnson, Chancellor. In 1828, the late Capt. Messervey, of Charleston, died intestate, seized and possessed of real and personal estate of considerable value, distributable amongst the defendant, Sophia his widow, and six children, who are the plaintiffs in this bill. Administration of his estate was granted to the defendant, Sophia, and by an order of this Court, at January term, 1830, she was appointed guardian of all the minor children, being the whole of the plaintiffs, except Sophia, and thus became possessed of the personal estate, and entitled to receive the rents, issues, and profits of the real estate. In May 1829, the plaintiff, Sophia C., filed her bill in this Court, on behalf of herself and the infant children of the intestate, praying a sale of the whole estate, real and personal, for the purpose of making partition, and the defendant, Sophia, answering that bill, assented that an order for the sale of the estate might be made for that purpose, and on the recommendation of Mr. Commissioner Hunt, the whole estate was, at the same time, ordered to be sold, except the furniture, for one-third cash, balance on bond and mortgage, payable in one and two years, the real estate to be insured, and the policy to be assigned to the Commissioner, for the benefit of the parties; that the portions of the minor children, whether in money or bonds, or both, be paid and delivered over to the defendant, Sophia, their guardian, on her entering into bond, if that had not already been done, with sufficient security for the faithful discharge of her duties as guardian; and that the furniture should be sold for cash, on the 12th January, 1830. Hunt, the Commissioner, reported to the Court, that he had, in pursuance of the order of the Court, sold the whole estate, and that the same had been purchased by the defendant, Sophia, at the

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gross sum of $12,735.72 *and that he had paid to defendant, Sophia, one-third part of the proceeds, as her distributive share, and also the shares of her wards, the minor children of the intestate; and to the plaintiff, Sophia, who was then of age, her share or portion. The Commissioner also reported, that he had investigated the accounts of defendant, Sophia, as administratrix of the estate, and found that the balance of $2,374 93 cents, was the distributive share of each child, of the whole estate, real and personal; and that the defendant, Sophia, had received that amount on account of each of her wards; and that he had paid over a like sum to the plaintiff, Sophia C., and recommended that the defendant, Sophia, should be discharged from her administration, and account annually with the Commissioner, for the estate of her wards—which report was confirmed by the order of the Court. The plaintiff, Sophia C., avers that so much of the foregoing report as represents that her portion of the estate was paid to her, or that the same was actually paid to her, is not true in point of fact, and that she has not received the same or any part of it, and defies the production of any evidence to shew it; but on the contrary, she was always under the impression, that her portion had been paid to her mother, the defendant, Sophia, with that of the minor children; and believed that the orders of the Court, requiring the defendant, Sophia, to give a guardianship bond and security, and the purchaser at the Commissioner's sale to pay one-third cash and to give bond and mortgage for the balance, had been strictly complied with. And the bill charges, that the defendant, Sophia, combining and confederating with defendant, Barelli, so far from complying with the terms of the order directing and requiring her to give bond and security, for the faithful discharge of her duty as guardian of her infant children, executed the said bond in her own name, but without any warrant or authority, signed and sealed it, in the name of one Susannah Gleize, her sister, whereby the said bond is without the required security; nor did she give bond and mortgage for her purchases at the Commissioner's sale, as required by the order for sale; nor has she accounted with the proper officers of the Court for her management of the estate of her wards; and the plaintiffs suppose and believe, that no conveyance was ever executed by the Commissioner to defendant, Sophia, for the property purchased at his sale. The bill further charges, that defendant, Sophia, having become indebted to her co-defendant,

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Barelli, on the 20th May, *1830, executed to him a penal bond, conditioned for the payment of $5,008.50, and to secure the payment thereof, mortgaged to the said Barelli, a three story brick building in Tradd street; a lot of land on the east side of Meeting

street, at the corner of Cumberland and Meeting streets; and a two story brick house and lot on the east side of Meeting street, No. 120—of all which, the intestate was seized at the time of his death, and being part of the real estate purchased by defendant, Sophia, at the sale of the Commissioner. That the defendant, Barelli, was upon the most intimate terms of friendship with defendant, Sophia, and acted as her agent in the management of the said estate, as appears from his own advertisement, published in the Charleston Courier, of the 24th and 27th January, 1829, in which he desires all persons who are indebted to the estate to make payment to him, and those to whom the estate was indebted to present their accounts properly attested. The bill further charges, that at the time the defendant, Barelli, took the said mortgage, he knew and was informed, that the premises were part of the estate of the intestate, and was privy to all the circumstances attending the sale by the Commissioner, and the purchase by the defendant, Sophia: but had notwithstanding procured, in a judicial proceeding in the Court of Common Pleas, an order for the sale of the premises, to foreclose the equity of redemption, and that in pursuance thereof, the premises had been advertised for sale by the sheriff under instructions from defendant, Barelli. The bill prays, amongst other things, that defendant, Sophia, may account for the plaintiffs' respective portions of the estate, and that she be required to give a new guardianship bond, with sufficient security to cover all the demands against her, that the sales of the real estate be set aside as fraudulent; or that defendant, Sophia, be required to give a mortgage of the property, purchased by her at the Commissioner's sale, as of the day of sale, and that the mortgage from her to defendant, Barelli, may be decreed to be null and void, as far as regards the claims of the plaintiffs: that the defendant, Barelli be enjoined from selling the premises under the order obtained at law, to foreclose his mortgage—and for general relief. The defendant, Sophia, has not answered. The defendant, Barelli, answering, admits the death of Capt. Messervey, intestate, leaving the estate and family stated in the bill, and understood that the estate was to be settled

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by a proceeding in the Court of Equity, *and that defendant, Sophia, was advised to become the guardian of her minor children, and supposed that every thing done under the sanction of the Court was correctly done, but was otherwise a stranger to the proceedings. He denies all combination with Sophia, and states, that having become largely indebted to him, she gave the bond and mortgage, stated in the bill, to secure the payment. He admits, that when he took the mortgage, he knew that defendant, Sophia, had the same under a sale from the Commissioner, but she assured him that she had a good title, and that it was only necessary to pay the fees, which she requested him to do, and referred him to Mr. Hunt, the Commissioner. On calling on Mr. Hunt, he told him that defendant, Sophia, had bought the property, and settled with him, and he was ready to deliver the titles when the fees were paid. Defendant, Barelli, paid the fees, and took the title deeds and delivered them to defendant, Sophia, or they were delivered to her by Mr. Kane, the clerk of the Commissioner, Hunt. That through the agency of Messrs. Hunt and Shand, he obtained a certificate that there was no record of any mortgage of the premises in the office of register of mesne conveyances, and from all the other offices in the city, where, if there were any incumbrances, they would be found; that none such existed, and on the faith of these, and the representations of the defendant, Sophia, that her title was good, and that she intended to record the conveyance from the Commissioner to herself, he consented to accept the mortgage of the premises as a security for the sum due him; and that so far from knowing that there was any mortgage from defendant, Sophia, to the Commissioner, or other incumbrances, he acted with all the caution which his knowledge enabled him to exercise, and in full confidence that defendant had a perfect title to the premises mortgaged to him. He admits that he may have read the notice of the sale published by the Commissioner, but avers that he did not charge his memory with the terms, and denies that he had any agency in obtaining the order for sale, or in the settlement between defendant, Sophia, and the Commissioner; and was in fact ignorant of the decree, and a stranger to the proceedings for dividing and settling the estate, and trusted to the certificates, that there was no incumbrances on the estate, without knowing, or hearing, or being given to understand, that there was any fraud or irregularity in the transaction. He admits, that in the course of a legal proceeding in

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the Common *Pleas, he obtained an order for the sale of the premises mortgaged to him, and the plaintiffs' prayer for an injunction having been refused, they were sold by the sheriff on the 5th August, 1833, and that he purchased the houses and lots in Meeting and Tradd streets, at $3,800, leaving a balance still due him on the judgment against defendant, Sophia. He insists on his title thus obtained, and denying all fraud and combination, prays to be dismissed, &c.

On the trial of the case, it appeared in evidence that defendant, Barelli, was on terms of intimate friendship with defendant, Sophia, and her family; paid his addresses to the plaintiff, Sophia C., and was so marked in his attentions as to induce her

friends to suppose that they were engaged to be married. To her mother, defendant Sophia, he familiarly applied to epithet of "mother," to her sisters, that of "sister," and to her aunts, that of "aunt;" and was a constant visitor at the house, and took all liberties he would have done if he had been a member of the family, but afterwards married another lady.

In January 1829, as stated in the bill, he advertised himself, in the Courier, as the agent of defendant, Sophia, the administratrix of the estate, giving notice to those indebted to the estate to make payment to him, and to those to whom the estate was indebted to present their demands to him, and made the inventory of the estate. The auctioneer, Mr. Logan, who conducted the sale made by the Commissioner, had instructions from defendant, Sophia, who did not even attend the sale, to act under the direction of Barelli. The prices were limited by him at so high a rate, that no one else bought any thing, and he bid off the whole on account of defendant, Sophia. The sales were reported to him, and he gave a check for the commissions. Dr. Schmidt, who attended the sale with a view to purchase some of the property, applied to him to know whether it was wanted for the family, for, in that event, he did not intent to bid. He declined answering this question directly, but remarked that nothing would be suffered to go out of the family at less than the prices fixed.

The evidence is very abundant, that such was the influence which Barelli had obtained over defendant, Sophia, and such the confidence she reposed in him, that she confided the management of the estate almost exclusively to him, and would do no act herself in relation to it without his approbation. In the language of one of the witnesses, she acted upon his ipse dixit.

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*This confidence probably originated in her own incapacity for business, and in the confidence that he would become interested in it by an intermarriage with her daughter. She had also become indebted to him, in consequence of having engaged with him as a partner in sailing a vessel to the West Indies; and, on one of her sisters remonstrating with her against suffering him to exercise such influence over her, and taking such liberties in her house, she replied, that she was indebted to him, and if she did not act as he wished, he would ruin her.

In the spring of 1829, Mrs. Wilkie heard a conversation between defendants, on the subject of securing the debt by a mortgage, and the witness stated to him that the property belonged to the estate, to which he replied, that "it was no business of his."

Another witness (Mrs. Schirer) stated that she heard Barelli say that a sale of the estate was necessary, to put it in the power of defendant, Sophia, and understood that the proceedings in Equity were intended for that purpose.

Mr. Kane, the clerk of the Commissioner, Mr. Hunt, examined on Interrogatories, stated that Mr. Hunt, since dead, executed a deed to defendant, Sophia, for the houses and lots purchased by her at the sale, and took her bond and mortgage of the premises for the credit part of the sales, but that no money was paid at the time: since the answer of Barelli, and not very long before the examination of the witness, he has discovered the bond and mortgage in his own possession, endorsed with the assignment of Mr. Hunt to defendant, Sophia, as the guardian of her children, but he does not state whether they were or were not, delivered to her.

There is no doubt that, on general principles, the estate purchased by defendant, Sophia, at the Commissioner's sale, and mortgaged to secure the bond given for the credit portion of the sales, would in her hands be liable for the amount, notwithstanding it has never been recorded. She has, however, subsequently mortgaged them to Barelli, to secure a debt due to him; and the questions which arise, are: 1st. Whether, in point of fact, Barelli had notice of the existence of the prior mortgage at the time he took the mortgage to himself; and 2d. If he had, whether he must not be postponed until the former mortgage is satisfied.

Barelli, in his answer, explicitly denies, that he had notice of the prior mortgage, and this must be taken for granted until the contrary is shown, by competent and

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conclusive evidence; but it *strikes me, that no one, who will take the trouble to examine the facts of the case, can doubt that he has willfully misrepresented the fact, or more charitably, that he has forgotten it. The whole management of the estate was confided to him by the administratrix, the defendant, Sophia, and so completely had he acquired her confidence, that she would do no act in relation to it without his concurrence. He made the inventory of the estate, received the debts due to the estate, and paid those against it. He alone attended and gave directions as to conducting the sales by the Commissioner, and paid the fees of the auctioneer. He received the deed from the Commissioner to defendant, Sophia, and paid his fees. When speaking on the subject of procuring a mortgage to secure the debt due to himself, he was told by the witness, Mrs. Wilkie, that the property belonged to the estate. He stated to the witness, Mrs. Schirer, that a sale of the estate was necessary to put it in the power of defendant, Sophia; and I will not believe he was so worthless and faithless an agent, as to suffer himself to remain profoundly ignorant that a mortgage of the property to

secure the purchase money was a part of the terms of the sale. The mantle of charity is scarcely broad enough to hide the conclusion, which necessarily arises out of the combination of circumstances, that the transaction was too deeply laid to be easily forgotten.

The defendant, Sophia, had become largely indebted to him, and it was but reasonable that he should desire to have it secured; a mortgage on her undivided estate would not, perhaps, furnish a very ample security, besides the inconvenience of obtaining partition with the other parties; besides, a sale under a decree in Equity, at which she was to become the purchaser, would put the whole estate in her power, and she dare not refuse any proposition that he would make; and for what other purpose could a sale of the estate have been desired? Not to meet demands against it, for they had been paid—not to provide for the wants of the minor children, for the estate remaining in her hands, as administratrix, would have been just as productive as if they were her own; nor does it appear that there was any peculiar necessity for selling the whole estate on account of the plaintiff, Sophia C., unless indeed it was in her contemplation of her marriage with Barelli. And is it extraordinary that Barelli should have used the influence which he had acquired over this family, to induce them to do what he might suppose would effectually secure his demand against the mother?

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*The bad faith which he practised in the delicate affair of his attentions to the plaintiff, Sophia C., is pregnant proof that he was not wholly trust-worthy. There can, I think, be but little doubt that he was better informed of the character and nature of the proceedings in Equity than either the defendant, Sophia, or any of the family; if he was not, he was not that diligent and faithful agent which defendant, Sophia, supposed. I conclude, therefore, that he did know that a mortgage of the estate to secure the price was a part of the terms of the sale, and that no money was paid by defendant, Sophia, to the Commissioner, but the fees of office.

Assuming, therefore, that Barelli had notice that the mortgage was a part of the terms of the sale, and that no part of the purchase money was paid by defendant, Sophia, to the Commissioner, the question then arises, whether in law and Equity, the lien of his mortgage is to be postponed until the claims of the plaintiffs are satisfied, and to what extent. And here, again, I think, there is but little room to doubt.

The bond and mortgage given by defendant, Sophia, for the purchase money to the Commissioner, were prescribed by the order, and constituted a part of the proceedings of the Court, and could not be cancelled by the Commissioner, but upon full satisfaction, or the order of the Court. But the Commissioner was, by the order of the Court of May term, 1829, directed to deliver and pay to defendant, Sophia, as the guardian of her minor children, their portions of the estate, whether the same should consist of money or bonds, or both; and under this order, she was entitled to the possession of the bonds; and I apprehend that this would no more discharge the bond, than if a creditor should confide the safe keeping of a bond to his debtor. Her appointment as guardian of her minor children, did not operate as a satisfaction of the bond and mortgage. It is true, that the debt to her wards on this account, became identified with her personal responsibility, but the mortgage was a higher security, which she was incapable of cancelling, as there was no other party capable of contracting about it. The defendant, Barelli, dealing with defendant, Sophia, with the knowledge that she was required to give the bond and mortgage, and had been appointed guardian of her children, was bound to know the trust resulting as a legal conclusion from the circumstances, and according to a familiar rule,

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he is bound by them: one dealing with *a trustee in relation to the trust property with a knowledge of the trust, assumes all the responsibilities of the trust.

There is another view which puts this matter beyond all controversy. The act of 1791, 1 Faust, 27, under which the proceedings for partition were had, expressly provides, in all cases, when lands are directed to be sold for the purpose of partition, they "shall stand pledged for the payment of the purchase money;" and in my own administration of justice, when my attention has been called to the subject, I have always refused to require a mortgage from the purchaser, believing that the act itself gave a better security than any mortgage that could be devised. It is a security which even the Court itself has no power to cancel. Defendant, Barelli, according to his own admissions, knew that the property mortgaged to him belonged to the estate of the intestate, and that it had been purchased by defendant, Sophia, at the sale by the Commissioner for partition; and his ignorance, if he was indeed ignorant, that the law imposed a lien on it for the purchase money, cannot help him. Of a part of the purchase, one-third was required to be paid in cash; and the Commissioner, in his report, has acknowledged the receipt of it, and states that he had paid it over to defendant, Sophia, on account of her wards, to the extent of her interest in it, and to the plaintiff, Sophia, her portion of the whole estate; and the question arises, whether the lien given by the act extends also to the cash part of the sales.

The case, itself, furnishes conclusive evi-

dence that no money was ever, in fact, paid on account of the sales. Defendant, Sophia, was entitled, in her own right, to one-third of the proceeds, and to five-sixths of the remaining two-thirds in right of her wards; and as to them, it would have been a mockery to pay the amount to the Commissioner, and to receive it back in the instant; the interchange of receipts between them was all that was rendered necessary by the occasion; and it is not pretended in the report that the Commissioner received any money on account of plaintiff, Sophia. Divested of the mortgage, the case stands thus:—The estate was sold partly for cash, and partly on credit, but the cash part was never paid. Can the purchaser resist the lien created by the act, as to the cash part of the purchase? I think not. It is true that the interchange of receipts between the Com'r. and defendant, Sophia, might, for most purposes, be regarded as a payment; but Equity regards the substance, and not the form, of things, and will,

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to *subserve the purposes of justice, set up securities, which, in form, have been extinguished. The case of Sophia C. Messervey, is something different from that of the minor plaintiffs, of whom she is the guardian ad litem. The Commissioner states, in his report of January, 1830, that he, himself, had paid to this plaintiff, her distributive share of the estate, real and personal. By what means this fact found its way into the report, or upon what circumstances it was founded, does not appear: but the case furnishes intrinsic evidence that the fact is not true; she avers most unequivocally that she has never received anything. The Commissioner, Hunt, never received a dollar on account of the sales beyond his fees of office, and two-thirds of the purchase money was not then due; and on the trial of this case, there has not been even a show of evidence, or a plausible argument in support of it; and the question is, whether she is bound by it.

The judgement of a court of competent jurisdiction, on a matter in issue, unquestionably concludes the parties; and that this Court would, on a proper case, have had jurisdiction of the question, cannot admit of a doubt; and it only remains to be inquired, whether it was put in issue between the parties, and adjudged by the Court.

The bill filed by the plaintiff, Sophia, in 1829, on which this report is founded, only prays for a sale of the estate, for partition; and necessarily could not have put in issue the question, whether she had, or had not received her distributive share. The usual formula of referring the bill and answer to the Commissioner, and his report recommending the sale, followed; and upon this was founded an order for the sale of the estate, real and personal, with directions as to the terms, and that the proceeds should be "divided and distributed between the plaintiff and defendant, in the proportion of one-third to the defendant, Sophia Messervey, and two-thirds to be divided between the plaintiff, Sophia C., and her minor brothers and sisters;" and that the portions of the minors should be paid and delivered to their guardians, &c., &c.: and I apprehend that this order did not put in issue the payment, for the fund had not yet been realized; yet the Commissioner, in his report of the manner in which this order had been executed, states that he had received and paid her the whole of her distributive share of the estate. She never could have anticipated that the question of payment to her, could have been involved in a

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re*port of his own actings and doings, in the execution of the orders of the Court; and ought not to be bound unless she had had an opportunity of controverting the fact, which does not follow from the order of sale, nor does it appear from the report itself, which appears on its face as a mere official ex parte proceeding. But this is not all: the report concludes by merely recommending "that defendant should be discharged from her responsibility, as administratrix, and that she account, yearly, for the proceeds of the estate of her minor children; and in confirming this report, effect only is given to the matters recommended by the Commissioner, and is not a sanction to the facts stated in it, having no relation to the matters adjudged, the fact that the Commissioner had paid to the plaintiff her distributive share of the estate, has no possible connection with the liability of defendant, Sophia, as administratrix, or her accountability as her guardian, the only matters adjudged. I therefore conclude that the question is not res judicata, and that she is not concluded.

It is therefore Ordered and decreed, that the defendant, Sophia Messervey, do account before the Commissioner for the estate of her wards, the minor plaintiffs, distinguishing how much is due on account of the sales of the real, and how much on account of the personal estate; and that he ascertain and report how much is due to the plaintiff, Sophia C. Messervey, distinguishing in like manner between the real and personal estate. And it is further ordered, that unless the defendant shall, within sixty days after the final order of the Court, on the matters of account, and notice of this decree, pay to the Master or Commissioner of the Court, to abide the further order of the Court, what shall be ascertained to be due to the minor plaintiffs, on account of their distributive share of the real estate of their intestate father, with interest up to the time of payment, and also pay to the plaintiff, Sophia C., what shall be likewise due to her on account of the said real estate, with interest as aforesaid, then the mortgage executed by the said Sophia Messervey, the defendant, to the said defendant, Barelli, for the three story brick house

and lot in Tradd-street, and the two story brick house situate on the east side of Meeting-street, and No. 120, more particularly described in the pleadings and the order of the Court of Common Pleas directing the sale for foreclosing the equity of redemption, and all the proceedings had thereon, be, and the same are hereby declared to be set aside, and va-

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cated, and *utterly null and void; and that the Commissioner or Master of the Court, do thereupon proceed to sell the said houses and lots, if both be necessary, after having given due notice thereof, for cash; and that he retain in his hands so much of the proceeds, subject to the order of the Court, as may be necessary to pay the sums ascertained to be due to the minor plaintiffs, on account of their interest aforesaid in the said real estate of the intestate; and that he likewise pay to plaintiff, Sophia C. Messervey, what may be found due to her on that account. If the proceeds are insufficient, then he will retain for the minors, in relative proportion with the said Sophia C., and pay her the balance. If the proceeds exceed the amount, he will pay the excess to defendant, Barelli, deducting therefrom the costs of this suit. In any event, the defendant, Barelli, must pay all costs.

From this decree the defendant appeals, on the following grounds:

First.—That the evidence of Barelli's privity to the errors contained in the proceedings in Equity, is too slight to overturn his solemn denial on oath; and submit, in opposition to the inference of his privity, the following considerations:

1. That his agency in the commercial business of Mrs. Messervey, and in receiving and paying money for her, and in bidding for her at the sale, is a distinct thing from the management of her legal affairs, in which she was advised by her own counsel.

2. That the proceedings in Chancery were, on the face of them, intended to vest the whole estate in her, on the security of her guardianship bond: and there was no proof that Barelli consulted her legal advisers, or had any notice that those proceedings were irregular.

3. That the witnesses, Shirer and Wilkie, are mistaken in the evidence which they gave; as will be proved by the accounts between Barelli and Messervey, from which it appears, that in January 1829, and so late as June 1829, Sophia Messervey was indebted to Barelli in but a small sum, and that the heavy liabilities which she incurred to him, took place after January, 1830; and that the proposal of a mortgage came from Sophia Messervey at a subsequent period, and after the dissolution of his agency.

4. That if these considerations are not sufficient to take off, altogether, the charge against the defendant, the Court should direct an issue upon the point of notice.

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*Secondly.—That even supposing Barelli to be privy to the deception practised on the Court, the plaintiff, Sophia C., has no title to relief, inasmuch as she consented to a report, declaring that she had received her full share of the real estate, sold by the Commissioner at her own request, to her mother; and caused the said report to be confirmed; and there is no evidence that the solicitors were employed, or received their instructions from Barelli, or that the report was prepared at his instance, or with his knowledge.

Thirdly.—That under the orders made in this cause, Mrs. Messervey being the payee, as guardian, of her own bonds, could release the mortgage; and that the deception practised on the Court, was confined to the fact of representing that she was guardian—in which there is no evidence of Barelli's participation.

Fourthly.—That the parties in the suit, who were of full age, are responsible, and the solicitors and the Commissioner, are accountable for the irregularities in the legal proceedings; and that a decree against Barelli, goes to charge a bona fide creditor, upon doubtful evidence of participation, in a transaction for which the immediate parties are not called to account.

Fifthly.—That even if Barelli should be held bound by constructive or actual notice of the decree, to see whether there was not a mortgage to the Commissioner, such notice would bind him only as to five-sixths of $7,840, and the property in his hands should contribute only ratably with the rest of the real estate that ought to have been mortgaged.

And lastly.—That the proceedings in Messervey v. Messervey, if void or voidable, are so only as to the shares of the infants. And that the infants are not parties to the present bill. That the style in which the plaintiff, Sophia, chooses to sue as on behalf of herself and brothers, is unmeaning, and can make no difference in the consideration of the Court, as to parties; and that the bill should be dismissed.

Petigru & Lesesne, for appellant.
Rice & Memminger, contra.

Chancellor HARPER delivered the opinion of the Court.

The first ground of appeal relates to matters of fact, with respect to which we should very much incline to be governed by the

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*Chancellor's decision. Our own judgment on the evidence entirely agrees with the Chancellor's. The evidence is, that the defendant, Barelli, transacted not only the commercial business of Mrs. Messervey, but all her business affairs. The testimony of Mr. Shand, shews distinctly that he did habitually consult her legal advisers, and that of course he transacted the business with

the Commissioner; and from her confidence in him, and the ascendancy which he seems to have obtained over her, the inference is hardly to be avoided, that he principally directed every thing that was done. The evidence of the witnesses, Shirer and Wilkie, would only be important in considering whether the former decree and all the proceedings should not be set aside, as having been obtained by his fraud. And for this, I think there are strong grounds; but the Chancellor has not come to this conclusion, nor in fact does the question appear to have been made before him, or by the bill.

With respect to the second ground of appeal, the confirmation of the Commissioner's report, of his having paid to the plaintiff, Sophia C. Messervey, her share of the estate, was not an adjudication. When matters in issue are referred to the Master, and he reports upon them, and the report is confirmed, then the report is made the decree of the Court. But the fact of this payment was not referred to the Commissioner, or in any manner in issue. It was not a judicial, but an administrative order, which is always subject to the control of the Court—not intended to establish the fact of his having made the payment, but to approve of it if done, and to protect him in having made it. When a report of sales is made, can any one suppose that this is a judgment establishing the fact that the sales have been made? It can at most amount to no more than the entry of satisfaction upon a judgment or decree, which the Court habitually vacates when it has been made by mistake, or there is any equity to require it. The payment was not in fact made. When we think of the relation in which the plaintiff then stood to the defendant, regarding him as her affianced husband, he must know very little of the female disposition, who does not know that she trusted every thing with implicit confidence to his direction. He, on his part, assumed the character of a husband; he would of course assume to act for her, nor have I any doubt but that the report and order were made by his procurement and direction.

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Shall he be permitted to take advantage *of them? He was her agent, and his act might have bound her as to third persons, but he cannot claim his own act as being conclusive between himself and his principal.

Third.—Mrs. Messervey was not the guardian. The order of the Court was, that she should be appointed guardian, upon giving bond with sufficient security. This was never done, nor does it appear that letters of guardianship were issued. She therefore had no authority to release the mortgage, even if it had come into her possession. But the mortgage comes before the Court from the possession of the Commissioner, Mr. Hunt, and though an assignment appears endorsed on it, yet if it was not delivered, (which is to be inferred,) the assignment could operate nothing.

Fourth.—The defendant, Mrs. Messervey is responsible, and will be made so by the decree. If the plaintiffs had lost their security by the misconduct of the officers of Court, they might be made responsible. But if the security be not lost—if the property is still legally bound to satisfy their claims, certainly they are not bound to have recourse to the officers in the first instance.

Fifth.—I suppose that the fifth ground refers to the Commissioner's report, of his having paid over to Sophia C. Messervey her share of the proceeds of the estate, by which she is thought to have been precluded from claiming any thing now. But I have already disposed of that report. Her share of the credit part of the sales is included in the bond, and in fact, I suppose, though the records seem to bear a different meaning, that the Commissioner only intended to report, that he had paid over to her, her share of the cash proceeds of the sale.

The Chancellor however, directs the property in the hands of the defendant, to be made liable for all that shall be found due to the plaintiffs, on account of their shares of the real estate, including as well the part that was said to be received in cash, as the amount of the bond. If it depended on the mortgage merely, it would not be liable beyond the amount of the bond. This renders it necessary to decide on the effect of the Act of 1791, directing that when land is sold for partition, it shall stand pledged for the purchase money. The Act provides, that the party may apply at his option to the Court of Equity or Common Pleas, for a writ of partition; directs the manner of proceeding, and enacts, that "if it shall appear to the

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Court, that it would be more for the *interest of the parties that the same should be sold, then they shall direct a sale to be made on such credit, and on such terms as to them shall seem right, and the property so sold, shall stand pledged for the payment of the purchase money." The Act then goes on to provide, "that the Judges of the respective Courts shall be, and they are hereby authorized from time to time, to make such rules and orders as may be necessary for the purpose of carrying the foregoing clause into effect." It was urged, that this does not apply to sales made by the Commissioner or Master. But in every case in which land is sold for partition under the authority of the Court of Equity, the sale is made by the Commissioner or Master. I suppose it was intended that the act cannot apply when the sale is made on the recommendation of the Commissioner merely, no writ of partition having issued. But I do not perceive the grounds of this. The practice of making sales on the recommendation of the Commissioner, without the return of commissioners

in partition, is one of doubtful propriety. Yet the act refers it to the Court, to determine on the expediency of a sale, and the Court of Equity would of course make the enquiry for this purpose through its accustomed officer. If there has been an irregularity in not having a previous return in partition, I do not perceive that this can deprive the parties of the benefit which the law expressly gives them.

As to the claim, that the property in the hands of the defendant, Barelli, should contribute only ratably with the rest of the real estate that ought to have been mortgaged—the defendant is entitled to more than that. He has a right to the benefit of his mortgage, as against his co-defendant, Mrs. Messervey. She purchased all the real estate, and mortgaged it all. Part was not included in her mortgage to Barelli, but remains as I understand in her own hands. She is directly the debtor, and this property should be first sold, and applied to the payment of plaintiffs' demands. But if, as suggested, she had sold part of the property to a bona fide purchaser without notice, this could not deprive the plaintiffs of the right to be satisfied of the whole of their claims out of the property, in the hands of a purchaser with notice. For we cannot avoid agreeing with the presiding Chancellor, that Barelli was cognizant of the proceedings in Equity; knew how every thing was arranged, and was the principal agent in making the arrangements.

The last ground is founded on a supposi-

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tion, that the plaintiff, *has no case, and the infants not being properly made parties, the bill must be dismissed. The infants were improperly made plaintiffs to the former bill for partition. Their interests were adversary to those of their co-defendant assuming to be their next friend. But if it were regular to do so, it would not benefit the defendants to vacate the proceedings as to them on that ground. They are properly plaintiffs to the present bill, for they have the cause of complaint. I do not say that they might not have sustained a bill by another friend, making their sister a defendant, and liable if they should fail to obtain satisfaction of the present defendants; but that is not the case before us. According to the view I have taken, she has a sufficient case, and right to relief. The infants are not formally and technically parties plaintiffs; but the Court, if necessary, would permit that defect to be supplied. She has sued for herself, and in their behalf. It may be true, as argued by counsel, that none but a creditor, or legatee, can sue on behalf of himself and others. But the objection must be taken in a proper time and manner.

The defendant's demurrer to the bill, on which this question ought to have been made, has been overruled. He has answered to the bill of "Sophia C. Messervey, for herself, and as a guardian ad litem of her brothers and sisters." He has taken no exception to this manner of suing by his answer, and must, therefore, be held to waive the objection.

The only modification which it appears necessary to make of the Circuit decree is, that upon the coming in of the report upon the account directed to be taken, the defendant, Sophia Messervey, pay to the plaintiffs, respectively, what shall be found due to them on account of her administration of their father's estate, and the sales of the personal estate; and that the Commissioner, or Master, do, in the first instance, sell all the real property purchased by the said Sophia Messervey, and mortgaged to the Commissioner in Equity, which was not mortgaged by her to the defendant, Joseph A. Barelli, but remains in her hands, and apply the proceeds towards the satisfaction of the plaintiffs' claims on account of their share of the proceeds of their deceased father's real estate; and that he then proceed to sell the property in the hands of the defendant, or so much thereof as be necessary for the satisfaction of the plaintiffs' said claims, in pursuance of the directions of the decree; and it is ordered and decreed accordingly.

Chancellors JOHNSON and JOHNSTON concurred.

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2 Hill, Eq. *584

*TRUSTEES OF THE EPISCOPAL CHURCH OF MACON v. LEROY M. WILEY and J. B. ROWLAND.

(Charleston. Feb. Term, 1837.)

[*Courts* ⟸18.]

A bill may be sustained here for the specific performance of a contract for the sale of lands in Georgia: and defendant was decreed to pay the purchase-money on condition that plaintiff execute and tender titles to be approved by the Commissioner.

[Ed. Note.—Cited in Mechanics' B. & L. Ass'n v. Fowler, 57 S. C. 121, 35 S. E. 433.

For other cases, see Courts, Cent. Dig. § 58; Dec. Dig. ⟸18.]

[*Frauds, Statute of* ⟸103, 116.]

On a sale of land at auction, the auctioneer is the agent of both parties and his memorandum in writing is sufficient to take the agreement out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 202, 258; Dec. Dig. ⟸103, 116.]

[*Frauds, Statute of* ⟸103.]

And when the auctioneer made a pencil memorandum on a loose slip of paper at the moment of sale, and shortly afterwards entered the sale in his sales book, the latter is regarded as the true entry.

[Ed. Note.—Cited in Long v. McKissick, 50 S. C. 239, 27 S. E. 636.

For other cases, see Frauds, Statute of, Cent. Dig. § 202; Dec. Dig. ⟸103.]

[*Auctions and Auctioneers* ⟸6, 8; *Principal and Agent* ⟸145.]

And where the auctioneer entered the sale as made to the agent, the contract may be enforced against the principal when he is discovered; and the authority of the bidder need not be in writing.

[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. §§ 18, 26; Dec. Dig. ⟸ 6, 8; Principal and Agent, Cent. Dig. §§ 514, 515; Dec. Dig. ⟸145.]

[*Frauds, Statute of* ⟸116.]

[The authority of the auctioneer to sell lands need not appear in writing.]

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 255; Dec. Dig. ⟸116.]

Heard before Chancellor Johnston, Charleston, January Term, 1836.

The contract in this case, relied on by the plaintiffs, was made in Georgia, between citizens of that State, concerning a lot in the town of Macon. The lot was put up for sale on account of the plaintiffs, by T. P. Bond, an auctioneer; and was knocked off to one Jesse Smith, as the highest bidder, at the price of $2,450. But doubting the responsibility of Smith, the auctioneer required another name, threatening to re-sell, when J. B. Rowland, one of the defendants, came forward and assumed the purchase, at the price of $2,400. The auctioneer then entered the name of Rowland, as the purchaser, with a pencil, upon a loose slip of paper; and after returning to his office, entered the sale in his sales' book.

Rowland having referred the auctioneer to the defendant, Wiley—Wiley enters into the treaty and arrangements, whether individually, or as one of the concern of Wiley, Baxter & Carter, is a question of testimony. Upon a defect in the title being discovered, it is agreed between the parties that the fulfilment of the contract should be suspended until the legislature of Georgia shall make good the title. In the mean time, the lot depreciates in value, in consequence of which the trustees desire to make Wiley take the lot, and for the same reason Wiley finally declines taking it. Wiley removes to South Carolina, and the bill is filed against him here, to compel a specific performance of the contract.

Johnston, Chancellor. The plaintiffs aim at Wiley, as the only solvent defendant.

It would be sufficient for the plaintiffs to have made out a contract with Rowland, either as the agent of Wiley, or as jointly interested with him in the purchase; either would give them a decree against Wiley. If Rowland was Wiley's agent merely, then whatever would bind the agent, would enure to the plaintiffs, as against the principal. If, however, Rowland was jointly interested with Wiley, they are both bound, and although

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there may have *been other persons known to these two, who are also interested in the purchase, the plaintiffs are not to be turned round to them, nor obliged to resort to other than those whose names were disclosed to them when the sale was made. Without therefore, depending upon the evidence of a direct contract with Wiley, if Rowland made a binding contract, that is enough for the plaintiffs, provided Rowland was any way concerned with Wiley in the purchase, either as agent or a partner. That there was the connection, of either agency, or joint interest between them, the evidence leaves no doubt. That Rowland made a valid contract, appears to me equally plain. For admitting that the auctioneer's memorandum does not take the case out of the statute of frauds, if of force in Georgia, his answer overrules his plea. Both have answered. Wiley admits the sale, the terms, the thing sold, and to whom the auctioneer knocked down, and leaves it only to be proved what the bidder was authorized, and by whom; and the authority of the bidder need not be in writing.

Two things only in the case have created any difficulty in my mind. The first was the case of Bacon v. Roach, the doctrine of which I have always, although joined by few in that opinion approved. But that has recently been overruled by the Appeal Court. The other related to the power of this Court over the whole contract. The land sold is in Georgia; the plaintiffs are not entitled to a decree, but upon making titles; and this Court has not power to compel them. But I can give them a decree dependent upon their making titles.

It was, indeed, contended for the defendant, that this Court does not possess jurisdiction over any contract, into which, land lying beyond the limits of the State, at all enters. But if the thing which is required to be done, is that which the defendant can do in this State, and there is the obligation of law upon him to do it, the cases leave no doubt, that this Court, acting on the person, and not in rem, is not only competent, but bound, to make him fulfil his obligations.

Arglasse v. Muschamp, 1 Vernon, 75, decided by Lord Nottingham, in 1682, is an example. Muschamp, by a fraud in England, obtained a rent charge on the Earle of Arglasse, in Ireland, and on a bill brought in England where Muschamp was found, to be relieved against the grant, he pleaded to the jurisdiction. The plea was overruled, on the ground

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that the Court acts in personam, and *a release of the grant decreed. Here the fraud was perpetrated in England; but that makes no difference, as the subsequent cases show. For although the fraud gave the jurisdiction, it was never supposed but once, and that in the next case I shall mention, that there was a local venue as to fraud.

In Kildare v. Eustace, 1 Vernon, 405, tried in 1686, the bill was to be relieved, touching trusts created in Ireland, of lands in that

kingdom. Lord Chancellor Jeffries doubted his jurisdiction, because the trusts were not created in England, and thought that it was the circumstance of the fraud being committed in England, which gave jurisdiction in Arglasse v. Muschamp. But he was so clearly wrong, that when subsequently, the same point was argued before himself, Lord Chief Justice Beddingfield, and Lord Chief Baron Atkins, not only were the Judges of opinion that the jurisdiction was complete, but the defendant's counsel gave up the point.

Roberdeau v. Rous, 1 Atk. 543, brought before Lord Hardwicke, in 1738, was the bill of an infant, in England, against the defendant, also in England, to compel the delivery of possession of lands in St. Christophers, and for an account of the rents and profits; to which a demurrer was put in. The Court held, that a plea was the proper form of defence, and therefore overruled the demurrer, but entered into a series of observations, shewing its clear conviction, that whenever the Court can effectually act in personam, it has jurisdiction.

Foster v. Vassall, 3 Atk. 587, which came also before Lord Hardwicke, in 1747, turned upon the informality of the plea put in; but his lordship, while he overruled the plea, for want of averments, took occasion again to repeat the doctrine, that the Court must act so far as it can act, in personam. The case before him was, among other things, for an account of estates in Jamaica, the executor being in England.

Penn v. Baltimore, 1 Ves. 444, was decided by Lord Hardwicke, in 1750, after much consideration, aided by a powerful and sifting argument of the case, the weight of which so impressed him, that he declared it was worthy the consideration of a Roman Senate. It was a bill against Lord Baltimore, residing in England, to compel the specific execution of an agreement settling the boundaries between Pennsylvania and Maryland. The Court decreed the execution, disclaiming all power to act in rem, but only in personam.

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*In Cranstown v. Johnston, 3 Ves. jr. 170, which came before the Master of the Rolls, in 1796, the defendant had, while pretending to treat with the plaintiff for payment of a demand he held on him, clandestinely obtained a judgement in St. Christophers, against the plaintiff, who was not resident there, under which he, with much secrecy and expedition, sold and purchased a rent charge in reversion which the plaintiff held on property in that colony. The Master of the Rolls declared, that he must forget the name of the Court in which he sat, before he could hesitate to relieve in such a case; asserted the jurisdiction, when it could operate in personam, and decreed a re-conveyance, deducting the defendant's debt and expenses.

Here is a steady current of authorities, to which twice as many might be added, all to the same effect. I say to the same effect, for although some of the judges did mix up with their reasons in the colonial cases, a notion that the jurisdiction of the Court was increased by the supremacy of England, yet it is plain, that that consideration was not at all necessary in their decisions, nor formed the ground of them.

The case of Pike v. Hoare, Ambler 428, tried in 1763, and relied on by defendant's solicitor, is not at all calculated to shake the weight of these authorities. The bill was to have an issue of devisavit vel non, ordered and tried in England, of a will made there, but charging the testator's debts on lands in Pennsylvania. The heir who filed the bill and contested the will, had withdrawn all opposition to probate in the Ecclesiastical Court, and had, without opposing it, suffered a decree to perpetuate testimony to pass; in consequence of which, the executors and devisees had paid out above five hundred pounds towards the debts. Lord Henley, who heard the case, although he confesses he built his opinion materially on the circumstance that the land lay abroad—yet, unhesitatingly declared, that the plaintiff's conduct was such, that if the land was in England, he would not have directed the issue—that he had completely forfeited his equity.

I feel, therefore, warranted in decreeing for the plaintiffs upon their making a conveyance; although I would not be prepared to go the length of those decisions, which hold that a defendant within the jurisdiction may be compelled to make conveyances or deliver possession of lands in foreign parts.

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That seems a very *hard doctrine; and if the plaintiffs were in this State, and the bill was against them to compel them to convey, I would hesitate much. I think I would not sustain such a bill. But it stops very far short of that, to give them a decree upon condition of doing that voluntarily, which I would not compel them to do; leaving them to take or refuse the decree at their option.

Both Rowland and Wiley are before the Court. One of them lives in this State—both have answered.

But to return to a point upon which I remarked at the outset. I said it was immaterial to the plaintiffs, whether Rowland contracted as agent, or partner, of Wiley. And so it is. But it is material to Rowland; for if he acted as agent merely, the whole contract should be thrown, as between him and Wiley, on Wiley. Whereas, if they were jointly interested, they are both and each liable to the plaintiffs, and the conveyance should be made to them jointly, leaving them to settle the matter between themselves. But Rowland's answer admits that what was done, was done towards a joint purchase, and he may be allowed to speak for himself, when he thereby takes a purchase on his own shoulders. So that the Court will leave it to

the defendants to determine whether the decree shall be that Wiley take the titles and pay the money as principal of Rowland; or whether the conveyance shall be to them jointly, and that both shall be liable for the money. Whatever the determination may be, it is not intended that they should be thereby deprived of the right of appeal. The decree in either case will be, that the titles be deposited with the Register and approved by the Master, before payment of the price, and that within a given time. When their determination is made, let an order be proposed.

The decree dated the 4th inst., having left to the defendants, the choice of taking a title jointly or to the said Leroy M. Wiley alone, and no choice being made—it is Ordered and decreed, that upon the plaintiffs executing and delivering to the defendants, a deed for the lot No. 5, in square 41, in the town of Macon, to be approved by the Commissioner of this Court, and tendered to the defendants, or to their solicitor in this cause, within two months from this date, the defendants do pay to the plaintiffs the sum of two thousand four hundred dollars, with interest on sixteen hundred dollars, from the seventeenth day of January, eighteen hundred and thirty-two; and on eight hundred dollars, from the

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se*venteenth day of July, in the year eighteen hundred and thirty-two, and the costs of this suit.

The defendant Wiley appeals from the decree made in the case, upon the following grounds:—

1. Because his Honor decreed, that the plea of the statute of frauds was overruled by the answer, and therefore could not be maintained.

2. Because his Honor decreed, that the Court possessed jurisdiction in the case, although the contract was proved to have been made in another State, between the citizens of another State, concerning lands lying in another State.

3. Because, if the contract, in consequence of the removal of the defendant into this State, is to be considered as having been made between a citizen of this State, and citizens of another State, the suit ought to have been instituted in the Courts of the United States.

4. Because his Honor decreed a specific performance against the defendant, although the testimony and answers proved that he was interested in the contract only as one of the mercantile firm of Wiley, Baxter & Carter.

5. Because his Honor decreed, that although the remedy was not mutual, and the Court had no power to enforce performance of the contract on the part of the plaintiffs who were without the jurisdiction of the Court, a specific performance should be decreed against the defendant.

6. Because time is material in enforcing a contract by a Court of Chancery when the circumstances of the parties are changed, and the property in this case having depreciated during the period of delay on the part of the plaintiffs, a specific performance of the contract ought not to be decreed against the defendant.

A. M. Smith, for the motion.
Petigru, contra.

Chancellor HARPER delivered the opinion of the Court.

The second and sixth grounds of the motion, which relate to the points chiefly considered by the Chancellor below, have been abandoned.

With respect to the first ground, we do not

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think it necessary *to determine, whether the answer overrules the plea; because we are of opinion, that there was a sufficient memorandum in writing to take the agreement out of the statute of frauds, the auctioneer being regarded as the agent of both parties. It is agreed, with respect to goods sold at auction, he must be so regarded; but some of the earlier cases, determined that this could not be extended to lands.—Stansfield v. Johnson, 1 Esp. Ni. Pri. 101; Buckmaster v. Harrop, 7 Ves. 341. But Lord Eldon expressed a different opinion, in Coles v. Trecothick, 9 Ves. 234, which has been followed ever since—by Lord Erskine in the same case, of Buckmaster v. Harrop, 13 Ves. 456, and by Sir Wm. Grant, in Kemeys v. Proctor, 3 Ves. & B. 57. He states that he should himself have been of a different opinion, but was governed by the decisions of the Court of Common Pleas, in Emmerson v. Heelis, 2 Taunt. 38, and White v. Proctor, 4 Taunt. 209, to the same effect with the Equity cases cited. The same thing has been decided in New York.—M'Comb v. Wright, 4 Johns. Ch. Rep. 659. I, myself, expressed a different opinion, in a case decided by me as Chancellor; but upon its being carried up to the Court of Appeals, that Court overruled my opinion; so that the question may be regarded as settled.

Then an objection was taken to the sufficiency of the memorandum, as not setting forth sufficiently the description of the property, and the terms of sale. I do not understand the objection to apply to the entry in the auctioneer's book, but to the pencil memorandum made on the land at the moment of sale, which it was thought constituted the true memorandum. But this is contrary to the universal understanding. The entry in the auctioneer's book was made as early as practicable. If a memorandum of sales be made by a shopkeeper, in pencil, or on a slate, and afterwards entered in the day book, the latter is always regarded as the original entry.

Then it was argued, that having contract-

ed and dealt with Rowland, the plaintiffs have no recourse against Wiley. But it is perfectly well settled that if a party contracts with an agent, not knowing him to be agent, and afterwards discovers the principal, he may afterwards enforce the contract against the principal. See Paterson v. Gandasequi, 15 East 62, and Railton v. Hodges, 4 Taunt. 576, &c. There is a difference if the party contracts with an agent, knowing of the principal. There, if after he knows

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the *principal, he continues to deal exclusively with the agent, and gives the credit to him, the principal will be discharged. Addison v. Gandasequi, 4 Taunt. 574. Here, however, the plaintiffs dealt with the principal from the time they discovered him. The case of Kemeys v. Proctor, seems to have been, in this respect, precisely like the present. The auctioneer entered the sale as made to the agent, and the contract was enforced against the principal. It is clear that the auctioneer's authority need not be in writing.—See Lord Eldon in Coles v. Trecothick.

The third ground was not urged in argument.

The fourth ground involves matter depending on testimony, with respect to which we have no reason to distrust the Chancellor's conclusion.

The fifth ground was not urged, and seems to be without foundation.

The decree is affirmed.

Chancellors JOHNSON and JOHNSTON concurred.

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2 Hill, Eq. 591

FRANCIS B. FOGG, and MARY, His Wife, v. JOHN IZARD MIDDLETON and HENRY MIDDLETON.

(Charleston. Feb. Term, 1837.)

[*Bonds* ⟸23, 27.]

Defendant J. I. M., with a view to prevent family discord, and to relieve himself from the suspicion of having exercised undue influence over his mother, who had by deed and will given him the bulk of her estate, executed bonds in trust to his brother for the payment of certain sums for the benefit of the eldest daughter of each of his sisters; left them with his brother, and having informed the parties interested of this proceeding, went to Europe where he still remains, leaving, however, a large estate here in the care of his brother; the bonds meanwhile remaining unpaid, and the trustee having taken no measures in relation to them: *Held*, that there was sufficient evidence of delivery; that the bonds were irrevocable, and sustained by a sufficient consideration; and the trustee was decreed to account.

[Ed. Note.—Cited in Gadsden v. Whaley, 14 S. C. 216.

For other cases, see Bonds, Cent. Dig. §§ 22, 30; Dec. Dig. ⟸23, 27.]

[*Bonds* ⟸65.]

[A bond was executed to a trustee, conditioned to pay a certain sum to a third person out of the income of an estate, for the receipt of which the trustee was agent, after the payment of certain debts. *Held*, that the bond might be enforced when, with reasonable diligence, the income would have been sufficient to pay the bond, with the specified debts.]

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 65; Dec. Dig. ⟸65.]

[*Trusts* ⟸33.]

[If A. executes a bond to B., and delivers it to C. for the use of B., and it is accepted by him, this constitutes C. a trustee of B. in respect to the bond, and he will be bound to execute the trust, and he cannot resist its execution on the ground that the bond was voluntary.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 43; Dec. Dig. ⟸33.]

[*Trusts* ⟸336.]

[Where property is conveyed, without consideration, in trust, the cestui que trust may maintain a bill to enforce the trust against the trustee who has accepted it.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 497; Dec. Dig. ⟸336.]

Heard at Charleston, April Term, 1835.

Chancellor De Saussure, who presided, pronounced the following decree, which contains a full statement of the case:

It is proper to state the relative situation of the family, and the circumstances of the case, which may be summed up in a short compass. Mrs. Mary Middleton was the widow of Mr. Arthur Middleton, the illustrious signer of the Declaration of Independence, and its vindicator with his sword. He died, intestate, after the termination of the revolutionary war, but prior to the statute of February 1791, abolishing the rights of primogeniture, and his real estate descended to his eldest son, Mr. Henry Middleton, one

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of *the defendants; whilst his personal estate was distributable by law, among his widow and children, consisting of his two sons, Mr. Henry Middleton, and Mr. J. I. Middleton, and his daughters, who respectively intermarried with Mr. Joseph Manigault, Mr. Henry Izard, Mr. Henry M. Rutledge, Mr. Daniel E. Huger, and Mr. ——— Blake.

Mrs. Mary Middleton, in her life time, conveyed by deed to her second son, Mr. J. I. Middleton, her large real estate; and by a will, purporting to be her last will and testament, disposing of her personal estate, bequeathed the greater part thereof between her two sons, and gave considerable pecuniary legacies, (as is alleged, and which does not seem to be contradicted,) to each of her daughters (except Mrs. Manigault, who was dead). Afterwards, she executed another will, and died in 1814, leaving the same in full force, by which she disposed of the bulk of her personal estate to her two sons, subject to certain legacies, and particularly a legacy to each of her daughters, of £100 sterling, which was greatly below the legacies under the former will.

The personal estate of Mrs. Middleton was appraised at upwards of seventy one thousand dollars.

Some discontents naturally arose in the minds of daughters, so slightly provided by a wealthy parent, who bestowed so large a fortune on her sons; for notwithstanding the legal right of the parent to dispose of her estate according to her judgement, her preference, or even her caprices, the moral sense of the community and the feelings of families, revolt at any very great disproportion made among children, where no misconduct exists, or is alleged to exist. These discontents reached the ears of Mr. J. I. Middleton, with the exaggerated report, that the use or the abuse of his personal influence over an aged mother, had produced the effect of diminishing her bounty to her daughters, by her last will and testament, to his benefit. His delicacy revolted at the supposed imputations, and he resolved to vindicate himself from them by voluntarily executing bonds, to each of his sisters, to the amount they would have been entitled to under the former will of their mother; and thus relieve his name and character from the suspicion of having exercised an undue influence over his mother, for his own benefit, and to the prejudice of his sisters. He accordingly executed bonds to them, or their husbands, for the sums to which they would have been entitled under the older will of their mother, and transmitted them to their respective husbands. These, it seems, were

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*returned by all of them, except Mr. Henry Izard, who, it seems, consented to receive it, but in a modified form, as appears by the two letters of Mr. J. I. Middleton, of the 4th and 17th May, 1815, to Mr. Henry Izard, in which he speaks fully on this subject; and explains his views and intentions, his motives and his acts, in relation to all his sisters. Mr. J. I. Middleton, in pursuance of these intentions, executed bonds, in trust, to his brother, Mr. Henry Middleton, with conditions for the payment of certain sums for the eldest daughter of each of his sisters, and placed them in the possession of his brother, Mr. Henry Middleton. He then went to Europe, about 1817, and has remained there ever since, leaving his estate, including the personal estate, the slaves derived from his mother's will, in the hands of his brother, Henry, as his attorney and agent; and to apply the income of the estate to the payment of the debts of her estate, and the legacies under her will. The debts have been paid, and the bond to Mr. Izard's family has been paid, but no payment has been made on the bond for Miss Mary Rutledge, now the wife of Mr. Fogg, the plaintiff. After many years, applications were made, by letters, to Mr. Henry Middleton, as the agent and attorney of Mr. J. I. Middleton, for payment, which applications being unattended to, the bill was filed in this Court, which makes this case.

The defence set up against the claim is stated fully in the answers. In substance, it is, that the bond, though signed and sealed was not delivered, but kept some time by the obligor and then deposited for safe keeping with his own agent and attorney. That it was voluntary, and without consideration, and cannot be enforced in a Court of Equity. And that it was conditional, as to the time of payment, which was to be made after the debts and legacies were paid, without interest till a year after those payments.

The first question, then, is, whether the bond, in question, is obligatory on J. I. Middleton, so that the same can be enforced in this Court?

It is proven by Mr. Bee, to have been duly executed, and he was a subscribing witness. It was a voluntary bond, in the ordinary sense, as there was no pecuniary consideration. But it was given upon full deliberation, not lightly, and upon a consideration of the highest import to the feelings of the obligor. He saw, and he felt, that the extraordinary preference given to him by his mother, by the conveyance of a great real estate, and'

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bequests of a large *personal estate, to the disinherison of his sisters, highly estimable in themselves, and who had never given offence to their mother, (for that is not pretended,) had produced a painful effect on their minds. They were disappointed of reasonable expectations, and humiliated by parental neglect amounting to a marked preference of another child, and he felt that something was due to their wounded feelings; and to quiet his own mind, and to secure himself from suspicions, if not imputations of an undue influence exercised over the mind of his aged mother, he, himself, therefore, proposes to give them bonds, equivalent to their expectation under a former will. He, himself, in his letter to Mr. Izard, puts it on that ground. He valued family concord, and propitiates it by doing voluntarily, an act which he felt to be a duty to himself, and did not consider it a bounty. He disclaims the idea, over and over again, that it is to be considered by his nieces, as conferring a pecuniary obligation on them. This, then, is a good consideration on which the bond can be supported.

It was, however, urged, that it was not delivered to Mr. Henry Middleton, as trustee for the persons intended to be benefitted, but as his agent for safe keeping. And that Mr. Henry Middleton did not accept the trust; and, therefore, the act was not perfected. Mr. J. I. Middleton himself, under his own hand, states how he considered the transaction at the time, and how his brother considered it. He says, in his letter, "In order to effect this purpose, my brother has consented

to become a trustee, for bonds, to the amount of the supposed deficit which I have drawn in favor of my eldest niece." &c. "I had it drawn in this manner, (stating the manner,) in order to avoid the possibility of its lapsing by any accident to Mary, for whom it is intended. Again, a circumstance stated, induces me to put them all on the same footing, and render the deed irrevocable, (as my determination always has been,) through my brother." In the letter of 17th May, 1815, he says, "A bond drawn in the manner you mention, shall be substituted for that now in the possession of my brother." Surely, these various expressions denote a finished act irrevocable; and that his brother was the trustee, and had consented to act. Can it be permitted to the defendant, to weaken the force or change the character of this transaction, and these clear and positive declarations, by recollections at the end of twenty years, stated by the defendant himself with proper caution, as uncertain? Assuredly not.

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The *Court must and will look to the acts and declarations of the party at the time of its origin, and not to faint and doubtful and ancient recollections. And so with regard to Mr. Henry Middleton, the defendant. In his answer, after twenty years, and after being engaged in great public affairs abroad, which drew his attention from minor affairs at home, it is stated, so as to leave it doubtful or questionable, whether the bonds were placed in his hands as trustee or as agent of his brother, and whether he accepted the trust. His brother, Mr. J. I. Middleton, unqualifiedly says he had consented to serve as trustee. Could he be mistaken, when speaking at the very time of the transaction? Or, is it not more likely, that a recollection, at such a distance of time, should be incorrect? The evidence, too, of Mrs. Rutledge, a lady of the most respectable character, drawn from her reluctantly and painfully, taken in connection with Mr. J. I. Middleton's letter, is conclusive. She testifies, "that in the month of Oct. 1819, she passed a few days with her brother, Mr. Henry Middleton, at his residence near Washington. During her stay, and the morning preceding the day of her departure, he made her a communication respecting a bond executed by her brother, J. I. Middleton. He stated, that as they, the witness and himself, might be separate many years, he requested her to recollect, that among other bonds left with him by his brother, J. I. Middleton, there was one executed to him by his said brother, for the benefit of her (witness') daughter, Mary, now Mrs. Fogg, for one thousand pounds sterling, and that if any thing should happen, she must remember that his estate would be liable for it. She understood that he was perfectly acquainted with the nature of the bond, and regarded his communication as intended to inform her that he held the bond, in trust for her daughter, Mary, although she does not remember that the word trustee was used. The amount of the bond was mentioned, but she does not remember the date.

The witness was under the impression that the other bonds alluded to, were of a similar nature to the one he, Mr. H. Middleton, desired her to bear in mind. She supposes this impression arose from her having heard that her brother, Mr. J. I. Middleton, had given bonds in favor of the children of her deceased sister Mrs. Henry Izard. The counsel for the defendant supposes that Mrs. Rutledge must be mistaken in her evidence. But, surely more reliance is to be placed on

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the plain, and positive, and affirm*ative evidence of a witness, entitled to the highest credit, who gives particulars of time and place, and the occasion of the communication, on a subject to which her attention was particularly drawn, a few years after the execution of the bond, than on the negative recollections of a defendant, even of the same high character, after a lapse of twenty years.

In my judgment, the bond was duly executed, was irrevocable, was placed in the hands of Mr. Henry Middleton, as trustee, and he was bound to take care of the interests of the cestui que use. This is the equity and justice of the case; and is, I think, amply supported by the authorities cited by the counsel in the argument.

The only question which remains, is, when it shall begin to bear interest. The condition of the bond is, that the sum of one thousand pounds sterling should be paid in three equal annual instalments, to commence from the day when the debts and legacies charged on the estate of the late Mrs. Mary Middleton, mother of the said J. I. Middleton, shall have been paid and released, with annual interest on the said sum; which interest shall commence from the end of one year, after payment of debts and legacies, as aforesaid. The plaintiffs allege, that the income of the estate was sufficient to have paid the debts and legacies, some time in the year 1820, and that the interest should commence one year after. The defendants insist, that the income of Mrs. Mary Middleton's estate, broke in upon as it was, by a defaulting agent, was not sufficient to have paid the debts and legacies of her estate, before about the year 1830 or '31; consequently no interest is chargeable earlier. This is a point which can only be settled by an account which must be gone into, unless the parties shall agree and fix upon an intermediate time. It appears that the personal estate bequeathed by Mrs. Middleton to her son, Mr. J. I. Middleton, remains in the hands of Mr. Henry Middleton.

It is therefore Ordered and decreed, that the sum of one thousand pounds sterling,

the condition of the bond in question, be paid out of the said estate, together with interest; and that it be referred to the Commissioner, to examine the accounts of the income of the said estate, from the year 1815, and to ascertain the debts and legacies due by the said estate; and to report when the income was sufficient to have paid the said debts and legacies; and to calculate interest on the said bond, from one year

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after the pe*riod when said debts and legacies could have been paid, which shall be paid out of the said estate.

On further consideration of this case, it appears to me proper to add, that after the distinct and positive declaration, in writing, by J. I. Middleton, that his brother had consented to accept the trust in question, and after the avowal of the trust by Mr. Henry Middleton, testified by Mrs. S. S. Rutledge, it was not in his power to disclaim the trust. He had assumed the trust, and acted under it, by paying the money on one of the bonds to the family of Mr. Izard; and that without any other instructions from Mr. J. I. Middleton, but on his general authority. Again, Mr. J. I. Middleton says, in his answer, that he did not advise his brother to take the ground of defence assumed in the answer, to wit: That the bond was voluntary and revocable, was never formally delivered, and that Mr. Henry Middleton never assumed the trust. This appears to me a plain disavowal of the defence; notwithstanding the ultimate adhesion to the defence. I cannot, upon the fullest consideration, see any reason to doubt the equity and the legality of decreeing for the plaintiffs.

Defendants appeal, and hope the decree may be reversed, for the following, among other reasons:—

1. That plaintiffs seek payment of a voluntary bond, never delivered to them, but signed and sealed, and made payable to Henry Middleton, who refuses the trust; so that plaintiffs cannot sue at law. But if they cannot sue at law, they cannot be relieved in Equity, for Equity never interferes in favor of a volunteer.

2. That the bond being voluntary, and the plaintiffs not parties to it, J. I. Middleton had a right, if he saw fit, to recall the money. That he has exercised this right, and Equity will not control the legal right of the obligor, or obligee, or give the plaintiffs a better security.

3. That, in point of fact, there was no delivery of the bond; and no acceptance of the trust, by the supposed trustee.

4. That in favor of a volunteer, relief cannot be extended in Equity, beyond the letter of the deed. Whereas, the decree not only carries the relief beyond the letter of the deed; but, in opposition to Equity, makes the defendant liable to the plaintiffs, for the default of a third person; and decrees interest from the time when the debts and legacies might have been paid, if moneys

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lost *without the wilful default of the defendants, had been duly applied.

Petigru, for appellants.

Grimke, contra.

Chancellor JOHNSTON delivered the opinion of the Court.

Under the decided cases, the delivery of the bond would have been established upon even less evidence than was furnished on the trial. As it is, the proof fully sustains the Chancellor's conclusion on the fact.

The law of the case seems to admit of little doubt.

Cases have been quoted to shew that Equity will not aid a mere volunteer, where no legal right has passed, or where the action of this Court is necessary to constitute the relation of trustee and cestui que trust.

But the delivery and acceptance of the bond, ipso facto, constituted Mr. Henry Middleton, trustee. The bond contained his commission, and set forth his duties.

It also vested in him, the debt of which it was the evidence; and if that debt should be detained, he had a legal remedy to recover it.

Wherever a trustee has accepted a trust, he is bound to a diligent discharge of his duties. If he holds choses in action, with a clear remedy on them, it is unfaithful in him not to endeavor to enforce them. If he holds a bond, even although that bond is a free gift, he has no right to remit it.

It never was the law that a trustee was not as amenable to a volunteer cestui que trust, as to one who is not a volunteer. If that were the law, no executor would be accountable to collateral legatees.

So that without going further than Mr. H. Middleton, the plaintiffs have a right to come here to compel him to perform his trusts.

But if he is liable, it results that he may be compelled, also, to surrender to his cestui que trusts, all the legal remedies he possesses. And this puts the plaintiffs in possession of the bond, to all intents, as if it had been drawn to them as obligee, or assigned to them.

If it had been drawn to the plaintiffs, by Mr. John Izard Middleton, or assigned to them by Mr. Henry Middleton, will it be pretended that the plaintiffs could not recover from the obligor, even if it was given on no consideration? If it had been given on a consideration, which failed, that would be a good defence. But the original want of consideration would be none.

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*But if a consideration were necessary to support the transaction and enable the plaintiff to sue here, one existed in this case, not

valuable, indeed, but meritorious. The Chancellor has stated it truly and forcibly.

The object was to heal family discord, by curing suspicions.

In Wiseman v. Roper, 1 Ch. Rep. 84, articles were enforced in favor of a nephew against an uncle, whose principal object in entering into them, was to reconcile the nephew's father to him.

In Stapilton v. Stapilton, 1 Atk. 1, Lord Hardwicke held a volunteer entitled to the execution of an agreement intended to establish the peace of a family.

If the Court, in this case, travels beyond the case of the trustee and cestui que trusts, and takes cognizance of the liabilities of the obligor, it is at the instance of the defendants, who insisted on his being made a party. Being here, at his own instance, the Court will, to prevent circuity of action, decree against him what he would have been liable to pay the defaulting trustee, or what the plaintiffs could recover, if the bond had been assigned to them.

The payment of the bond is, by its terms, made to depend upon the extinguishment of the debts and legacies charged on Mrs. Middleton's estate. The instrument should receive a reasonable construction; neither too strict nor too loose on either side. On the one hand, it could not be the intent of the obligor, when he gave the bond, to give an unavailable obligation: which this would be, if he might evade payment, by capriciously delaying to discharge the precedent obligations. On the other hand, he should not be bound to greater diligence in paying the prior obligations, than would be exacted of one who had accepted a trust to pay them out of the assets of the estate; and if, by reasonable diligence, they could not be paid as early as the plaintiffs could have wished; or if without fault in Mr. Middleton, the assets were wasted by an agent, (which would excuse a trustee,) these circumstances should be taken into consideration in fixing the time when the debts and legacies should have been extinguished. Of course, these matters will be attended to in the reference which the Chancellor has ordered.

The motion is dismissed.

Chancellors JOHNSON and HARPER concurred.

Chancellor DE SAUSSURE absent, from indisposition.

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2 Hill, Eq. *600

*JACOB ESSWEIN and NANCY ESSWEIN v. JOHN SEIGLING, Executor of Theodore Esswein.

(Charleston. Feb. Term, 1837.)

[*Executors and Administrators* ⇐491; *Gifts* ⇐20.]

A gift executed by delivery is binding. Actual manual delivery is not necessary; it is enough that the donee have possession with the assent of the donor; and therefore where the defendant was an executor in possession of an estate, the management of which required extraordinary trouble, and the legatees wrote to him to retain $1,000 of the funds in hand as a present, which he accepted; and afterwards filed a bill for an account: *Held*, that the plaintiffs were bound and defendant was allowed this sum in making up the accounts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2082; Dec. Dig. ⇐491; Gifts, Cent. Dig. § 35; Dec. Dig. ⇐20.]

Heard before Chancellor JOHNSON, Charleston, May Term, 1836.

Theodore Esswein, of Charleston, by his will dated 17th March, 1830, gave all his estate to his parents, Jacob Esswein and Anna Maria Esswein, and his sister, Nancy Esswein, of Manheim, Germany; and named Dr. Benjamin Simons and John Seigling, of Charleston, executors. Anna Maria died before the testator, and he died in Cuba, on the 28th June, 1830.

Seigling, one of the executors, who was in Cuba, removed the property there, to Charleston; which was not effected without some difficulty; and proved the will here.

Jacob and Nancy Esswein, in Dec. 1830, wrote to Seigling, among other things, as follows: "The compensation which the law allows, does not appear to us an adequate indemnity for a man of business, nor will we limit ourselves to it, but beg you to make use of our gratitude to any extent you may deem proper." And again, on the 6th March, 1832, "In acknowledgment of the great pains you took in these affairs, we, with a deep sense of gratitude, intreat you to accept, besides the legal commission, or provision as executor, $1,000, both as a present from our part, and a token of memory of your late friend, which sum you will please deduct from the proceeds in hand." And on the 13th June, 1832, "The precaution you display in the management of our affairs, leaves us more indebted to you, but we hope hereafter to find occasion to return to you, or some member of your respectable family, part of our obligations. Let us entreat you, esteemed friend, not to judge us wrongfully on that account, nor suspect us of a desire to pay off a friendship, which has obliged us forever, and bids us to avail ourselves of every opportunity to prove by deed the sincerity of our sentiments."

They afterwards found fault with the administration, and filed this bill.

The Commissioner made his report of the balance in defendant's hands. The plaintiffs excepted to the allowance of the $1,000.

Johnson, Chancellor. In assuming the administration of the estate, the defendant incurred the obligation imposed by law, to

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*pay the plaintiffs what should remain of the estate after paying the debts of the testator, and the necessary expenses and charges of

administration; and as a compensation for his services the act of the legislature authorizes him to retain a commission of two and a half per ct. on all moneys received, and provides the like commission on all sums paid out; and the act of 1745, (Pub. Laws, 203,) provides, that if the executor shall have extraordinary trouble in the management of an estate, he may bring an action in the Court of Common Pleas, in which a jury may allow him a further compensation, not exceeding five per cent on the amount which may have passed through his hands. In stating the accounts, the Commissioner credited the defendant with two and a half per cent for receiving, and the same for paying out the funds. So that he became indebted to the plaintiffs on the balance of the estate; and the question is, whether the defendant is entitled to credit for the additional sum of $1,000, which the plaintiffs tendered to him, and authorized him to deduct from the funds in hand, and which he agreed to accept as further compensation. If it be regarded as a mere voluntary offer to give, I think very clearly that he is not.—No executory contract is binding, unless it is founded on a good or valuable consideration, and the discharge or dissolution of a subsisting debt or obligation, is as obviously the subject matter of a contract, as an undertaking to pay money, or to do any other act, and necessarily requires the same consideration to support it.—Hooper v. Goodwin, 1 Swan. 485; Bryson v. Brownrig, 9 Ves. 1; Byrn v. Godfrey, 4 Ves. 6; Reeves v. Brymer, 6 Ves. 516. No declaration of any intention to give, however solemn and formal, even although the terms import a present gift, will be binding unless it be accompanied by a delivery or transfer of the thing intended to be given. But it follows necessarily, that a gift executed by a delivery of the thing intended to be given, is binding on the donor, however improvident it may have been on his part, or however unworthy the donee. Cotteen v. Missing, 1 Mad. Rep. 103. I do understand, however, that an actual manual delivery is indispensible. It is enough, that the donee obtained the possession of the thing given, under the authority and with the assent of the donor. Thus, if the gift be of a horse in a stable, and the donor say to the donee, "I give you that horse and authorize you to take him," and he take him accordingly; so of money in a drawer, or goods in a warehouse.

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*Here, the defendant was in possession of a fund which belonged to the plaintiffs, and in their letter of the 6th March, 1832, they intreat him, "to accept, besides the legal commission, or provisions as executor, $1,000, both as a present on our part, and a token of memory of your late friend, which sum you will please deduct from the proceeds on hand;" a most clear and decided declaration of an intention to give. The answer of the defendant, to this letter, is not before the Court; but in their letter of the 1st September, 1832, they say, they rejoiced "at the acceptance of the gratification we offered to you, as a feeble effort of our gratitude." &c; and it is obvious that in his reply to the first letter, defendant had consented to accept the tendered gratuity, and in conformity with their request, had deducted it from the fund in hand, and appropriated it to his own use. So that the gift was perfected to the whole extent of which, from its nature, it was capable; and the question is, whether the plaintiffs are bound? I think they are. The circumstances well warranted the defendant in treating this sum as his own, and the necessary inference is, that he did so. He may have adventured it in hazardous and loosing speculations, or dissipated it in folly. If he has made a profit in it, and is bound to account for the principal, he must also account for the profits; and it would be unreasonable to call him to such an account at this day. If it had been lost, or dissipated in folly, the plaintiffs are chargeable with throwing this temptation in the way of the defendant.

There is another view of this matter. The Act of 1745, before referred to, allows an executor additional compensation, not exceeding five per cent., when he shall have had extraordinary trouble in the management of the estate. The defendant had extraordinary trouble with this estate. A part of it was in Cuba, and a part here, and necessarily involved the trouble and expense of traveling to and fro; he was under the necessity of remitting the funds to Germany, by means of bills of exchange; his diligence and prudence in the management of it, is again and again admitted, and commended in the plaintiffs' letters; and although the tender of the $1,000, is put on a footing of a voluntary donation, yet it is obvious, that this extraordinary trouble, is the basis of the gift, and entered largely into the considerations; so that in truth the donation was not merely gratuitous; and I apprehend, that the Court would not enter very minutely into the inquiry,

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whether the compensation *fell short, or exceeded, the compensation allowed by law. As in Trimmier v. Trail, 2 Bailey 480, where a legatee agreed not to charge the executor interest on her legacy, because he had not charged her commissions on her legacy, and had boarded her gratuitously for a short time; and it was held that the consideration was good, and the promise binding, without an inquiry into the exact state of the accounts. The exception is, therefore, overruled.

From this decree the plaintiffs appealed.

Petigru for plaintiffs.—Delivery is essential to a gift, and a consideration to a promise. Neither delivery nor consideration is made out. But even if the gift had been

executed, the defendant could not insist on it. The rule is against allowing a person standing in a fiduciary relation, to practice upon the confidence of his constituent, so as to make an advantage of his bounty, till the relation is at an end. Thus a gratuity from a client to his attorney, may be recalled. Walmsley v. Booth, 2 Atk. 25; Newman v. Payne, 2 Ves. jr. 199; Welles v. Middleton, 1 Cox 112.—So the principle has been enforced against a guardian, Hylton v. Hylton, 2 Ves. 547; Pierse v. Waring, 1 P. Wms. 121, n.—Against an agent, Cray v. Mansfield, 1 Ves. 379; Fox v. Macreth, 2 Cox 158; Gibson v. Jeyes, 6 Ves. 266.—Against trustees, Campbell v. Walker, 5 Ves. 678; Ex parte Hughes, 6 Ves. 617.

All these were cases perfectly free from fraud. The gifts or contracts had been executed; but on the principle of protecting against an abuse of confidence, the transactions were not allowed to stand. This case is fully within the principle, and is a very weak one for the claim, which is certainly not stronger than a receipt without satisfaction. A receipt in full would not have bound the plaintiffs. Corbett v. Lucas, 4 M'Cord 323. The claim of the $1000, is, therefore, certainly bad at law. A fortiori it is bad in Equity, which never assists a volunteer, but sets aside actual gifts from a cestui que trust to his trustee, as against policy and justice.

Eckhard, for defendant.—In all cases of a gift the real question is, whether the donor has parted with his dominion over it. M'Dowall ads. Murdoch, 1 Nott & M'Cord, 237. Where the subject will not admit of a

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corporeal delivery, if the party goes as *far as he can towards transferring the possession, his bounty will prevail. Toller, 234. A gift may be by deed, in word, or in law. All goods and chattels personal, may be given without deed. A free gift is good without consideration, and it is not in the donor's power to retract it, though he made it without any consideration. 2 Tomlin's Law Dictionary, Title Gift. Though a Court of Equity will not assist a volunteer, yet if the act be completed, though voluntary, the Court will act upon it.—18 Vesey, 150. To complete a gift, there must be an actual or constructive delivery of possession.—Pitts v. Mangum, 2 Bailey, 588. There may be cases where the Court will establish an agreement made with a trustee for extraordinary allowance.—Ayliffe v. Murray, 2 Atkin's 59; Brocksopp v. Barnes, 3 Maddock, 61. The appointment of an executor in India, constitutes him agent for the management of the estate.—Poole v. Larkins, 4 Vesey, 72; Cockerell v. Barber, 2 Russel, 585. The act of 1745 recognizes the principle of additional compensation to executors, beyond commissions.—Logan v. Logan, 1 M'Cord's Chancery, 5. As to the rule of guardian and ward, that applies where a gift is required as a condition of accounting.—1 Maddock's Chancery, 123. The parties being of full age, are prima facie bound by their contracts. The inquiry is, has any supposed influence which an attorney has over a client, been used to his prejudice.—Ervin v. Miles, 1 M'Cord's Chancery, 547.

PER CURIAM. The case depends on testimony, and we are satisfied with the conclusion of the Chancellor. The decree is affirmed. Parties to pay their own costs.

Chancellor JOHNSTON dubitante.

CASES IN CHANCERY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA, IN MAY TERM, 1837.

CHANCELLORS PRESENT.

HON. HENRY W. DE SAUSSURE, President.
" DAVID JOHNSON,
" WM. HARPER,
" J. JOHNSTON.

2 Hill, Eq. *605

*CAROLINE SEIBELS v. ABNER WHATLEY, BARNET STATHAM and Wife, and Others.

(Columbia. May Term, 1837.)

[*Powers* ⟸19.]

Testator, by his will, after a specific bequest gives the residue to his wife for life, and at her death "to the nieces of my wife, in such manner and at such time as my said wife shall think proper." *Held*, that the power of disposing was not given to the wife; that she had no right to divest the legacies so given, nor to disturb the equality of the portions which the will vested in the nieces, but merely to fix on the time and manner of enjoyment; and that a niece of the husband not being within the description of those named in the will, could not take by the appointment of the wife.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 41; Dec. Dig. ⟸19.]

[*Wills* ⟸573.]

Where the term "increase of slaves" is used, it means increase thereafter to be produced. Under a bequest of a female slave and her increase, children of the slave born before the execution of the will, do not pass.

[Ed. Note.—Cited in Donald v. Dendy, 2 McMul. 130, 131, 132; Donald v. McCord, Rice, Eq. 330, 333, 341, 342; Boyd v. Satterwhite, 12 Rich. Eq. 492, 493.

For other cases, see Wills, Cent. Dig. § 1218; Dec. Dig. ⟸573.]

Edgefield, June Term, 1836.

Peter Lamkin, late of Edgefield district, having a wife but no children, made his last will and testament, dated 10th of June, 1826, of which the following is a copy:

"I, Peter Lamkin of the State and District aforesaid, being of sound mind and memory, but mindful of the uncertainty of life, do make and ordain this my last will and testament, revoking all others.

"1st, I lend unto my wife Helen Lamkin all my estate, real and personal, (after paying all just demands that I may owe,) to be by her enjoyed during her life, and at her decease, I do hereby give, devise and bequeath unto Edmund Lamkin Whatley, my

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nephew, *the tract of land I now live on, containing eight hundred acres, together with all the crop, horses, cattle, hogs, farming utensils, &c. that may be on the plantation at the decease of my said wife; also the following negroes: Ned, Sam, Pompey, Pollidore, George, Nance and her increase, Mary and her increase, Betty, the wife of Ned.

"The balance of my negroes and other property not herein specified, as willed to Edmund L. Whatley, at the death of my wife Helen, it is my wish shall be given to the nieces of my wife, in such manner and at such time, as my said wife, Helen, shall think proper. In testimony whereof I, the said Peter Lamkin, have hereunto set my hand and seal this tenth day of June, 1826. Peter Lamkin. [L. S.] Witnessed, &c.

"It is my wish that Col. Abner Whatley, and my wife, have the sole management of my affairs."

Shortly after the date of the will, Peter Lamkin died.—Col. Whatley qualified alone as executor on the will, and Helen Lamkin, the widow, continued in the possession of the property until her death, in April 1831.

Helen Lamkin the widow, left a will in which, after reciting the power given to her

by her husband's will of distributing the residue of his estate after death &c. she gives of that estate, to Elizabeth Helen Lamkin, (her husband's niece, not hers) a negro child named Emma: to all the rest of her nieces not otherwise therein provided for, five dollars each; and the residue of the estate to her nieces, Helen Anne Whatley and Caroline Lamkin Statham, to be equally divided betwen them; and appointed Abner Whatley her executor. By a codicil, she altered the distribution between Helen Anne Whatley and Caroline L. Statham, and gave to Helen Anne, a negro girl, Harriet, and a tract of land called the Pickle place, and the residue to Caroline L. Statham.

After the death of Helen Lamkin in April 1831, Abner Whatley qualified on her will, and in conformity with its provisions, delivered over the legacies as therein directed, except the negro girl, Emma, (a child of Nance, born before the execution of Peter Lamkin's will and bequeathed by Helen Lamkin to Elizabeth,) which he still holds as guardian of his son Edmund L. Whatley.

The negro woman Nance, bequeathed by Peter Lamkin to E. L. Whatley, had at the execution of his will two children, Tom and the said girl Emma which Abner Whatley,

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the executor, re*garded as passing by the terms of the will, "Nance and her increase," to his son Edmund, and therefore as his guardian has them now in possession.

The plaintiff, Cornelia Seibels, a niece of Helen Lamkin, has filed this bill against Abner Whatley, as executor of the two wills, and as guardian of his son, Edmund L. Whatley, and against Barnet Statham, and Caroline (formerly Seibels) his wife, Dr. Thomas Batty and Helen Ann (formerly Whatley) his wife, and Eliza Seibels, as defendants, claiming an equal share with the other nieces of Helen Lamkin, to that portion of Peter Lamkin's estate, which he by his will directs to be given to the nieces of his wife, in such manner and at such time as she shall think proper; and that Tom and Emma form a part of this estate, thus subject to an equal division among the nieces of Helen Lamkin, and do not pass and vest in Edmund L. Whatley by the terms and description "increase" of Nance, although they were born before the execution of the will of Peter Lamkin. All the defendants, except Eliza Seibels, answered, and insisted that the will of Peter Lamkin conferred the power upon his wife to dispose of this property among her nieces in such portions as she might think proper; and Abner Whatley suggests in his answer, that if such was not his intention, and the property be now subject to equal division among all the nieces of Helen Lamkin, then other nieces who are not parties to this suit are entitled to come in and take shares.

Johnston, Chancellor. The first point made by counsel, is whether Tom and Emma, children of Nance, born before Mr. Lamkin's will, pass to E. L. Whatley under the bequest to him of "Nance and her increase."

The words used do not limit the increase given with Nance to future increase. Increase, as a general term, will, I suppose, include past increase as well as future; and extend to all the children of the stock slave.

The next point relates to the extent of the power conferred on Mrs. Lamkin by her husband's will.

The words used by the testator do not give the wife the power of giving or bequeathing to her nieces, but amount to a bequest to them by the testator himself. If the power of disposing had been given to the wife, and not exercised by the husband, then it might have been a debatable question, whether she

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had not such control *over the corpus as to apportion it according to her sound discretion. In such case, I think her distribution, however unequal, would stand, unless it frustrated some expressed object of her testator, and thus evinced fraud or an evasive motive.(a)

The first words used by the testator are these: "The balance, &c. at the death of my wife, it is my wish shall be given to the nieces of my wife." If he had stopped here, I think no lawyer would doubt that this would have amounted to a direction to his executors to deliver "the balance" to his wife's nieces, and so would have constituted a valid bequest to the nieces themselves.—The executors would have taken upon that trust.

The words superadded ("in such manner and at such time as the said Helen shall think proper") have no other effect, than to require the executors to deliver the property at such times and in such manner, as the wife may think most advantageous to the legatees. This gave the wife no right to divest the legacies given by the husband to the nieces, nor to disturb that equality of portions in the corpus of the legacies which the will of the husband vested in them, but merely to fix upon a time and manner for their enjoying their shares. As to time, for instance, she might order the legacies to go over either in her life time or at her death, and either before or at the nieces marrying or coming of age, &c. As to manner, she might by deed or will have ordered the property to be delivered either free from or subject to, trust or settlements, &c.

Mrs. Lamkin transcended her power, not only in attempting to take from some of her nieces their right to equal portions, but in endeavoring to give part away from her own nieces to Elizabeth Helen Lamkin, a niece of

(a) 1 Con. Eng. Ch. Rep. 242; 2 Ib. 303; 5 Ib. 464; 6 Ib. 405; 7 Ib. 562; Sug. Pow. 440, 442, 481, 488; 7 East. 521; 1 Vin. 66; Harp. Eq. Rep. 117.

her husband. The husband gave exclusively to the former; his own nieces do not fall within the legatees described by him, and cannot take without violating the words of his will.(b)

It is decreed that so much of the bill as relates to Tom and Emma ante nati "increase of Nance" be dismissed.

That the appointment made by Mrs. Lamkin among her own nieces, be set aside for inequality: and that in favor of Elizabeth Helen Lamkin be set aside, because made to a person not described in the power conferred on her.

That the Com'r do make up the accounts, and ascertain and report the names and ages

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(i. e. whether infants or not) of the per*sons entitled to take as nieces of Mrs. Lamkin. Also what would be the most proper time for delivering their portions, and subject to what trusts and conditions. The costs to come out of Mrs. Lamkin's estate so far as it may extend. The balance, if any, to go according to the effect of the decree, under the rule of Court.

The defendants, except Eliza Seibels, appealed, and will move the Court of Appeals to reverse so much of the decree as sustains the bill, and decides that Helen Lamkin had not power to dispose of the property in such proportions as she might think proper, among her nieces; and to dismiss the bill on the ground, that Peter Lamkin by his will conferred upon his wife the power of disposing of the property as she should think proper, with no other restriction than that the objects of her bounty should be her nieces.

The plaintiff appeals, and contends that Tom and Emma did not pass to E. L. Whatley.

Wardlaw, for the plaintiff.
Bauskett, for defendants.

HARPER, Chancellor. We differ from the Chancellor who pronounced the decree, in relation to the subject of the plaintiff's ground of appeal. When the term "increase of slaves" is used, I think it is the common understanding of men, that it refers to increase thereafter to be produced. If a female slave were bequeathed who had children grown up, and themselves having children, would it be thought that all these were to pass under a bequest of the first parent and her increase? So of a domestic female animal. When the right of a tenant for life to the increase of a flock or herd is spoken of, the increase to be produced after his title accrues, is of course meant. It has been decided by this Court, overruling the case of Gayle v. Cunningham, (Harp. St. Rep. Eq. 124,) that the children of female slaves born after the making of the will and before the death of the testator, do not pass under a bequest of the mother. The express bequest of the slave and her increase, might perhaps be construed to have the effect of indicating the testator's intention that these should pass. But I cannot in any way construe them to relate to children born before the making of the will.

With respect to the defendants' ground of appeal, we agree with the Chancellor, and little needs to be added to his reasoning.

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*There can be no doubt of the correctness of the remark, that if the will had stopped at the words—"The balance &c. at the death of my wife, it is my wish shall be given to the nieces of my wife"—that though expressed as words of wishing or recommendation, they would have been imperative and made an effectual bequest to all the nieces of the wife, who would have taken equally; and that the wife could have had no control in the matter. What effect can be given to the superadded words "in such manner and at such time as my said wife, Helen, shall think proper?" It is not said in such proportions; and can such construction be given to the words? It is plain that the words "at such time" can have no effect in this respect. Can the words "in such manner?" It seems obvious enough that manner is something different from substance or quantity. In the King v. the Marquis of Stafford, 7 East. 521, referred to by the Chancellor, the gift was to the wife for life, and then to the use of her issue "in such parts, shares and proportions, manner and form," as she should direct. There was no doubt about her power of apportioning; but it was contended that under the devise to her issue, she could only appoint an estate tail. But Lord Ellenborough determined on the words "manner and form"—that they import the power of determining the nature and quantity of the estate the issue should take, and therefore that the fee was well appointed by the wife. In Trollope v. Linton, 1 Cond. Eng. Ch. Rep. 242, it was determined by the Vice Chancellor, Sir John Leach, that the words "manner and form" have the effect of authorizing the person having the power of appointment to give equitable estates to the appointed; and that the grant of a term of 500 years to trustees for their use, was a good exercise of the power. The cases on the subject are collected by Mr. Sugden in his treatise on Powers, and he comes to the conclusion (p. 442) that "In all these cases, it is quite clear the testator means the fee to pass: and the word manner or any word of the like effect, may well be construed in favor of the intention, to mean, in such mode as to the quantity of the estate to be given, as the donee shall think fit." Here, then, full effect may be given to the words used in the will, without holding them to relate to the proportions of the property, which they do not naturally import. Mrs. Lamkin might have given the share of either of her nieces to trustees for her separate use during life, and at

(b) 4 Con. Eng. Ch. Rep. 97; 13 Ves. 114.

her death to her issue, or made any other similar arrangement which prudence had

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seemed to require. *It was well observed in argument, that if a similar power had been given as to property bequeathed to a single individual, it would have been impossible to say that these words could have no operation or effect. There is no reason for giving them a more extensive operation when the bequest is a joint one. The plaintiff's motion is granted; and the decree affirmed with respect to the defendant's ground of appeal.

Chancellors DE SAUSSURE and JOHNSON, concurred.

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2 Hill, Eq. 611

JOHN P. KING v. MARGARET CLARKE.

(Columbia. May Term, 1837.)

[*Executors and Administrators* ⟸57.]

An administrator cannot set aside the gifts or contracts of his intestate, on the ground that they were made in fraud of creditors. He has no other rights than his intestate had.

[Ed. Note.—Cited in White v. Palmer, McMul. Eq. 116.

For other cases, see Executors and Administrators, Cent. Dig. § 309; Dec. Dig. ⟸57.]

[*Fraudulent Conveyances* ⟸241.]

A judgement against an administrator in Georgia, is not such evidence of indebtedness as will enable one claiming as a creditor, to sustain a bill here to set aside the gifts of the intestate as fraudulent.

[Ed. Note.—Cited in Tillman v. Walknp, 7 S. C. 62.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 700; Dec. Dig. ⟸241.]

[*Judgment* ⟸689.]

Administrators of the same intestate in different states, are so far independent of each other, that a judgement against one furnishes no right of action against the other. There is no privity between them.

[Ed. Note.—Cited in Tillman v. Walkup, 7 S. C. 62.

For other cases, see Judgment, Cent. Dig. § 1212; Dec. Dig. ⟸689.]

[*Fraudulent Conveyances* ⟸205, 208.]

A creditor seeking to set aside a voluntary conveyance for fraud, must shew that his debt existed at the time of the conveyance by such evidence as would establish it in an action at law; and that he cannot be paid unless the conveyance is set aside.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 625, 631; Dec. Dig. ⟸205, 208.]

Before Chancellor Johnston, Edgefield, June Term, 1836.

The bill (filed Sept. 1833) states that S. & M. Allen brought their action of assumpsit in Richmond county, (Geo.) against Freeman W. Lacey and David Clarke: that pending the suit (on 7th Jan. 1830,) Clarke died intestate. Wm. Magar administered on his estate in Georgia, and was made defendant to the suit; and judgment was recovered (12th Jan. 1832) against Lacey in his own right, and against Magar as administrator of Clarke, for ten thousand dollars, and execution lodged on which nothing has been collected. That S. & M. Allen assigned the judgment, 12th April, 1832, to the plaintiff. That Lacey resides without the State, and at the rendition of the judgment and ever since, was totally insolvent. That the judgment against Magar was taken, subject to the plea of plene administravit præter. The amount of assets in the administrator's hands undisputed, does not exceed $850, for which the plaintiff is willing to give credit on the judgment; and beyond this, he has, in money and property, to the value of perhaps eleven hundred dollars, claimed by defendant—the whole amount disputed and undisputed, not exceeding two thousand dollars. That, pending the said action against him, and in anticipation of the judgment and to defeat it, David Clarke, on 4th Nov. 1829, executed a deed of gift to the defendant, his mother, of several slaves and other property, but retained possession himself until shortly before his death, which took place in Florida, in 1830. That, when about to go there, he placed a large sum of money in defendant's hands, on deposit, or as a gift.

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That *shortly after his death, and before administration, the defendant took into her possession all his personal chattels which she could seize, and removed to this State, and has since, with the funds of Clarke, as is alleged, purchased lands and negroes. The bill charges the deed of gift to be fraudulent and void as to creditors; and prays that it may be set aside—the property sold and applied to plaintiff's judgment; that defendant account for the money and effects which came into her hands; and for the property purchased with Clarke's funds, and for the hire of the negroes—and for general relief.

An amendment to the bill (filed 18th January, 1834,) states that at the filing of the original bill, the Ordinary's office for Edgefield was vacant; and since filled, the plaintiff has, in that district, taken out letters of administration on the estate of David Clarke; and prays a general account from defendant.

Defendant, in her answer, denies the plaintiff's right to sue in his character of creditor, and insists that, if responsible, she is only so to an administrator. Requires proof of the facts to establish the plaintiff's claim; and insists that the Georgia judgment, being only evidence of debt, is examinable; and the alleged cause of action being for money won at play by David Clarke, from the clerk and agent of the Allens, it is questionable whether by the laws of this State, such action could have been sustained: and that the claim now made is by one who has purchased the judgment at one-fifth of its nominal value. She denies all fraud in the bill of sale: two of the

negroes mentioned in it had been in her possession for many years before, when she advanced money to her son; one is not, and has not been in her possession, and the remaining negro has been in her possession since the execution of the bill of sale. She received no money from her son on deposit. Lacey gave her $250 for a horse given her by her son; and his note for $2,000, which is worthless. As to the land and negroes purchased by her, they were bought from her own earnings hoarded up for many years, aided from time to time with small sums presented to her by her son. To the amended bill she answers that some articles of furniture were left with her by her son, which are not accounted for.

On the trial, the plaintiff's letters of administration, and an exemplification of the Georgia judgment against Lacey and David Clarke's administrator, was given in evidence;

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but no witness was *called to prove the assignment. Freeman W. Lacey examined by defendant on commission, proved that the Georgia action was brought to recover money won by David Clarke and others from the clerk of S. & M. Allen. That Clarke and his partners won not more than five or six thousand dollars from the clerk, who, to the witness' own knowledge, lost other large sums to persons not connected with Clarke. That, in 1831 or '32, he paid to the plaintiff five or six thousand dollars, in notes and bonds of the deceased Clarke, some of which have been since collected; and that the plaintiff informed him he had purchased the judgment for two thousand dollars.

Other evidence was given which is not stated in the brief: nor is it necessary to the points decided, that it should be detailed. The Chancellor in his report, states that he thought the fraud was fully made out, and regrets that the plaintiff did not establish the indebtedness to the Allens, or the assignment to himself.

The Chancellor pronounced the following decree:

Johnston, Chancellor. The plaintiff in his character of administrator of David Clarke, is not entitled to avoid the gifts or contracts of his intestate, on the ground that they were made in fraud of creditors. An administrator is the mere representative of his intestate. Wherever the intestate would be bound, the administrator is bound. In this case, unless David Clarke could have set aside the gifts or contracts complained of, (which it will not be contended he could have done,) his administrator, as administrator, cannot do so.

The argument is very frequently advanced, that an administrator represents the creditors of his intestate. But he does this to no greater extent than the intestate did. The intestate held his property in trust for his creditors. If he made a disposition of it in fraud of their rights, they could set it aside. But could he?

It is asked, If an administrator cannot set aside the fraudulent gifts of his intestate, for what reason is he made a party to all suits brought by the creditors against the fraudulent donee? For the very same reason that the donor, if he were alive, would be made a party—in order that it may appear that there is an insufficiency of property to answer the creditors without resorting to that included in the gift; and that a judgment may be rendered against such as is accessible, in exoneration of the donee, whose gift, being

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*good as between himself and donor, must be protected as far as can be done without injuring the creditors. Another reason is, that the funds be restored to the administrator for due administration.

It is necessary then for the plaintiff to shew himself to be a creditor, in order to avoid the gifts of which his bill complains. Has he done this?

If the judgment rendered in Georgia against Magar, the Georgia administrator, was evidence of the indebtedness of the estate, still he has not proved that that judgment was ever assigned to him. This would be fatal to his pretension that he is a creditor.

But I am inclined to the opinion, that the judgment is not evidence that the estate is indebted to the Allens. I mean, that if the Allens had brought suit against the S. Carolina administrator, they could not have offered this judgment, rendered against the Georgia administrator, as evidence of their debt, but would have been obliged to substantiate their debt by original proof.

Professor Story, in his commentary on the Conflict of Laws, Foreign and Domestic, chap. 13, sec. 522, says on the authority of Lightfoot v. Bickley, 2 Rawle, 431, that "where administrations are granted to different persons in different States, they are so far deemed independent of each other, that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration: for in contemplation of law there is no privity between him and the other administrator."

The United States Constitution, in declaring that full faith and credit shall be given in each State to the judicial proceedings of the other States, means only, I apprehend, that credit shall be given to them as against parties bound by the record, or their privies, not as against strangers. I take the South Carolina administrator to be a perfect stranger to the Georgia administrator. He is not even his successor, as administrator de bonis non.

But the plaintiff, as administrator, is entitled to an account of the property of his intestate, received by the defendant without

the gift of the intestate. Let an account be taken for so much of that kind of property as the plaintiff can prove the defendant to have received, and which the plaintiff has not alleged to have been given.

If the defendant desires to set up her counter-right as distributee, to have back from the

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plaintiff so much as there may not be *debts to absorb, she must file a cross-bill. Let the defendant pay the costs of this suit.

The plaintiff appealed and moves the Appeal Court to reverse so much of the decree of the Chancellor as disallows plaintiff's right as a creditor of his intestate, to an account for the property alleged by plaintiff to have been given by his intestate to the defendant, on the following grounds:—

1. The judgement in Georgia, exemplified and exhibited here, is evidence of a debt due by the estate; and is no farther questionable here in its present form and in this suit, than would be any other foreign judgement between the original parties to the suit.

2. Because it was sufficiently admitted and proved, that the plaintiff was the owner of the judgement.

3. Because, admitting the judgement not to be conclusive upon the defendant, and the assignment to the plaintiff not to have been regularly proved, yet the judgement is prima facie evidence of the debt, and the onus lay with the defendant to impugn it—and that the plaintiff had bought and paid for the judgement was sufficiently admitted and proved, to constitute him an equitable assignee.

4. Because in ordering an account to be taken of the estate of David Clarke, the intestate, the order should have been extended to ascertain the extent of the debts, and to whom due.

5. Because, an administrator has a right in Equity to set aside the fraudulent gifts and contracts of his intestate, upon the allegation and proof that the property is necessary for the payment of debts which have a lien under the statute against fraudulent conveyances, upon such property.

[For subsequent opinion, see McMul. Eq. 48.]

Bauskett, for appellant.
Waddy Thompson, contra.

HARPER, Chancellor. We concur with the Chancellor, that the transcript of the judgement recovered in Georgia would not have been admissible in evidence in an action against the administrator here. This is very fully sustained by the case of Lighfoot v. Bickley, referred to—as well as by expediency and analogy.—As said by the Chief Justice of Pennsylvania, in that case, "Did an administrator represent the person of the

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intestate without *qualification or restriction, the plaintiff's argument would be incontrovertible; but it is clear that his commission extends only to assets of which the Ordinary had jurisdiction."

It was surmised that the decision may have turned on the circumstance that the judgement was one of a jurisdiction altogether foreign. But by common law, a foreign judgement is prima facie evidence, though its merits may be enquired into. It was not because the judgement was foreign, but because it was against a person with whom the defendant in Pennsylvania had no privity. The Chief Justice speaks of an unexampled spirit of comity exercised in Pennsylvania, by which the administrator of another State is allowed to meddle with the assets there, and which he supposes likely to be attended with much perplexity and confusion. But no such comity has ever obtained in this State, and it is plain that it might be attended with very mischievous consequences. A person having a doubtful claim, even a citizen of this State, might resort to another State where the deceased person happened to have left goods, and procure administration to be granted to an instrument of his own; and avoiding appearances which would show and detect fraudulent collusion, such an administrator might betray the defence, so as to enable the claimant to recover. Even if the judgement were open to investigation, the bona fide administrator here, might find the greatest difficulty in impeaching it, and it would be a hardship that such burden should be imposed on him. But according to our decisions, under the Constitution of the United States, requiring full faith and credit to be given to the judicial proceedings of other States, the judgement, if admitted at all, must be conclusive.

Though not made specifically a ground of appeal, it was urged in argument that the debt on which the judgement was founded was sufficiently established by the admission of the answer and the testimony of a witness, and that the assignment of the judgement must, in Equity, operate an assignment of the debt. But to this there are various objections. That case was not made by the bill; nothing was charged as to the original indebtedness, nor was the plaintiff called upon to meet that case. The part of the answer relied upon, was plainly intended to impugn the judgement, and not to admit any thing respecting the original indebtedness. The examination of the witness was directed to the same point—the consideration of the judgement. Something is inci-

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dentally *brought out, which might seem to bear on the original indebtedness; but plaintiff's examination was not directed to this; and even if it had been, the witness states only his belief without the grounds of it, and

plainly, his testimony is too vague to authorize any conclusion.

The plaintiff comes to set aside a voluntary conveyance for fraud. To sustain his bill, it was incumbent on him to shew at the hearing, that a debt existed at the time of the conveyance, and that the creditor will be disappointed unless it be set aside. He must, coming into this Court, establish it by such evidence as would be sufficient to establish it in an action against an administrator here. It might not be necessary to shew the entire extent of the indebtedness; but the plaintiff has failed to shew any indebtedness; though he states himself, to have received about $2,000. Having failed to make out his case, the Court cannot upon an hypothesis, or surmise that perhaps he may have a sufficient case, direct a further inquiry on reference. The defendant has a right to require the dismissal of his bill, so far as respects this part of the case.

The decree is affirmed.

Chancellors DE SAUSSURE, JOHNSON and JOHNSTON concurred.

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2 Hill, Eq. 617

WM. KINSLER and Others v. ISOM CLARKE.

(Columbia. May Term, 1837.)

[*Injunction* ⇐52.]

Injunction granted to restrain defendant pending an action to try titles, from committing waste by cutting and carrying off the timber, where the chief value of the land consisted in the timber, and it appeared more than probable that defendant would not be able to pay the damages which might be recovered.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. ⇐52.]

[*Injunction* ⇐174.]

On an application for an injunction, the plaintiff may read affidavits filed before the coming of the answer in support of the bill, or in contradiction to the answer: but no affidavits filed subsequently to the coming in of the answer can be read.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 386; Dec. Dig. ⇐174.]

Before Chancellor Johnson, Lexington, July, 1836.

The bill in this case was filed for an injunction to restrain the defendant from committing waste in cutting down and carrying off the timber from the land in question, pending an action of trespass to buy titles at law, by the plaintiffs against the defendant—alleging that the chief value of the premises, by reason of its vicinity to Columbia, consisted in the timber; and that the defendant is fast dissipating his property, and will not be able to satisfy the damages which the plaintiffs may recover.

The defendant, in his answer, admits the alleged waste, but insists that he has a perfect legal and equitable title to the premises; and sets it out.

The Chancellor in his decree, discusses the

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question of right to *the premises, and decides it in favor of the plaintiffs. But as the Court of Appeals refused to express any opinion on that question, it is unnecessary to state the facts connected with it, and the Chancellor's reasoning thereon. In relation to the application for an injunction, the decree proceeds as follows:

An action at law is the common and legitimate remedy for a trespass, when the party injured may be remunerated in damages to the extent of the injury sustained. Retributive justice does not however always furnish an adequate remedy: the trespass may be of such a nature, that the extent of the injury cannot be ascertained by any rule: as in the common case of working a mine. And the Courts of Chancery have interposed a preventive justice in those cases in which, from their nature, damages might prove an uncertain or inadequate remuneration, by restraining the wrong doer from a continuation of the trespass. An injunction to stay waste, is a process in ordinary use, and although the doctrine was originally broached with great caution, and proceeded on with great circumspection, injunctions to restrain trespass when irreparable mischief would be effected before a trial at law could be had, are now regarded with more favor.—Vide Eden on Injunctions 138, et seq.; Shubrick v. Guerard, 2 Desaus. Eq. Rep. 619, note; 1 Fonb. Eq. 32, 33, notes. And in reviewing the cases on this subject, I confess, I feel some surprise that they have advanced in favor thus far at so tardy a pace. It is true that the title to a freehold, is a subject which exclusively belongs to the jurisdiction of the law Courts, but Chancery utterly disclaims the right to interfere when the title is in dispute, whether it refer to the factum of the muniments under which the parties claim, or the boundaries—Eden, 138. And when the parties come before the Court, the plaintiff, the acknowledged owner of the soil, and the defendant, a naked trespasser, it strikes me as comporting more with substantial justice to both parties to restrain the trespass, than to leave the plaintiff to pursue his remedy at law. In most trespasses, particularly those committed on lands, it is utterly impossible to fix with precision the quantum of injury, and we know from experience that the verdicts of juries in such cases are generally the results of compromise between the extremes and when this is not the case, the plaintiff is inadequately rewarded, or the defendant punished with great severity. It would therefore be for the interest of both parties, that the trespass

should be prevented: every one has the right
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to enjoy that *which is his own; and one who would willfully disturb him in it, has no right to complain if he is restrained. Injunctions to restrain trespasses, have been confined to those cases only where the injury was supposed to be irreparable, and whatever may be my own views of its propriety, I am not disposed to depart from the old, or make a new precedent, and will proceed to consider whether this case falls within the established rule.

The bill states, and the answer admits that the locus in quo is pine barren, and is principally valuable on account of the fire wood and timber growing on it, and its contiguity to the Columbia market. That the defendant has been for some time past cutting, and claims the right, and proposes to continue to cut the wood and carry it to market. And there is no question that by the employment of an adequate force which the sale of the wood itself might command, the defendant might, before the action at law could be tried, strip it of the last stick of wood upon it, and leave the plaintiffs a barren waste. For this injury, an action at law certainly lies, and the plaintiffs would be entitled to recover the value of the wood cut and carried off. He cannot, in a Court of law, purge the conscience of the defendant, and by that means ascertain the extent of his injury, and much less would he be able to show the greater benefit that he might have derived by a better husbandry, and waiting for better markets: and it is obvious that any damages which a jury might give, would be the result of conjecture. But above all, the trespass tends to the destruction of the wood and timber which gives to the land its principal value, and brings the case precisely within the principle of the rule. A case occurred in the Court of Appeals a few years ago which is not reported, and of which I retain a very imperfect recollection, which strikes me as being on all fours with this. If my recollection does not mistake me, that was an application for an injunction at the instance of the owner of a saw mill, to restrain a trespasser from cutting timber on lands contiguous to it, and which was principally valuable on account of the timber. The application was refused by the Circuit Court, and on an appeal an injunction was ordered to issue. The plaintiffs in support of this application rely also on another ground which I am disposed to think has merits: the insolvency of the defendant, and the probability that he will be unable to pay the damages which may be recovered in the action at law.

The ground on which the Court proceeds
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is, it will be recollect*ed, to restrain those injuries which may be supposed to be irreparable at law—and what benefit, I would ask, would a plaintiff derive from a judgment at law against a notoriously vagrant pauper? and how, I ask, is the community to be protected against the wanton injuries of this class of people?—Are we to look and see them dispose of our property in mere wantonness, and be gravely told that the Court of law affords relief by compelling them to answer in damages?—I think not, justice is not so blind, nor the arm of the law so feeble as to permit such an outrage when preventive justice can be interposed.

The fact of insolvency is denied in the defendant's answer and he affirms his ability to pay any damages which plaintiffs may recover on account of the supposed trespass: but from the affidavits of several persons who are intimately acquainted with his circumstances, I am led to conclude that his means are at best only slender, and that from his improvident habits, it is more than probable they will rather decline if not go to ruin, than improve. At any rate, they are, in my estimation, a very inadequate security for the damages which the plaintiffs have already sustained according to the defendant's own account of their extent, and although that is not the abject state of pauperism supposed, the result would be the same, if in the end the defendant should be unable to pay the damages. The right of the plaintiff to read affidavits in contradiction of the defendant's answer in relation to the allegation of his insolvency is denied. The rule on this subject appears to me to be well settled. The plaintiff is unquestionably at liberty to file and read affidavits on an application for an injunction in support of the allegations in his bill before the coming in of the answer; and as constituting a part of the case, they may be read on any subsequent motion to perpetuate or dissolve the injunction: but it is an inflexible rule that no affidavits filed subsequently to the coming in of the answer, can be read; and the reason given for it by the Lord Chancellor, in Smythe v. Smythe, 1 Swanston, 253, is that it is calculated to surprise the defendant. If he observes, the plaintiff at once supports the allegations of his bill by the statement of particular facts or affidavits, the defendant has an opportunity of explaining or denying them; but if they are kept back until after the answer is filed, it is not dealing fairly with the defendant. The only exception allowed to the rule, is in cases of waste, and such as are analagous, for the purpose of
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preventing irrepara*ble mischief, and extends only to the fact of waste and not to the question of title—Ib. 254, note (b.) and the cases there cited. On looking into the proceeding, I observe, that although the defendant has answered, neither the bill, answer or affidavits have been filed; and I suppose that this formality has been waived by the counsel, and that the defendant had notice of the af-

fidavits before the answer was put in—one of them is indeed endorsed on the bill, and no objection has been raised on that account—I am therefore of opinion that the affidavits are admissible. It is therefore Ordered that an injunction do issue to restrain the defendant from cutting wood or timber, on the land described in the conveyance from James Cayce to Fabriel Friday, referred to in the pleadings, until the trial and final determination of the action at law brought by the plaintiffs against the defendant also referred to in the plaintiff's bill, from trespass thereon, or until the further order of this Court.

De Saussure, for the appellant.

Gregg, contra.

On appeal, the following opinion was delivered:

De SAUSSURE, Chancellor. This was a bill filed to obtain an injunction to restrain the defendant at law from committing waste by cutting off timber from the land in question, pending an action of trespass to try title at law, brought by plaintiff, Kinsler, against defendant, Clarke. It was alleged that the chief value of the land consisted in the timber which the defendant was cutting down: and that he was insolvent, and not able to answer in damages for the injury done.

These allegations were sustained by affidavits. The answer denied the insolvency.

The claim of both parties to the title was set forth in the pleadings, and the Chancellor on the Circuit, to put an end to litigation and the multiplicity of suits, made a decree on the question of right. But as this Court is unwilling to decide on the question of title, which is pending in a suit at law, it will make no decree on the appeal on that ground, but will leave the parties to the litigation of the title in the Court of law, to which the Court remits them.

The only question then for the judgment of the Court, is on the appeal from the decree of the Chancellor granting an injunction

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*restraining the defendant at law from cutting down timber on the land in dispute, until the question of right should be decided.

The appeal made, was on the ground, that in a mere case of trespass, no injunction ought to be granted.

On a careful examination of the decree of the Chancellor on the Circuit, I concur entirely with him, in directing an injunction to be issued in this case. He has placed the interposition of the Court, for the protection of the land in question from irreparable injury, for which the remedy would be doubtful and uncertain, on the true grounds: and I concur entirely with him. Nor is this doctrine and practice new in England or in this country.

In analogous cases, this branch of preventive justice is freely administered in England, and in this State several important decisions have been made in the same spirit.

The case of Brookes & Marsh from Edgefield, Col. MS. cases, was decided on great argument, in which the Circuit Court granted an injunction pendente lite to restrain a party in possession, from cutting off the timber from a tract of land valuable almost wholly for its timber; and he was alledged on affidavits to be insolvent and incapable of answering in damages. And this decree was solemnly affirmed.

It is Ordered that the decree on this point be affirmed, and the injunction continued.

Appeal on this point dismissed.

Chancellors JOHNSON, HARPER and JOHNSTON concurred.

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2 Hill, Eq. 622

DANIEL S. BLACK v. JOHN HAIR and PETER BLACK.

(Columbia, May Term, 1837.)

[*Chattel Mortgages* ⇐262.]

A mortgagee of personalty does not fall within the principle which prevents a trustee to sell from buying at his own sale: but he holds such a trust character as to throw the burden on him of showing the fairness of his purchase.

[Ed. Note.—Cited in Britton v. Lewis, 8 Rich. Eq. 284; Calhoun v. Calhoun, 2 S. C. 308; Mills v. Williams, 16 S. C. 597, 598.

For other cases, see Chattel Mortgages, Cent. Dig. § 544; Dec. Dig. ⇐262.]

The bill states that the plaintiff gave his father, James Black, a mortgage on upwards of twenty negroes, together with horses, stock, plantation tools, &c. to secure the payment of $1,000 annually for twelve years, commencing on 1st January, 1829; conditioned that in default of payment, the said James Black, his executors, administrators, &c. might advertise and sell the said property to the highest bidder, to satisfy the said notes, returning the overplus. That James Black died, and defendants administered on his estate; and default being made in pay-

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ment of the notes *as aforesaid, they proceeded to sell on two different days, several of the negroes and other property, and themselves purchased some of the negroes and other articles of property, at inadequate prices, on which one of the defendants afterwards made profit by selling again. The bill prays that the sale to defendants may be set aside, on the ground that a trustee to sell cannot purchase at his own sale; and that the property may be re-sold at their risk.

The answer admits the sale and purchase, but insists that the sale was fairly conducted; and one of the defendants admits that

he made a profit of $25 by selling a slave he bought, on the day of sale. Denies fraud, &c.

Chancellor De Saussure, before whom the cause was heard, decreed on this part of the case as follows:

As to the conduct of the administrators in conducting the sales of the slaves, the evidence is conclusive that they were fairly made, and brought fair prices. As to the minor articles, although some of the circumstances at first induced doubt, yet I agree with the Commissioner, that upon the whole there is no sufficient ground to vacate the sales.

The plaintiff appealed, and insisted that the defendants were trustees to sell, and sustaining that character they were not at liberty to purchase at their own sale: that all the reasons applicable to other trustees existed here, where the time, place and credit were fixed by them, and the auctioneer was their agent. And on the evidence, it was argued that the sale was not fairly conducted; at least was so suspicious that defendants should pay the costs.

Herndon & Caldwell, for appellants.

Pope, contra.

JOHNSTON, Chancellor. A majority of the Court is of opinion that the plaintiff's appeal cannot be sustained.

The opinion of the Court (in which, to avoid being misconceived, I state that I do not concur) is, that a mortgagee of personalty does not fall within the principle which prevents a trustee to sell from buying at his own sale. It is my province to state the reasons which have conducted my brethren to this conclusion.

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*A creditor holding a mortgage security, is a trustee to sell, not only for the benefit of the mortgagor, but for his own also. If he were not at liberty to bid, he would be deprived of the means of protecting his own interests as creditor. The mortgagor is at liberty to bid also, and has thus the means of entering into fair competition with the mortgagee, and compelling him to give a fair and full price.

But the Court is of opinion that although a mortgagee does not stand in that relation to the mortgagor which would subject him to an order setting aside, as of course, his purchase at his own sale; yet that he holds such a trust character, as to throw the burden on him of supporting his purchase, by proof of fairness.

In this case the Commissioner and Chancellor, have drawn an inference from the evidence before them, that there was no actual fraud in the sale; and they appear to be well warranted in their conclusion.

Chancellors DE SAUSSURE, JOHNSON and HARPER concurred.

2 Hill, Eq. 624

NANCY KING and Others, v. MARY JOHNSON, the Executor of Wm. King, and Others.

(Columbia. May Term, 1837.)

[*Bastards* ⟸98.]

One having a lawful wife and children separated from them and lived in a state of adultery with a woman by whom he had several illegitimate children, and with the proceeds of their labor purchased lands, and had the conveyances executed to the natural children: *Held*, that the father might permit his natural children to receive the profits of their labor and might invest those profits for them; and that such investment was no violation of the act of 1795, prohibiting gifts and conveyances, exceeding one-fourth of his estate, by a man having a wife or children, to a woman with whom he lives in adultery, or his illegitimate children.

[Ed. Note.—Cited in Canady v. George, 6 Rich. Eq. 105; Williams v. Halford, 67 S. C. 303, 45 S. E. 207; Williams v. Halford, 73 S. C. 128, 53 S. E 88.

For other cases, see Bastards, Cent. Dig. § 249; Dec. Dig ⟸98.]

Edgefield, June Term, 1836. Bill for relief, partition, &c.

The plaintiff, Nancy King, was the legitimate wife of the defendant's testator, by whom he had two sons, who are also plaintiffs. About thirty years ago the testator separated from his wife, and soon after attached himself to the defendant, Mary Johnson, with whom he lived in a state of adultery until his death in 1835; and had by her a numerous family of illegitimate children, who are parties, defendants. The defendant, Mary, and the children, assumed the name of the testator, and they all lived together as a family, of which he was regarded by themselves and the neighborhood as the head. In 1820, the testator purchased two or more tracts of land, containing together about 420 acres, and procured the conveyances to be executed to and in the names of his illegitimate sons; and the plaintiff's bill prays, that

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these conveyances may be set aside *and the land partitioned amongst them, according to their interests, on the ground, that they are in violation of the Act of 1795, (1 Brev. Dig. 68), which declares that all gifts and conveyances in whatever form or manner, by one having a lawful wife or children, in favor of a woman with whom he lives in adultery or illegitimate children, shall be void, so far as the same shall exceed one-fourth part of his estate real and personal.

The defence concedes that the testator made the contracts to purchase the lands, and procured the conveyances to be executed to the defendants, his illegitimate sons; but avers that the purchase money was paid by the proceeds of the labor of the defendants, and not with the money of the testator or any separate property of his own.

At the time the testator abandoned his wife

and attached himself to the defendant, Mary, he is represented to have been poor and without credit, a drunkard and gambler, and so continued. In the language of some of the witnesses, he "never would work," and most of them concur in saying, that his success in accumulating property was the result of the industry and economy of Mary and his illegitimate children. About the time he made the contract for the purchase of the land, Mary, the defendant, complained that it was hard that the fruits of the labor of her children should go to others (referring obviously to the provisions of the Act before recited.)—The testator conceded that her children had made the property he had, and said that he would procure the titles to be made to them, to prevent his lawful wife and children from getting the land.

Johnston, Chancellor. A very attentive re-examination of all the testimony offered at the trial, has but served to confirm me in the impression it then made on me, that the labor of Mary Johnson's children procured all the property, the conveyances for which were made in their names; and that any agency which Wm. King had in accumulating the property of the family, is more than compensated by the property which he claimed as his own, and disposed of by his will.

I am satisfied by the reflection I have been able to bestow on the subject, that the natural children were so far strangers to Wm. King, that they could claim the profits of their labors; that he was at liberty to act as their trustee for investing those profits in

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property *for them, and that the investment was no violation of the spirit of the Act of 1795. That Wm. King, adopting them as his own, and holding out their mother as his wife, would have been liable to creditors on the score of contract, is true; but because he could make himself liable by contract for these children, it by no means follows that he could take their earnings from them; he could not take them from them, but by virtue of a contract with them. But they were minors and incapable of binding themselves. Much less was he bound to take their earnings, even if he was at liberty to do so. Even if creditors could have claimed the earnings or property of the natural children in discharge of necessaries furnished on the contract of the father, (which, according to Proctor v. M'Call, 2 Bailey's R. 302, they could not do, unless they were deceived in the relation between them,) the legitimate family who are volunteers under the father, cannot claim that as a part of his estate, which was in conscience no part of his property.

The bill must therefore be dismissed as to all the property the conveyances for which were executed to, and stand in the names of the natural children, and it is decreed accordingly.

The plaintiffs appeal from the decree in this case, dismissing the bill as relates to the lands embraced in the conveyances to the defendants, the illegitimate children of Wm. King, and move the Court to reverse the decree, on the ground:

That those conveyances are in violation of the Act of 1795.

Griffin, for the appellants, contended, that except the right to inherit, illegitimate children are put on a footing with legitimate.—2 Kent. Com, 214. If the putative father adopt an illegitimate child and take him under his care and protection, he is liable for necessaries.—Hesketh v. Gowing, 5 Esp. N. P. 131; 2 Kent's Com. 193, 214. And the relation is so well recognized, that an information will lie for the abduction of a bastard daughter under the care of her father. Rex v. Cornforth, 2 Str. 1162. See also 1 T. R. 101; 1 Ray. 68. So a step father is not bound to maintain the child, but if he assumes the protection and care of the child, he is bound for necessaries.—3 Esp. N. P. Ca. 1; 3 Petersdorf, 130. The father in this case living with the bastard children and their mother—regarded as the head of the family, assumed all the liabilities of a lawful parent, and consequent-

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ly acquired all the rights of, one, of *which was the right to the profits of their labor. Whatever was acquired by the joint efforts of the father and children, became legally his—as much so as if acquired by his own labor, or derived by descent, or will. He had then no right to dispose of it contrary to the Act; and the mode resorted to is plainly an attempt to evade it, which the Court should prevent.

D. L. Wardlaw, contra. Whatever may be the law as to the control a putative father may exercise over his bastard children, and whether he may or may not appropriate the proceeds of their labor to his own use, he may decline the right to make such appropriation. There is no rule of law to compel him to do it. He might and probably did, stipulate with the mother that the children should have their own earnings. The evidence favors this conclusion, and there is nothing contrary to law in such an arrangement.

Chancellor JOHNSON delivered the opinion of the Court.

The decree of the Circuit Court, dismissing the plaintiffs' bill, is founded on the conclusion that the facts on which the defence rests are true, and upon a careful review of the evidence taken on the trial that seems to be the necessary conclusion.

On the argument here, error in the conclusion as to the matters of fact has not been much pressed; but conceding that to be correct, it has been insisted that as the testator took these children under his immediate care and protection, and provided

for and treated them in all respects as a father would his legitimate children, the obligation and duties of legitimate children devolved on them; consequently in law, he was entitled to the proceeds of their labor, and the application of them to the purchase of lands for their use, was a violation of the act referred to.

The obligations between parents and children are reciprocal. On the parent devolves the duty of maintaining, educating and providing for the child; in return for which the child owes obedience and assistance during minority, and reverence and respect always; and it follows necessarily, that if in law either are absolved from these obligations, so also is the other. Now, it is very clear that the putative father is not entitled in law to the custody of his natural child, in opposition to the claims of the mother; nor is he bound to provide for it further than is re-

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quired by express en*actments of the legislature.—2 Kent. Com. 178. 1st Ed. The child cannot inherit from the father, and the extent to which the father can provide for his illegitimate child, is limited by the act before referred to. The father is not therefore, entitled, in law to the services of his natural child. It is said, however, that when the father assumes and discharges the duties of a parent, corresponding duties arise on the part of the natural child; and this is true so long as these relations exist. But these relations are merely conventional, and being voluntary, may be dissolved at pleasure. Not so as to the relations between the father and his legitimate children. The obligations between them are imposed by law, and neither can be absolved from them. The right of the putative father to the custody and services of his natural child, must therefore arise out of contract, in which the parties are at liberty to stipulate for themselves. There is certainly nothing in these relations to prevent the father from rewarding the child for its labor, or being its agent to invest the proceeds; on the contrary, in despite of the stern policy which alienates the bastard from his putative father, nature has bound them together by ties which cannot be severed; and it is impossible to resist the feeling that there is a moral duty imposed on the father, to aid the child when he can do so without violating the law, or doing wrong to others.

I am well aware that there is much danger of abuse in the application of this principle, and that without great circumspection it will be made a cover for evading the act, but of its correctness there can be no question; and abuses may be guarded against by requiring clear and unequivocal evidence of the fairness and reasonablenes of the transaction. Of this, the present case may serve as an example; for it is apparent that the defendant's testator was a mere drone in the hive, and that the land conveyed to the defendants is a very inadequate compensation for the long and faithful services of the defendants, out of the proceeds of which it was paid for.

The case of Hesketh v. Gowing, 5 Esp. N. P. Rep. 131, has been referred to, for the position that the putative father is liable for necessaries provided for a bastard child whom he had adopted as his own; and hence it is concluded that out of this relation all the obligations of parent and child arise. And this is put expressly on the ground of an implied contract, arising out of the defendant, holding himself out to the world as being

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bound to provide *for the child, and not on the footing of parent and child; and the same rule would obtain in the case of a foundling or other stranger.

There are doubtless many cases in which a quasi consanguinity between the putative father and his bastard child, would be recognized; as in Haines v. Jeffel, 1 Lord Ray. 68, in which it is said that the father and illegitimate daughter are within the degrees of consanguinity in which marriages are prohibited. So in Rex v. Cornforth, 2 Str. 1162, where it is held that an information would lie for the abduction of a bastard infant daughter being under the care of her putative father. But these are exceptions to the general rule, arising from moral and necessary causes, and by no means impugn the rule itself.

It is therefore Ordered and decreed, that the appeal be dismissed, and that the decree of the Circuit be, and the same is hereby affirmed.

Chancellors DE SAUSSURE, HARPER and JOHNSTON concurred.

2 Hill, Eq. 629

A. D. JONES and T. BRIGGS v. J. H. BLAKE and E. H. BLAKE, His Wife, and Others.

(Columbia. May Term, 1837.)

[*Gifts* ⇐49.]

What will be sufficient evidence of delivery to constitute a gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95–100; Dec. Dig. ⇐49.]

[*Judgment* ⇐670.]

A former decree against one as administrator on a bill to compel delivery of slaves claimed under a gift from intestate, will not conclude his rights as creditor, on a bill by him against the former plaintiffs to set aside the conveyance for fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1185; Dec. Dig. ⇐670.]

[*Fraudulent Conveyances* ⇐144.]

The decision in Smith v. Henry, (1 Hill, 16) that a debtor in giving a preference by conveyance of his property, to one creditor over another, shall not secure an advantage to himself at the expense of creditors as the price of such preference, means a certain direct benefit or advantage to be derived from the use of the property. And therefore where a debtor transferred slaves to his daughter in satisfaction of a precedent debt and retained possession of them under an agreement to pay hire, the conveyance was held to be valid, and was sustained against the other creditors.

[Ed. Note.—Cited in Pringle v. Rhame, 10 Rich. 75, 67 Am. Dec. 569; Nelson & Co. v. Good, 20 S. C. 235; Pregnall & Bro. v. Miller & Kelly, 21 S. C. 391, 53 Am. Rep. 684; Werts v. Spearman, 22 S. C. 218.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 480; Dec. Dig. ⇐144.]

Before Chancellor Johnston, Fairfield, July 1835.

In, or before 1829, the defendants, J. H. Blake and wife, filed their bill against the plaintiff, A. D. Jones, as administrator, and the heirs at-law of James Goodwyn. The object of that bill, and the case then made, will be understood from the following extract from the decree of Chancellor Harper, before whom it was heard in July 1829:

"The principal object of the bill is to compel the delivery of certain slaves mentioned in it, and to have an account of their hire. These slaves are charged to have been legally transferred and delivered to the plaintiffs, by the defendant's intestate, Major James Goodwyn, who was the father of the plaintiff, Mrs. Blake, in the latter end of the year 1824. The charge is, that the slaves were delivered in satisfaction of a precedent debt, which was due by the intestate to his daughter, for a part of her deceased mother's estate, which consisted of a chose in action, not reduced

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into pos*session by the intestate, during the life of his wife. The intestate had administered on the estate of his deceased wife, and was guardian of his said daughter.—Or, if the transfer of the property should not be established, the bill seeks to cover this demand, which is claimed to be ranked as a bond debt.

"The principal points made in this case were, whether there was any actual delivery of the slaves, so as to transfer the legal title; whether, if there was evidence of this, it was a gift, voluntary, or for a valuable consideration, in satisfaction of a previous debt; and in fact, whether any such debt existed; whether that which is supposed a chose in action, was not property in possession on which the intestate's marital rights had attached.

"It may be observed here, that much of the evidence and of the argument seemed to be directed to this point—Whether, if there be sufficient evidence of the gift or transfer, as against the intestate himself, or those claiming under him as volunteers, it may not still be fraudulent and void as to creditors. The question seems to me hardly to be sufficiently made by the pleadings; though the defendant, Abraham D. Jones, in his answer, prays that if the gift or transfer is established, it may be subject to the claims of creditors. If a gift or conveyance be made by a person indebted at the time, it will, from the mere fact of its being voluntary, be held fraudulent as to existing creditors, who are unable to obtain satisfaction of their demands. Now, there is no distinct allegation that the debts now existing against the estate of Major Goodwyn, were due at the time of the alleged transfer, or that the estate will not be sufficient to pay all debts, independent of the property claimed by plaintiffs. From the amount of the debts, I suppose I may take for granted, however, that a considerable portion of them existed at the time of the transfer; and if I should suppose the transfer voluntary, but good against the intestate and his personal representative, such decree might be made as is suggested—that it should be confirmed, subject to the claims of creditors. I therefore regard the point of the transfer's being voluntary or founded on consideration, to be before me, so far as regards the parties to this suit; it is unnecessary to say that creditors, not parties to the suit, will not be bound by the decree. But a voluntary conveyance may be fraudulent against creditors whose debts were contracted after its execution, although it be founded on a valuable consideration. The difference is,

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that in such instances there must be *proof or circumstances to establish the actual fraudulent intention. No charge of fraud of this sort is made in the pleadings, nor was the testimony offered which would be necessary to enable the Court to decide on such charge. I do not therefore consider the point in issue.

"I shall first consider whether there was a sufficient delivery of the slaves claimed, to transfer the legal title. The defendant, Abraham D. Jones, in his answer, admits his

intestate to have expressed his intention to give the plaintiffs ten negroes; but states that no particular slaves were specified, and supposes the intention was never carried into effect by an actual gift or delivery. Similar declarations of a future intention are testified by the witnesses. The only evidence we have of the transfer's having been actually made and of the slaves included in it, are the declarations of the intestate, testified by Mrs. Howell and Col. Chappell. The former, after mentioning that she had frequently heard Major Goodwyn before marriage of the plaintiffs, express his intention to give his daughter, the plaintiff, the negroes, Aggy and her family, and Betty and her family, whom he had got by her mother, stated that after the marriage, she had heard him say he had given them; that the plaintiff Blake, said, he could not then take them; he could only hire or sell them: that Major Goodwyn stated himself to have replied, "when you get a plantation I will send them to you; in the mean time, I may as well pay you hire as any one else;"—the hire was to be settled by the Messrs. Jones. Major Goodwyn said, every one of his family knew the negroes that were Eliza's. Col. Chappell testified to repeated conversations with the intestate, in which he expressed his intention to give to his daughter the negroes he had obtained with her mother; that in contemplation of plaintiff's marriage, he declared his intention to give them the negroes, among whom the witness thinks he enumerated the women Aggy and Betty: After the marriage, witness understood from Major Goodwyn that he had given the negroes, in pursuance of his promise; witness thinks he recollects him to have said, that he told them "there they are, take them!"—Witness's clear impression was that he had given: Major Goodwyn enumerated all the individual negroes he had given: The witness recollects but a few of the names from the conversation, but had learned them since: the women Aggy and Betty, their husbands and children, and Martha, were the negroes specified. The witness was struck

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with the circumstance *that more than ten negroes were enumerated—the number Major Goodwyn had promised to give. Major Goodwyn related the conversation he had had with the plaintiff Blake: said he had agreed to pay him hire, to be fixed by the Joneses. Witness is as certain as of any thing that ever happened, that Major Goodwyn distinctly said he had agreed to pay hire for the negroes enumerated.

"The question is, whether this testimony is sufficient to establish a delivery. It appears to me so. A delivery is to be proved in the same way as any other fact. It seems to me that the deliberate admissions of the donor, that he has delivered, are about as satisfactory as his calling witnesses to the transaction at the time. As is said in repeated adjudications, Brashears v. Blassingame, 1 N. & M'C. 224, note, Reid v. Colcock, Ib. 603, [9 Am. Dec. 729,] when a party says he has given, he may be fairly presumed to have known what is necessary to a gift, and to have observed the requisite ceremonies. What shall constitute a delivery, has not perhaps been very accurately defined. In Davis v. Davis [1 Nott & McC. 225, note,] reported in a note to Brashears and Blassingame, the idea is, that any act will do which is significant of the donor's intention that the transfer shall take effect at the time. The same thing is to be found in other authorities. In Reid v. Colcock, and Fowler v. Stuart, 1 M'C. 504, that seems to be regarded as a sufficient delivery which would authorise the donee to take possession, without committing a trespass. Now, when Major Goodwyn said, with reference to these slaves, "There they are, take them," the plaintiff could not have committed a trespass by taking possession of them, whether they were present or not. The words seem to indicate, however, that they were present; and then it would constitute a delivery in the strictest sense of the law, even applied to the livery of land. Blackstone says, "livery in law is when the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee, "I give you yonder land, enter and take possession."

"As observed in the case of Reid v. Colcock, parol gifts are regarded with jealousy by the Courts, and only established on the most satisfactory proof; because it frequently happens that men make loose or playful declarations of having given, or intending to give property to their children. I perceive nothing of this character in the declarations now in evidence. Major Goodwyn's conversations with both the witnesses seem to have

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been circumstantial *and detailed; particularly that with Col. Chappell, with whom he had so repeatedly conversed on the subject of making such a provision for his daughter. It seems to me that he went designedly into the detail for the purpose of making him a witness of a transaction which had happened to pass without the presence of a witness. There would be more reason to suspect such declarations, if the gift were made to one for whom the donor was under no obligation to provide, or if it appeared to be a sudden act, and not in pursuance of any previously expressed intention. But it appears he had a deliberate purpose for years, to make some such provision;—the defendant admits that he expressed such intention; he was under a natural obligation, and according to the testimony of Col. John Taylor as well as of Col. Chappell, under the obligation of his honour and promise to do so. It is true, the provision was somewhat larger than he had expressed his intention to make; but if it were necessary to account for that, it might be

done perhaps by the circumstance that the negroes, Aggy and Betty, with Martha, were those specifically that he intended to give, and in giving them, it would have been necessary to separate the families unless he had given them entire. That the plaintiffs did not take possession of the slaves, is sufficiently accounted for. That they were left in the intestate's possession, might be a material circumstance, if we were considering the claims of creditors; but, so accounted for, is not material as between the parties themselves. If the testator were in debt to his daughter, that would be a circumstance to corroborate the testimony respecting his declarations of having made satisfaction: but he certainly believed and acknowleged himself to be so. The agreement to pay hire is a strong evidence of the transfer. This agreement is admitted by the defendant; but he supposes it to have related to future hire, after the contemplated gift should have been completed. Col. Chappell, as I understand him, is positive that it related to the hire then accruing. This seems to me the more probable. It is unlikely that for two consecutive years he should be making arrangements to have the hire valued for the purpose of ascertaining what he should pay after some future period, when the value of the hire might be altered. If he had actually paid hire, this would be conclusive evidence of the transfer."

His Honor then went into evidence of the consideration, which he held was sufficient to show that the transfer was made for a

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*valuable consideration; and then decreed, that the defendants should deliver up the slaves to the plaintiffs, and account for hire.

The present bill was filed by the plaintiffs to establish their claims as creditors of Goodwyn, alleging that his estate would be insolvent and their demands unpaid unless the slaves decreed to Mrs. Blake were subjected to their payment; and charging that no deed or bill of sale was made, and as the alleged transfer was not accompanied by actual possession, that the transaction was fraudulent and void as to creditors—and prays that the slaves may be charged with the payment of their demands.

The defendants, Blake and wife, in their answer set up by way of defence, that the decree, in Blake v. Jones, had established their right to the slaves, not as a gift, but a sale for value in payment of a preceding debt, which could not be affected by Goodwyn's debts.

The plaintiffs' demands were established before the Commissioner. Exceptions were taken to his report; and the statute of limitations pleaded to Briggs' claims.

Johnston, Chancellor. In the case of Blake v. Jones, Chancellor Harper considered Mr. Jones before the Court as a creditor. He weighed the transfer of the slaves to Mrs. Blake against Jones' claims as creditor, and decided that the transfer was valid.

Although I do not see how this decision can be reconciled with Smith v. Henry, 1 Hill, 16, I am bound by it. If the Appeal Court should think fit to re-consider their opinion affirming chancellor Harper's decree, they can, upon the authority of Price v. Nesbit, 1 Hill Eq. 445, do so But this Court possesses no appellate power. As the Chancellor whose decree has been affirmed, decided against Jones as a creditor holding demands which existed at the time the slaves were transferred to Mrs. Blake, the same principle, the evidence being the same, must support the transfer against Briggs. This obvious view of the case renders it entirely unnecessary to consider the report and exceptions.

From this decree the plaintiffs appealed on the grounds:

1. That the gift or sale of the slaves to Mrs. Blake, is void as to creditors.

2. That the decree in Blake v. Jones did

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not conclude the rights *of the plaintiff, Jones, as a creditor; and did not and could not affect Briggs, who was not a party to the case.

Pearson & W. F. De Saussure, for the appellants.

Chappell & Gregg, contra.

HARPER, Chancellor. It appears to me that the decree delivered by myself in the case of the present defendants against the present plaintiff, is sufficiently explicit in stating that the claim of Mr. Jones in his character of creditor, was not considered. And it is manifest that it could not be then considered. The bill was against Jones as administrator, for the purpose of establishing the gift or transfer of the slaves by his intestate to the then plaintiffs. This was the case he was called upon to meet. But being a creditor of the estate, he had a right, if the estate were insolvent, to say that though such transfer were made, it must be regarded as fraudulent against creditors. This defence might perhaps have been made by the answer, or might have been the subject of a cross bill. But the defence was not made by the answer nor the evidence, although intimations were thrown out that the interests of creditors might be affected by the determination. This however was not enough. To invalidate a conveyance, the party must allege and prove it to be fraudulent. To do this, it was necessary to shew not only that debts existed at the time of the transfer, but that apart from the property transferred, the estate was insolvent. This shewing must have been preliminary to any relief to be afforded by the Court. The Court could not volunteer to direct an inquiry into the concerns of an estate, for the purpose of establishing a charge of fraud upon a surmise that it might turn out insolvent. Plainly it

was impracticable for the present plaintiff, Jones, to make out that case at that time. The lands of the estate were unsold and their value unknown, and there were important and litigated concerns of the estate to be settled. Could the Court have retained the bill for an indefinite length of time, in order to afford a party the chance of making out a charge, which if he had alleged it, he ought to have been prepared to prove at the hearing? I have little doubt but that the determination that the transfer was founded on valuable consideration, was regarded at the time as a determination in effect on the rights of Jones as creditor. Before the case of Smith v. Henry, 1 Hill. 16, an opin-

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ion seemed to have ob*tained, that to show a conveyance to be valid as against creditors, it was enough to prove that it was founded upon valuable consideration. And it may be that the decision in that case has suggested the present proceeding.

The case being properly before us then, we are first to inquire whether it comes within the principle of the case of Smith v. Henry. It appears to me that it does not. The principle of that decision, as it is expressed in very terms, is that the law allows a debtor to give a preference to one creditor over another, "but it will not allow him to secure an advantage to himself, at the expense of creditors, as the price of such preference." "An advantage to himself" in law, of which the function is to adjust the rights of property, must mean an advantage in relation to property, profit or pecuniary advantage. It could not mean, for instance, the gratification of taste or vanity. It was suggested that an advantage might be obtained by quieting other creditors, in consequence of the appearance of property in the donor. This is a sort of speculative and uncertain advantage which it is difficult to estimate, and perhaps it would be impracticable in a majority of cases for Courts to determine whether a donor had secured such an advantage or not. Still I think the consideration is entitled to its weight in considering the question of actual fraud or fairness upon all the circumstances of the case. But whatever weight it might be thus entitled to, it does not come within the principle of Smith v. Henry, which speaks in the most explicit manner of the certain, direct benefit or pecuniary advantage to be derived from the use of the property. I believe there is scarcely a sentence of the opinion, in relation to the matter, which does not illustrate this. "If a party indebted to several, goes to one of his creditors and says, "my whole property is not more than sufficient to pay you; I will give you the preference however, and assign to you, provided you will allow me to have the use of it for a stipulated length of time, or until I work out the debt"—this is fraud in both." The use spoken of is of course for the donor's own benefit. "The debtor gains what he is not entitled to at the expense of creditors and enjoys the property independently of them." The creditor "gives a bribe for the preference." A bribe means, in law, a pecuniary benefit. The expression—"use and enjoy the property as his own"—is frequently repeated. So in the quotations from Twine's case and Sheppard's Touchstone. In short, I cannot think that there is any ambiguity in the decision.

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*In this case, the proof is distinct and certain that the donor was to pay hire for the slaves. Can I say that his retaining possession under this stipulation was the securing of a benefit to himself? I do not see how. In general, a party who hires slaves may be supposed to do so for his own convenience. But if the price be full and fair, the law must regard the transaction as an exchange of equivalents. I do not suppose that it would be generally advantageous to cultivate a man's plantation by hired slaves. In this case, the hire was to be fair, for it was to be valued by indifferent persons. And it appears from the testimony of Mrs. Howell in the former cause, that Major Goodwyn consented to hire the slaves, not for his own convenience, but for that of the donee, Mr. Blake, who had no land.

I am well aware that this construction may occasion attempts to evade the rule as laid down in the case of Smith v. Henry. But it must be the business of the Court to guard against evasions. If the stipulation for hire were kept secret between the parties themselves—if the hire were very inadequate—if it remained for a long time not paid or demanded—all these would be circumstances to show the stipulation to be colourable or evasive. I should say that when the grantor retains possession after the sale, the presumption of law is that he does so for his own benefit, and that the burden is on him to show by the most satisfactory proof that he obtained no advantage from it. This has been done in the present case by the testimony of Mrs. Howell and of Col. Chappell —and indeed in some degree by that of the present plaintiff, who admits that he knew that a transfer of the slaves was intended, and that he and his father were to value the hire—on which the claim for hire was established and decreed against the estate of Major Goodwyn, when the present question was not under consideration.

Though not within the rule of Smith v. Henry, and though there was a valuable consideration, still the transaction might be fraudulent if there were proof of an actual fraudulent intention. But the proof is otherwise. The consideration was not greatly inadequate—though it is said the Court will not look nicely into considerations. The donor then possessed a very considerable estate, and there is nothing to show that he had

the slightest reason for believing himself to be approaching insolvency. The plaintiff did not certainly know the estate to be insolvent at the hearing of the former cause. He did

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what he had long intended, and *what the plaintiff admits that he knew him to have intended, and what he was under the strongest obligations of honor and conscience to do. Indeed I do not understand the charge of an actual fraudulent intention to be urged on the part of the plaintiffs. The decree dismissing the bill must therefore be affirmed.

Chancellors DE SAUSSURE and JOHNSON concurred.

Chancellor JOHNSTON. I concur in the result.

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2 Hill, Eq. 638

THOMAS M'MEEKIN, Administrator of Wm. Brummet, v. F. K. BRUMMET.

(Columbia. May Term, 1837.)

[*Wills* ⇐551.]

S. B. and D. B. delivered two female slaves to a trustee for the use of C. P., and if C. P. died without issue, "then the said negroes to return to the sons of S. B. and D. B. and their heirs forever." C. P. died without issue. At the time of the gift, S. B. and D. B. (the donors) had each one son living, and afterwards S. P. had other sons who died, and the son of D. B. died before the death of C. P. at whose death the only living son of either of the donors was the son of S. P. who was living at the time of the gift. This son recovered the negroes and their increase from the representatives of C. P. and took them into possession: On a bill by the administrator of the son of D. B. claiming one half of the slaves under the gift, it was held, that the limitation was to the sons of S. B. and D. B. living at the time of the gift, jointly, as if it had been to them by name; and therefore the plaintiff was entitled to a recovery.

[Ed. Note.—Cited in O'Dorn v. Davis, 7 Rich. 540; Mellichamp v. Mellichamp, 28 S. C. 130, 5 S. E. 333; Brown v. McCall, 44 S. C. 523, 22 S. E. 823; Tindal v. Neal, 59 S. C. 14, 36 S. E. 1004; Smith v. Clinkscales, 102 S. C. 245, 85 S. E. 1066.

For other cases, see Wills, Cent. Dig. § 1188; Dec. Dig. ⇐551.]

[*Wills* ⇐524.]

Where property is given by will, to be distributed among a class of persons at some future time, or on some future contingency, all are let in who come into existence before the time or happening of the event, and none can take but those then answering the description: but such principle does not apply to a deed or gift inter vivos. A will speaks at the time of the testator's death, and those who answer the description of legatees at the time will take unless a contrary intention appears; but a deed or gift speaks at the time when made, and the donee under it must be such as answers the description at that time. A future contingent interest may be given to a person not in esse, but the intention must be plainly expressed; and if there be a person to answer the description at the time, it will never be applied to another afterwards coming into existence who may come within the description.

[Ed. Note.—Cited in O'Dorn v. Davis, 7 Rich. 540; Mellichamp v. Mellichamp, 28 S. C. 130, 5 S. E. 333; Tindal v. Neal, 59 S. C. 14, 36 S. E. 1004; Smith v. Clinkscales, 102 S. C. 245, 85 S. E. 1066.

For other cases, see Wills, Cent. Dig. §§ 1116–1127; Dec. Dig. ⇐524.]

[*Descent and Distribution* ⇐17.]

A contingent remainder is transmissible to the personal representative, when the existence of the remainder man himself at the time of the event does not constitute the contingency.

[Ed. Note.—Cited in Dickson v. Dickson, 23 S. C. 225, 226; Roundtree v. Roundtree, 26 S. C. 472, 2 S. E. 474.

For other cases, see Descent and Distribution, Cent. Dig. §§ 51, 52; Dec. Dig. ⇐17.]

[*Joint Tenancy* ⇐6.]

The right of survivorship in joint tenancy, taken away by the Act of 1791.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 4; Dec. Dig. ⇐6.]

[*Partition* ⇐87.]

In decreeing partition of slaves recovered by defendant in a former suit from a third person, defendant allowed reimbursement for the expenses in proportion to plaintiff's interest.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 253; Dec. Dig. ⇐87.]

Lancaster, July 1836. The following Circuit decree presents the case:

Harper, Chancellor. On the 8th day of January, 1792, William Brummet delivered two female slaves to Zadock Perry, who signed a receipt for them, in effect declaring a trust in them for the use of his (the donee's) daughter, Comfort Perry, and the heirs of her body, "but should the said Comfort die without children to heir the said negroes, then the said negroes are to return to the sons of Spencer and Daniel Brummet, and their heirs forever." It is understood that the slaves had been previously the property of the said Spencer and Daniel Brummet, who at the time of the gift had each one son living.

The defendant was the son of Spencer Brummet; and William Brummet, who afterwards died in childhood and before his father, and who is the plaintiff's intestate, was the son of Daniel Brummet; Comfort Perry afterwards married Nathaniel Barber, to whom the slaves and their increase were delivered in 1798, and in whose possession they remained until the death of Comfort Perry, without issue, in 1829; at whose death the defendant was the only living son of either Spencer or Daniel Brummet; Nathaniel Barber retained possession of the slaves till his death, in 1832; after which they came into the possession of his administratrix, against whom an action was brought by the defendant, a recovery had and the slaves

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*and increase, with the exception of one named Zed, delivered up to him. It is agreed that Spencer Brummet had two other sons, born after the gift in 1792, who died respec-

tively in 1806 and 1807. The plaintiff in right of his intestate, claims one half of the slaves and damages recovered by the defendant from the administratrix of Nathaniel Barber, as being equally entitled, under the limitation to the sons of Spencer and Daniel Brummet, by the gift of 1792. No question arises as to the validity of the limitation to the sons of Spencer and Daniel Brummet; that was decided in the suit at law. The question is, who are to take under the limitation? I am of opinion, that it must be construed to the sons of Spencer and Daniel Brummet then living, as if it had been in terms, to F. K. Brummet, son of Spencer Brummet, and William Brummet, son of Daniel Brummet.

The argument on the part of the defendant, is founded on the class of causes, in which when property is given by will, to be distributed among a class of persons at some future time, or on some future contingency, all are let in who come into existence before the time or happening of the event; and it is urged that none can take but those who then answer the description; and as the defendant was the only son of Spencer or Daniel Brummet in existence at the death of Comfort Barber, that he alone could take under the limitation. But all the authorities without exception apply to the case of a will, and no such principle has ever been applied to a deed or gift inter vivos. As observed by Lord Mansfield, in White v. Warner, quoted in Denn v. Bagshaw, 6, T. R. 512, a will speaks at the time of the testator's death. And as laid down in other cases, those legatees or devisees who answer the description at the time of the death will take, unless a contrary intention appears from the instrument itself. A deed or gift inter vivos, speaks at the time of its execution, and the grantee or beneficiary under it, must be such as answers the description at that time. I do not mean to say, that a contingent future interest may not be given by deed, to a person not in existence, but that intention must be plainly expressed in the instrument; and if there be a person to answer the description at the time, it will never be applied to another com-

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ing afterwards into existence who may *come within the terms of the description. If this had been a direct gift in words of the present time, to "the sons of Spencer and Daniel Brummet," who must have taken? Undoubtedly F. K. and William Brummet. "Sons" is a good name of purchase. It is said that purchases are good by a certain description of the person without surname or name of baptism; as to the wife of J. S., to the eldest son, second or youngest son, all the sons, &c. Co. Lit. [3 a.] So in Wild's case, 6 Co. 17, it is said that if a man devises land to A and his children or issue, who has children or issue living, here, according to the rule of the common law as applied to a conveyance, the parent and children will take jointly: they take as purchasers by the name of "children or issue." But it is said, as distinguished from the rule of the common law with respect to a conveyance, that if there be a devise to A and his issue or children, who has no children, A will take an estate tail. The words "children or issue," are words of purchase exclusively in a conveyance, and cannot have the effect of enlarging the estate of the parent, as they have in a will. The word "sons" is no less a word of purchase. Neither will it be implied, notwithstanding the express mention of "children or issue," that they take a future interest as purchasers in remainder; because that purpose is not plainly declared in the conveyance. So if these slaves had been given to Comfort Perry for life, remainder to the sons of Spencer and Daniel Brummet, I take it to be equally clear, that there would have been a vested remainder in the sons of Daniel and Spencer Brummet, who were living at the time of the gift. It is observed by Lord Hardwicke, in Ellison v. Airy, 1, Ves. 114, in relation to a will, "The Court generally takes it that there ought to be a legatee in being; and therefore will not construe a will to extend to persons not in being, unless the testator shews his intention to be such by words in the will; which is the rule at common law, as to contingent devises or remainders, for they never construe them contingent or executory unless compelled."

Here, in the case supposed, the plain import of the words would give a vested remainder to the sons then living, and I am to seek for the law which would let in others under a gift of this sort; though this is the case in which all born before the period of distribution, are let in under a will. I take the distinction to be this: under a will the words are taken to apply to persons living at the testator's death; but others may be let in from the in-

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tention plain*ly inferred from the provision: in a conveyance, the words are taken to apply only to those living at the time of execution; and the Court will not extend it to others, unless it is absolutely impracticable to give it any other construction. An exception is made to the general rule in the case of a will; there is no such exception in the case of a deed. It is absolutely necessary to regard the limitation we are considering, as contingent in one respect; the property is only given over on the event of Comfort Perry's dying without children. But there is no necessity whatever, for supposing a contingency with respect to the persons who should take. If as contended for on the part of defendant, none can take but those who answer the description at the time of the happening of the event, then how would the property have been disposed of, if the defendant had also

died before Comfort Barber? In all the cases on the subject of letting in legatees born after the testator's death and before the period of distribution, the terms of the will plainly import a distribution among a class or classes of persons. As in Ellison v. Airy, the limitation was to the younger children of a nephew equally to be divided, and the terms could not be satisfied, without including all younger children. In Congreve v. Congreve, 1 B. C. R. 530, "to divide the money amongst all and every child or children." In Attorney General v. Crispin, Ib. 386, "£50 each to the children of D. R." In Heathe v. Heathe, 2 Atk. 121, "to all and every the child or children," &c. So if the limitation were to the sons of one individual, this might be held to import all his sons, and if he had but one at the time, necessarily to import those hereafter to be born. But here are no words directing any division or distribution; the limitation is to the donees jointly; Spencer Brummet and Daniel Brummet had each a son, and these fully satisfy the terms, "the sons of Spencer and Daniel Brummet." The general language of the cases, departing from the general rule and letting in legatees not in existence at the death of the testator, is that it is an indulgence to last wills, and to favor a provision for families. This applies still more strongly to marriage settlements, in which the terms "sons" or "children," always contemplate sons or children hereafter to be born. But this was neither a will nor a marriage settlement. Spencer and Daniel Brummet were making no general settlement of their affairs, or provision for their families. How am I authorized, in point of

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fact, to conclude or conjecture that *they contemplate any other sons than those who then answered the description? They seem to have been bestowing a benefit on a third person; they parted with the entire property, and may well be supposed, on a contingency not contemplated to happen, to have given this chance of benefit to their sons then in existence and whom they knew. If they should have other children, they might, in making a future settlement of their affairs, make such disposition among them as might seem just and suitable. Then if William Brummet was entitled under this limitation, was his right transmitted to his personal representative on his death? If he had been solely entitled under such a limitation, there can be no question but it would. If this should be construed a gift to Comfort Perry for life, remainder to her children living at the time of her death, with contingent remainder to William and F. K. Brummet in the event of there being no children, (as would appear to be the true construction, according to the determination of this Court in Henry v. Means, 2 Hill, 328,) then there can be no doubt but that a contingent remainder is transmissible to the personal representative, when the existence of the remainder man himself at the time of the event, does not constitute the contingency. But suppose the entire estate to be given to Comfort Perry, subject only to be divested in the event of her dying without having children. The rule, as fully settled and recognized by the case of Jones v. Roe, 3 T. R. 88, is that a possibility coupled with an interest is assignable, descendible or devisable. See also Fearne, 518, 553, and the cases there collected. Those were cases of executory devises, but the interest is exactly the same as under a limitation of this sort, one being created by will, the other by act inter vivos. Mr. Butler, in his note to Fearne, p. 384, after speaking of conditional limitations, and springing or shifting uses, observes, "Executory devises are the immediate subject of this part of Mr. Fearne's essay, but his positions and illustrations, are always directly or indirectly referrible to the general doctrines of law on all limitations of this description, whether in deeds or wills." And this is certainly true with respect to the time within which they may be limited to arise; (Loyd v. Carew quoted, Fearne, 275,) or as to their being assignable, devisable or transmissible.

As I have said the limitation is to the sons jointly, there is nothing to make a tenancy in common, and there is no doubt but in England, if one had died before the determina-

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tion of the contin*gency, the other would have taken the whole by survivorship, as indeed if one had died after the determination and when the property had vested in possession.

But under our Statute of 1791, providing "That where any person shall be, at the time of his or her death, seized or possessed of any estate in joint tenancy, the same shall be adjudged to be severed by the death of the joint tenant, and shall be distributed as if the same was a tenancy in common;" "and that in cases of intestacy, the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by this act." I believe the construction of our Courts has uniformly been, that any interest, of any sort, in which there may be a joint tenancy, shall be severed by the death of one joint tenant, and the share of the deceased go to his legal representative.

Indeed, if a person having such an interest in severalty, would transmit it to his legal representative, and if upon the falling in of the property it must be distributed under the act as personal estate, (which seems to be matter of necessity, for otherwise there is no law for its distribution,) there is the same necessity for applying the parts of the act quoted, to an interest of the same sort held in joint tenancy.

In decreeing for the plaintiff, it seems but equitable that he should reimburse the de-

fendant half the expenses of the suit at law in which the slaves were recovered; such expenses beyond mere costs, I suppose must have been incurred. It is Ordered and decreed, that a writ of partition issue, to divide between the plaintiff and defendant, the slaves received by the latter of the administratrix of Nathaniel Barber, under the recovery in the action of trover before mentioned;—that defendant allow, account for and pay to plaintiff, a moiety of the damages recovered and received in the said action of trover, beyond the slaves specifically received, with interest from the time that the same was received, and a moiety of the hire of the said slaves for the time they have been in his possession; that the Commissioner take an account of the expenses incurred by the defendant in the action at law before mentioned, and that plaintiff reimburse to defendant a moiety of the said expenses. Parties to this suit to pay their own costs.

The defendant appealed.

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*PER CURIAM. The decree of the Chancellor is affirmed for the reasons given.

Chancellors DE SAUSSURE and JOHNSON concurring.

T. Williams & Eaves, for the plaintiff.

Clarke, De Saussure & Clinton, for defendant.

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2 Hill, Eq. 644

JAMES WARDLAW, for Himself and Others, v. The Administrators and Heirs of HENRY GRAY.

(Columbia, May Term, 1837.)

[*Husband and Wife* ⇐8.]

A wife being entitled to one half of her father's estate, proceedings in partition were had, and a tract of land ordered to be sold by the Commissioner on a credit of one and two years, with bond and mortgage to secure the purchase money. The husband purchased, and instead of giving bond and mortgage, gave his receipt to the Commissioner for one half the purchase money, his wife's share, and for the other half as guardian of the other distributees, and received titles. After the first, but before the second instalment became due, the husband died, and the land was sold by order of this Court, as his property, on a bill to apportion his assets. On the widow's presenting her claim for her share of the sale of the land, it was held, that she was entitled to payment thereof; and to the benefit of the security of the mortgage which should have been given, or not being given, that the Act of the Legislature in such cases gave one.

[Ed. Note.—Cited in Daniel v. Daniel, 2 Rich. Eq. 118, 44 Am. Dec. 244; Ex parte Geddes, 4 Rich. Eq. 304, 57 Am. Dec. 730.

For other cases, see Husband and Wife, Cent. Dig. § 26; Dec. Dig. ⇐8.]

[*Guardian and Ward* ⇐164.]

Guardian settled with his ward while an infant, and took a receipt in full and gave his note payable at a future time for the balance due, and a payment was made on it after the ward came of age. After the death of the guardian, on the claim of the ward to have the balance due on the note rank as a specialty demand under the guardianship bond: *Held*, that the note was not payment of the preceding demand; its only effect being to postpone the time of payment; and although the postponement might discharge his securities, it still left the guardian liable on the bond.

[Ed. Note.—Cited in Heath v. Steele, 9 S. C. 92.

For other cases, see Guardian and Ward, Cent. Dig. § 545; Dec. Dig. ⇐164.]

[*Husband and Wife* ⇐10.]

Payment by the Commissioner to the husband of his wife's distributive share of an estate, without the order of the Court is wrongful; and is not such a reduction into possession by the husband, as that the marital rights attach.

[Ed. Note.—Cited in Yeldell v. Quarles, Dud. Eq. 56; Geiger v. Geiger, Cheves, Eq. 162; Ex parte Mobley, 2 Rich. Eq. 58; Hill v. Hill, 1 Strob. Eq. 26.

For other cases, see Husband and Wife, Cent. Dig. § 34; Dec. Dig. ⇐10.]

[*Husband and Wife* ⇐11.]

Where the husband as adm'r has wasted his wife's choses, this is a sufficient reduction into possession: but if the notes or bonds which he took as adm'r are forthcoming the wife's right still exists.

[Ed. Note.—Cited in Renwick v. Smith, 11 S. C. 308.

For other cases, see Husband and Wife, Cent. Dig. § 53; Dec. Dig. ⇐11.]

[This case is also cited in Wiesenfeld, Stern & Co. v. Byrd, 17 S. C. 113, without specific application.]

Abbeville, June Term, 1836.

Bill to apportion assets, &c. Report made of demands against H. Gray's estate, arranged in the order of priority; and exceptions thereto filed.

This case was taken up for the special purpose of considering so much of the Commissioner's report, as is covered by the 1st, 2d, 3d and 5th exceptions of the administrators of Henry Gray; the rest of the report being still before the Commissioner.

Johnston, Chancellor. 1. Of the four exceptions which have been argued, the first depends on the following facts:

Henry Gray's wife, who was a daughter of the late Dr. Flanagan of Newberry, being entitled as a distributee, to one half of her deceased father's estate, proceedings in partition between the distributees were instituted in the Court of Equity for Newberry district, where the estate lay, which resulted in a decretal order that the Commissioner of that Court should sell for partition, a tract of land lying on the Enoree, called the Mill Tract, part of the real estate, on a credit of one and two years, with interest from the day of sale, taking bond with surety and a mortgage of the land to secure the purchase

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money. Under this order, the *Commissioner sold the land to Henry Gray on the 5th of

October, 1829, and without receiving either the money or bond and mortgage to secure it, executed titles to Mr. Gray, the 17th of November following, upon the following arrangement:

Mr. Gray gave him a receipt for one half the purchase money as his wife's share; and a similar receipt for the other half, as the share of the other distributees, for whom he (Gray) was guardian or administrator.

On the 5th of April, 1831, (after the first, but before the second instalment would have fallen due,) Mr. Gray died, leaving his wife living.

By an order in the present suit, the same land was sold since Mr. Gray's death, as parcel of his estate; and the avails are in Court, to await claims against his estate.

His widow presents a claim for her share of the sale made to her husband; signifying at the same time, that if it is sustained, she will accept in satisfaction a moiety of the last sale, being an inferior amount.

The Commissioner has sustained her claim; and the first exception is an appeal from his decision.

I am not entirely satisfied with the conclusion to which I have been conducted by the very imperfect examination which my short time has allowed me to give this very difficult matter. But my view is this:

A married woman cannot be deprived of her inheritance in land but by deed strictly conforming to the Act of Assembly, or by an exact performance of such conditions as the Court may impose. Mrs. Gray was entitled to her land, or the substitute for it, which the Court ordered, as the only condition upon which she should be deprived of it; and she was entitled to have that substitute placed in the situation in which the Court ordered it to be placed; and to have all the benefits incident to its being placed in that situation. For it must be considered that the husband had no power to sell the land; and in order to have it sold, was obliged to resort to the Court, and was a party to an order which placed the purchase money in the custody of the Court, not in his. The fund (or the securities for it, which is the same thing,) was therefore in Court, at the instance of Mr. Gray, in trust for his wife; and he could not obtain possession of it without the order of the Court—an order which would not have

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been made without provision for *the wife, unless by her consent. To all these advantages, Mrs. Gray was entitled, as terms on which the land was sold.

If bond had been given for the wife's share of the land as required by the order of sale, and the bond had neither been paid off nor assigned to the husband, it would have survived to the wife. If it was paid off by the husband, he could not draw the money (there being no order for the distribution) without applying to the Court; and then the Court might have provided for the wife out of it. If it was not paid off the Commissioner could not assign it to him without permission: to say otherwise, would be to assert that an officer of the Court may supersede the Court itself in the exercise of the trust delegated to it in behalf of femes covert.

It is admitted that if Mr. Gray could, without the aid of the Court, or by operation of law have got the money, his wife's right of survivorship is gone; and it has been argued, that if he had given bond, he would, eo instanti, have become both debtor and creditor; and so (on the authority of the cases following Wankford v. Wankford—1 Salk. 299, 3 Ib. 262, 2 Bail. 60, 1 Hill Eq. Rep. 423) have been rightfully discharged of the bond, and put in possession of the money secured by it. But if he had given bond, he would not have been indebted to himself, but to the Court through its Commissioner, interposing as a trustee for his wife: nor could he claim payment unconditionally—which is, I apprehend, the ground upon which the law remits money to a debtor's pocket. He must be a debtor, or a creditor with an unconditional right to receive.

In these observations it is not intended to assert that a Commissioner may not, without leave, as is every day's practice, pay out money to one unconditionally entitled to it, as for instance, to one entitled in his own right, or as guardian, or as administrator; but merely to decide that when the payment would deprive the Court of functions with which it is invested for the benefit of parties before it and who also have a right to claim the exercise of those functions and would be denied this right by the payment, the payment is unwarranted.

Again—a Commissioner, like any other agent to sell, has no other authority than that contained in the order under which he acts; and cannot, without violation of duty, convey but upon a compliance with the condition set out in the order: nor can a purchaser take a conveyance without complying with

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the terms of sale *contained in the vendor's authority, into which he is bound to look. A conveyance made without compliance with the terms of sale, must be set aside at the instance of any person interested.

Here the conveyance was upon no consideration.

Mr. Gray could not in the face of the terms of sale, which were notice to him not only as party but as a purchaser, take a benefit to himself at the expense of his wife. He could not, after invoking this tribunal to aid him in disposing of his wife's land, and after placing the fund under his control with power to provide for her out of it, defeat her rights and frustrate the power of the Court for their protection by refusing to pay the money into Court, or taking it into his own hands, under an assumption that

it need not be paid in, which is the same thing.

If the money had been paid to the Commissioner, the payment of it to Mr. Gray would have been bad; in that case the Commissioner alone might have been liable to Mrs. Gray. As it is, there was no payment to the Commissioner: in fact the purchaser did not pay for the land. The owner of the land, Mrs. Gray, is entitled to payment, and to the benefit of the bond which should have been given, and to the security of the mortgage which was ordered, and which the Act of Assembly would have set up if none had been ordered.

The first exception is overruled.

2. I feel as great difficulty about the second exception as about the first. This exception depends on the following facts:

Mr. Gray became the administrator of his wife's deceased father; he was also the administrator or guardian of all his wife's co-distributees in that estate.

In this situation, under an order of the Ordinary, he sold his father-in-law's personalty, and took notes for the purchase money. He died without ever having had a partition of the estate; the whole of which belonged to the distributees, there being no debts against it. Since his death, administration de bonis non on his intestate's estate has been taken out by Mr. Harrington, to whom the administrators of Mr. Gray have accounted for the shares of Mrs. Gray's co-distributees, but they decline to account to him for Mrs. Gray's share, contending that Mr. Gray had reduced that as husband.

The Commissioner has allowed the claim of the administrator de bonis non for Mrs. Gray's share (for the payment of which

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there *are assets belonging to Mr. Gray's estate) and the second exception contends that the allowance was improperly made.

If my opinion, in Spann v. Stewart, 1 Hill Eq. 326, had been reported, (*a*) I should have referred to it as my opinion on this point. As it is, I can only say that my opinion has undergone no change since I delivered it: and that opinion is, that when funds come into an administrator's hands as administrator, he is still chargeable with them as administrator, until he does some act indicating an intention to throw off his trust character. Here the only act done by Mr. Gray was to sell the property and secure the price by notes: an act which he was bound to do by the order of the Ordinary, and which he could do only as administrator.

My difficulty has been about the extent to which this opinion was modified by the appeal decree in the case of Spann v. Stewart. But when I consider the current of authorities before that case, and the language of the Court in Boozer v. Wallace, 1 Hill Eq. Rep. 393, since decided, and compare them with the opinion in Spann v. Stewart, I am rather under the impression that the Court intended to modify the doctrine I have laid down only in the single case where a husband, administrator, has wasted his wife's share.

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*Here there are assets to answer for those received by Mr. Gray, as administrator; and if I have correctly interpreted the decision in Spann v. Stewart, it cannot apply to destroy the wife's right.

The second exception is overruled.

3. The third exception was not insisted on by any party, and is overruled.

5. The fifth exception objects to the Commissioner's allowance of Philip Cromer's claim as a specialty demand.

(*a*) SPANN v. STEWART, (1 Hill's Eq. Rep. 326.) The decree of the Chancellor, so far as relates to this point, is herewith published:

[*Husband and Wife* ⇐11.]

What constitutes a reduction into possession of the wife's choses in action by a husband administrator.—Per Chancellor Johnston.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 39, 40, 47-57; Dec. Dig. ⇐11.]

JOHNSTON, Chancellor. The third position is, that so far as Dr. Wright reduced his wife's share into possession, the plaintiff is entitled to a diminution of his liability—(unless, I suppose, the amount reduced exceeded her share,)—and that his conversion of the assets into cash amounted to such reduction.

The first branch of the position will not be controverted. The latter is questionable.

There is no allegation in the bill, that Mrs. Screven's estate owes no debts; so that the decision in the case of Neil & Marsh, from Edgefield, does not apply.

The earlier cases are all, except one, cases in which the specific chattels which came to the husband's hands during the marriage, remained unchanged at the wife's death. It was scarcely contended in any of them, that the husband's possession was a reduction. The only question of consequence was, whether he was entitled to administer to the wife without account, under the statutes 22 & 23 C. 2, and 29 C. 2, or whether this right had been taken away by the Act of 1791. It was held that there was no reduction, and that his right under the statutes of Charles was taken away by our act.

In one of the cases, the husband never had possession during the coverture: so that that solely depended on the question whether the statutes of Charles were of force.(*b*)

There are some stray expressions in those cases, on which I may say something hereafter.

Whether a husband, who is also administrator has effected a reduction, depends, I conceive, on this: Has he, by discharging, or by throwing off his trust, freed himself from accountability under it, for the property in question? Has he rendered the property no longer trust-property? Then he holds it in his own right.

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*If he has openly denied his trust-character and openly evinced an adverse holding, and the act of limitations has barred the cestui que trusts; he holds the property as his own. If he has ended his trust by discharging it, what

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(*b*) Spights v. Meggs, 2 Brev. MS. 238; [Spights v. Halloway], 3 Desaus. Rp. 138, n; Sturgineger v. Hannah, 2 N. & M'C. 147; Byrne v. Stewart, 3 Desaus. 135; Elms v. Hughes, Ib. 155; Bunch v. Hurst, Ib. 273 [5 Am. Dec. 551.]

Mr. Gray, who was the guardian of Philip Cromer, came to a settlement with his ward on the 7th January, 1830—the ward being still an infant—(being born on the 20th August, 1809,)—when the balance due the ward appearing to be about $1,300, he paid him part in cash, and gave him his negotiable note with some time to run for the residue, and the ward gave him a receipt in full. Mr. Gray lived several months after the ward came of age, and paid him a $100 bill on it; but whether this payment was made before or after the ward's majority, is uncertain, there being no date to the credit endorsed on the note. After Mr. Gray's death, and after the ward attained age, Mr. Gray's

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administrator made a small pay*ment which is credited on the note. It is also in proof, that upon being called on by the administrator, after he came of age, the ward admitted that he was then of age, and was satisfied with the settlement he had made. The note is still in possession of the ward, and was produced on the investigation of his claim, which claim is to have the balance due on the note charged on the guardianship bond upon giving up the note.

It appears to me that the infancy of the claimant at the time he gave the receipt and took the note, is an immaterial circumstance; I think if he had done the same thing after coming of age, he still would be entitled to the relief he seeks.

The note in question was part of the consideration of the receipt. It has been repeatedly held that a note is not payment of a preceding demand, unless the note itself be paid. The only effect of taking the new security is to conform the time for payment of the preceding demand to that fixed in the new. The taking of this note postponed the time for paying the bond until the note fell due. The postponement might discharge Mr. Gray's securities, but left him liable on the

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bond after the note came to maturity, *if the note be produced and given up to repel the presumption that it has been paid off.

The case of Tobey v. Barber, (5. J. R. 68: 1, M'C. 449,) which appears to be well supported by preceding cases, and is expressly relied on in our own case of Barelli v. Brown, is, I think, decisive of this exception.

The fifth exception is overruled.

The administrators of Henry Gray appeal from this decree, and will endeavor to sustain the first and second and fifth exceptions above mentioned. To the foregoing statement, they will, as to the second exception, add, that although H. Gray's estate is amply sufficient to meet these demands of his wife

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he has left, is divested of a trust character, and is held as his own.

But while ever he is liable to execute a trust out of the property, he has not reduced it, but holds as trustee, whatever the form of that property may be.

A bare change of the property cannot be a reduction: for, then, if he exchanges slaves for other slaves, these last would not be liable to partition. Can it make any difference if the exchange is for money?

In Byrne & Stewart, the Court say "The marital rights cannot give him (the husband) the property, because it was not reduced to possession; nor could it be—for the sale did not take place till her (the wife's) death." This referred to a sale by a different person, in whose hands the property was. If it be inferred from this expression that a sale is a reduction, it appears to me the inference is not law; for, then, every sale by an administrator would amount to a conversion, and the beginning of an adverse holding of the avails; and then four years would bar the distributees.

If an exchange of chattels for money divests the trust, it cannot be merely by virtue of its being an exchange: for, then, any exchange, even for other chattels, would divest it.

Can it be on account of the character of the thing exchanged for?—because it is money? Then it would follow that if an intestate left nothing but money, the administrator would not be accountable.

It has always been held, however, that every trustee is liable, as such, for all the profits made by him, by trading with the assets. If this principle be not abandoned, no change of form will save the fund acquired from accountability.

The Court, in Elms v. Hughes, 3 Desaus. 160, speaking of what constitutes a reduction, say

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"when*ever a suit is necessary to give effect to a right, this is a right in action." This is a negative test of reduction; but I suppose was not intended as the only test. If it was, however, an accounting is a judicial proceeding.

An accounting is as much necessary, where the wife's distributive share consists in money, as a partition is where it consists in slaves. The purpose in each case, is to ascertain and declare the wife's share, and separate it from that of others. Without an accounting, it is impossible to ascertain it; since either she or some others of the distributees may have been advanced, either partially or beyond their shares, or settlements may have been made on them by the intestate.

The character of the holding may depend on the intention. Shall a man be considered as holding for himself, who declares that he holds as trustee? Shall he be so considered, unless he has declared, and that openly before creditors and distributees, so as to put them on their remedies, that he intends to hold for himself? It is very little to require of a husband who wishes to pocket his wife's property, that he shall account on the estate first.

I see no evidence of an intention in Dr. Wright to reduce his wife's share. Does it consist in receiving the dividends? Was he not bound to collect the debts? Does it consist in the sales? Is there evidence that he was not acting under orders from the Ordinary?

The amount of the matter is, that he has not accounted. And has he, therefore, ceased to be accountable?

We have a case on the very point. In Phælon & Houseal, 2 M'C. Eq. Rep. 423, the defendant received during his marriage, upwards of $3,000 in money belonging to the intestate, which he held till 1816, when his wife died, and thence to 1821, supposing all the time that she was the sole distributee. In that year, other distributees appeared and demanded partition with him; and it was decreed.

if they stood alone, yet that it is unable to pay more than perhaps one-third of his debts: and that none of the notes taken by Henry Gray, as administrator, at the sale of Reuben Flanagan's estate, remained in the hands of Henry Gray unpaid at the time of his death, so far as any of the settlements had between the administrators of Henry Gray, and the administrator de bonis non of Reuben Flanagan, or any of the papers which came to the hands of the administrators of Henry Gray, shew.

Wardlaw & Perrin, for appellants.
Burt, contra.

JOHNSTON, Chancellor. In this case, it is the opinion of the Court, that the Circuit decree upon the first exception was correct.

In offering any thing further in support of that decision, it might be sufficient to refer to the opinion delivered by Mr. Justice Butler, at the last December Term of the late Court of Appeals, in the case of Pitts v. Wicker, [3 Hill. 197.] in which every Judge present, eight in number, including every Chancellor, concurred.

The argument on the present occasion is, that the Circuit decree is inconsistent with the principles upon which the Chancellor who pronounced it, professes to place it. That the Chancellor evidently acted upon the maxim that Equity will regard that as done, which should have been done. But that admitting this principle to be true, it was not correctly applied to the case: for that although in virtue of the maxim, it might be correct to assume that a bond and mortgage had been

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executed by Mr. Gray: yet that he *had a right to pay the money even before it was due: that if he had paid the money to the Commissioner, he thereby extinguished the wife's interest in the bond. Only that the fund thus paid in, became thenceforth the exclusive legal property of the husband: which he was under no necessity to ask the aid of the Court to obtain.

Passing by the obvious remark that whatever right Mr. Gray might have to make payment in anticipation he never in fact made any payment, let us suppose that he did pay the purchase money to the Commissioner. The question then is, had he a legal unqualified right to the money thus paid in?

The case of Hood v. Archer [2 Nott & McC. 149] cited by Mr. Justice Butler, is in point, to show that he had no such right. In that case, the wife's inheritance was sold by the sheriff. The purchaser paid over the price to the sheriff. The wife then died: and the question was, whether the money belonged to the husband, by virtue of his marital rights, or whether the right to it did not remain in the wife, so as to vest in her administrator. The Court held that it belonged to the administrator of the wife.

If Mr. Gray had paid the money to the Commissioner, had he such a legal right to it that he could have recovered it at law from that officer? Money in the hands of the Commissioner is in the hands of the Court itself. No action can be maintained against him in another tribunal, to deprive him of it. The comity of Courts forbids it. The application for the money must be to the tribunal in whose custody it is. This principle, the correctness and importance of which will be at once perceived, was decided a few years ago in Charleston, in a case (I believe the style of it was Bowden v. Hutsell) carried up from a Circuit decision of Chancellor Harper.

If, then, the money when paid in, still belonged to Mrs. Gray, and her husband could not obtain it but on application to this Court, the question is, what order would the Court have made on such application?

Clancy says, "If the wife's fortune be within the reach of the Court," "Equity will not suffer it to be removed out of its jurisdiction until an adequate provision be made for her, unless she has been already sufficiently provided for; or that, on her personal examination, she waives the benefit of this protection."—(Clancy on Married Women, 188.)

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The same author again and again speaks *of this doctrine as "a settled rule of our Courts of Equity," and refers to numerous authorities which fully sustain him.

So far does this doctrine extend, that although the wife's trustee may, if he thinks fit, deliver her property to the husband: yet if a bill be once filed, whereby this Court obtains a control, the trustee will no longer be at liberty to do so; and if he pay over any of her money after such suit begun, the Court will hold it a payment by wrong, and set it aside.—(M'Caulay v. Philips, 4 Ves. 18.)

The argument then, which maintains that the Court will approve the act of the Commissioner in paying the money to Mr. Gray, on the ground that upon application it would have ordered him to pay it, seems to be unsupported by authority. The Court would never have so ordered, unless by the wife's consent.

And when we consider that the Court would hold a payment made by a trustee after suit brought, to be wrongful for the want of the wife's consent, or the order of the tribunal: would it not be plainly absurd to suppose that when the Court is itself the trustee, it would depart from its own rule; or that it would sanction that in its own officer which it would condemn in every one else who happens to come under its control?

The opinion of the Court upon the second exception is different.

It appears by the additional facts stated in the brief, that Mr. Gray did not only convert the assets, but that he wasted them, so as to bring himself within the rule in Spann v. Stewart.

If the notes or other securities which he took for the property which he sold as administrator, were forthcoming, or could be pointed out, I have the authority of all my brethren for saying that in such a case they would consider the wife's right indubitable. But when he has wasted the assets, the majority of the Court is of opinion, this is sufficient evidence of a reduction to destroy his accountability as administrator.

The appeal on the fifth exception has been abandoned.

Let the Circuit decree be reformed according to this opinion.

Chancellors DE SAUSSURE, and HARPER, concurred.

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